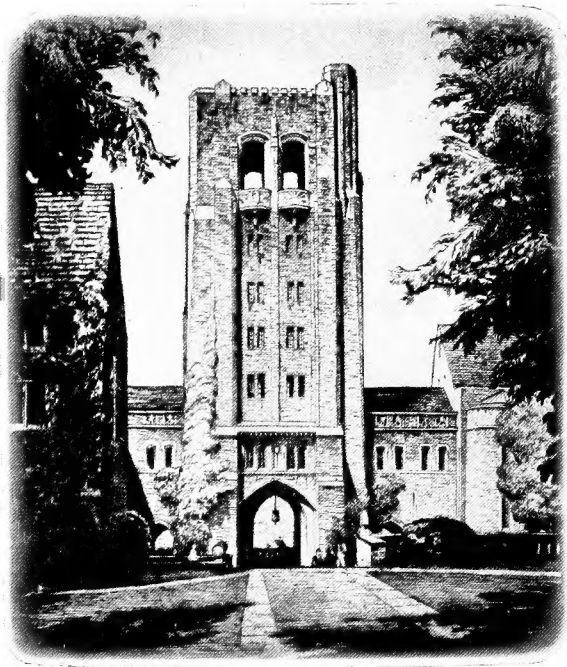


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A TREATISE
ON THE
LAW OF DAMAGES

EMBRACING
AN ELEMENTARY EXPOSITION OF THE LAW
AND ALSO
ITS APPLICATION TO PARTICULAR SUBJECTS OF
CONTRACT AND TORT

Abizley
BY J. G. SUTHERLAND

AUTHOR OF A TREATISE ON "STATUTES AND STATUTORY CONSTRUCTION"

FOURTH EDITION
BY
JOHN R. BERRYMAN

IN FIVE VOLUMES
VOL. II

CHICAGO
CALLAGHAN AND COMPANY
1916

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THE LAW OF DAMAGES.

VOL. II.

CHAPTER IX.

EXEMPLARY DAMAGES.¹

- § 390. Compensation for wrongs done with bad motive; violation of contract.
391. Exemplary damages; difference of views; when allowed.
392. Same subject; rule of United States Supreme Court; in what actions recoverable; conflict of laws.
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404. Enhancement and mitigation of exemplary damages.
405. Same subject; wealth of defendant; scope of inquiry.
406. Exemplary damages based on actual damages; nominal damages as a predicate.
407. Joint liability for exemplary damages.

¹ This subject is considered in connection with particular wrongs in the following sections: 77 (non-payment of check by bank); 514 (Suth Dam. Vol II.—1. 1257 attachment bonds); 930 (freight carrier); 1031, 1032 (trespass on real property); 1038, 1052 (Nuisance); 937, 950, 951 (passenger

408-411. Parties liable; master for servant.

412. Liability of officers, municipalities, estates, voluntary societies and sureties.

§ 390. Compensation for wrongs done with bad motive; violation of contract. A party who breaks his contract is liable for the resulting damage without regard to the motive by which he was actuated. And in theory, the damages recoverable in actions upon contract are not affected by the motive which induced the breach.² Actions for breach of marriage contracts

carriers); 987 (breach of marriage promise); 1131 (conversion); 1145 (replevin); 1178 (fraud); 1216 (slander and libel); 1253 (personal injury); 974 (telegraph and telephone companies); 1188 (infringement of patents); 1237, 1238 (malicious prosecutions); 1263 (death actions); 1281, 1283 (seduction, etc.).

² *Globe R. Co. v. Landa C. O. Co.*, 190 U. S. 540, 47 L. ed. 1171; *Baumgarten v. Alliance Assur. Co.*, 159 Fed. 275; *Western U. Tel. Co. v. Benson*, 159 Ala. 254, 21 Am. Neg. Rep. 14; *Same v. Rowell*, 153 Ala. 295; *Same v. Westmoreland*, 151 Ala. 319; *Hadden v. Southern M. Service*, 135 Ga. 372; *Payton v. Gulf Line R. Co.*, 4 Ga. App. 762; *Cumberland Tel. & T. Co. v. Cartwright Tel. Co.*, 128 Ky. 395, citing the text; *Western U. Tel. Co. v. Cross*, 116 Ky. 5; *Trout v. Watkins L. & U. Co.*, 148 Mo. App. 621, citing the text; *Moon v. Interurban St. R. Co.* (N. Y. Misc.), 85 Supp. 363; *Hurxthal v. Boom Co.*, 53 W. Va. 87, 97 Am. St. 954; *Coghlin v. La Fonderie*, 34 Can. Sup. Ct. 153; *Donaldson v. Temple*, 96 S. C. 240; *Western U. Tel. Co. v. Reeves*, 34 Okla. 468, 5 N. C. C. A. 364, citing the text.

Richardson v. Wilmington & W.

R. Co., 126 N. C. 100; *O'Connell v. Rosso*, 50 Ark. 603; *Gordon v. Brewster*, 7 Wis. 355; *Duche v. Wilson*, 37 Hun 519; *Norfolk & W. R. Co. v. Wysor*, 82 Va. 250, 8 Am. Neg. Cas. 651.

There are cases in which exemplary damages have been allowed against sureties on statutory bonds where the principal therein had subjected himself to such damages. In Alabama sureties have been held to that liability on an attachment bond, the writ having been wrongfully sued out. *Floyd v. Hamilton*, 33 Ala. 235.

In a later case the signers of a bond of indemnity given to induce a sheriff to levy on goods in the possession of one not a party to the process were held not liable for exemplary damages unless they authorized him to execute the process wantonly, recklessly or with circumstances of aggravation, or his acts were probably consequent on making the levy or were ratified by them. *Lienkauf v. Morris*, 66 Ala. 406; *Ritter v. Hoy*, 2 Ala. App. 358.

In Iowa the sureties upon a liquor seller's bond, the terms of which bound them to "pay any damage any person may sustain or which may result from the drink-

are an exception; and there are some other exceptions to which attention has been called;³ but such is the general rule. Another exception has been made where a party violates his contract in bad faith and from motives of self interest,⁴ and another where the breach is accompanied by a fraudulent act.⁵ The general rule denying the recovery of such damages for breach of contract has not been changed by the abolishment of the forms of action. "The exclusion of issues as to motives and punitive damages in actions on contract has been held to be justifiable because it limits the uncertainties and asperities at-

ing of any wine or beer, or any liquor got or procured at his saloon or place of business," have been held for exemplary damages. *Richmonds v. Schickler*, 57 Iowa 486. These cases are not in harmony with the weight of authority, nor consistent with the theory upon which such damages are imposed. It is otherwise as to attachment bonds in South Carolina and Illinois (*McClendon v. Wells*, 20 S. C. 514; *Spants v. Barrett*, 57 Ill. 290, 11 Am. Rep. 10); and as to dram-shop bonds in the latter state and in South Dakota. (*Cobb v. People*, 84 Ill. 511; *Garrigan v. Thompson*, 17 S. D. 132); and replevin bonds. *Dalby v. Campbell*, 26 Ill. App. 502.

The sureties on a statutory bond are not liable for exemplary damages although the act of the principal which broke the condition of the bond was a wilful tort. *North v. Johnson*, 58 Minn. 212; *Johnson v. Williams*, 23 Ky. L. Rep. 658.

In Texas a suit may be brought for a breach of contract and for a tort when both grow out of the same transaction and can be properly litigated together. But to recover exemplary damages the pleading must show that the manner in which the breach of contract was committed amounted to a tort for which an action would lie for ex-

emplary damages, independently of the right to recover actual damages by reason of the breach of contract alone. *Hooks v. Fitzenrieter*, 76 Tex. 277; *Southwestern Tel. & T. Co. v. Luckett* (Tex. Civ. App.), 127 S. W. 856. See *Pacific Exp. Co. v. Walters*, 42 Tex. Civ. App. 355.

The tortious breach of a contract for carriage is ground for imposing liability for such damages. *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 48 L.R.A.(N.S.) 1.

A court has no jurisdiction to award exemplary damages for the breach of a contract. *Ford v. Fargason*, 120 Ga. 708.

Inducing a party to breach his contract with a third person for the benefit of the defendant is not cause for imposing such damages. *Knickerbocker I. Co. v. Gardiner D. Co.*, 107 Md. 556, 16 L.R.A.(N.S.) 746.

³ §§ 98, 99.

⁴ *Green v. Farmers' C. D. Co.*, 113 La. 869.

⁵ *Welborn v. Dixon*, 70 S. C. 108; *Prince v. State Mut. L. Ins. Co.*, 77 S. C. 187.

An intent to defraud accompanying the breach of a contract is ground for the recovery of exemplary damages. *Givens v. North Augusta E. & I. Co.*, 91 S. C. 417,

tending litigation.”⁶ In actions of tort full compensation may be recovered though the injury was the result of mistake or the acts were done in good faith.⁷ In other words, the right to compensation for tortious injuries does not depend at all upon their being inflicted purposely or with any culpable intention.

There is, however, a marked difference legally, as there is practically, between a tort committed with and without malice; between a wrong done in the assertion of a supposed right and one wantonly committed; one unattended with any incidents of insult and one with such concomitants. Such vicious accompaniments increase the injury and render additional damages necessary to adequate compensation.

§ 391. **Exemplary damages; difference of views; when allowed.** There is much authority for allowing damages for torts beyond compensation whenever a case shows a wanton invasion of the plaintiff's rights or any circumstances of outrage or insult;⁸ whenever there has been oppression or vin-

⁶ *Houston, etc. R. Co. v. Shirley*, 54 Tex. 125.

⁷ §§ 98, 99.

⁸ *Amer v. Longstreth*, 10 Pa. 148; *Wall v. St. Louis & S. F. R. Co.*, 184 Mo. App. 127; *Ellis v. Wahl*, 180 Mo. App. 507.

It was said by Moses: "If a man shall dig a pit and not cover it, and an ox or an ass shall fall therein, the owner of the pit shall make it good. For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing which another challengeth to be his, the cause of both parties shall come before the judges, and whom the judges shall condemn, he shall pay double unto his neighbor. If a man steal an ox or a sheep, and kill it or sell it, he shall restore five oxen for an ox and four sheep for a sheep." Exodus, ch. §§ 21, 22.

Mr. Justice Gray observed in

Lake Shore, etc. R. Co. v. Prentice, 147 U. S. 101, 106, 37 L. ed. 79, 101, 8 Am. Neg. Cas. 703: "The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the king's messengers for trespass and imprisonment under general warrants of the secretary of state, in which the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover exemplary damages, the chief justice instructed the jury as follows: 'I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction

dictiveness on the part of the wrong-doer;⁹ whenever there is a wilful, malicious or reckless tort to person or property.¹⁰ In a Kentucky case the court say: "In actions of trespass juries are authorized to give what is denominated smart money. If trespassers were bound to pay in damages no more than the exact value of the property forcibly taken and converted by them there would be no motive created by the operation of the law to induce them to desist and abstain from invading the rights of others. To furnish such a motive smart money is allowed."¹¹ In an Illinois case the court say: "The experience of past ages demonstrates a tendency on the part of many in every community to take the law into their own hands and to oppress, insult and abuse others, even in pursuing their rights. And inasmuch as such conduct is not indictable the law has, for the repose of society, authorized the jury to give exemplary damages where a trespass is wanton, wilful or malicious, or where it is accompanied with such acts of indignity as to show a reckless disregard of the rights of others, as a punishment for the wrong, and to deter others from the perpetration of such acts."¹² A later case states the rule thus: Exemplary dam-

to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.'" *Wilkes v. Wood*, *Lofft* 1, 18, 19, 19 *How. St. Trials*, 1153, 1167.

Where an action is brought under a statute silent as to exemplary damages none can be allowed. *Kleybolte v. Buffon*, 89 *Ohio St.* 61.

⁹ *Nagle v. Mattison*, 34 *Pa.* 48.

The state of the wrongdoer's mind, not the force used, determines the liability for exemplary damages. *Baxter v. Magill*, 127 *Mo. App.* 392.

¹⁰ *Vansant v. Kowalewski*, — *Del.* —, 90 *Atl.* 421; *Groh v. South*, — *Md.* —, 89 *Atl.* 321; *Schmitt v. Kurrus*, 234 *Ill.* 578; *Thomas v. Kerr*, 137 *Ill. App.* 479; *Fidelity & Cas. Co. v. Gibson*, 135 *Ill. App.*

290; *Carmody v. St. Louis T. Co.*, 122 *Mo. App.* 338; *Bright v. Quinn*, 20 *Hawaii*, 504; *Illinois, etc. R. Co. v. Cobb*, 68 *Ill.* 53; *Cutler v. Smith*, 57 *id.* 252; *Connors v. Walsh*, 131 *N. Y.* 590; *Wagner v. Gibbs*, 80 *Miss.* 53; *Turnbow v. Wimberly*, 106 *La.* 259; *Cosgriff v. Miller*, 10 *Wyo.* 190, quoting the text.

¹¹ *Tyson v. Ewing*, 3 *J. J. Marsh.* 186; *Louisville & N. R. Co. v. Roth*, 130 *Ky.* 759; *Doerhoefer v. Shewmaker*, 123 *Ky.* 646.

A statute providing for the recovery of all damages sustained includes punitive damages. *Jones v. McCreery L. & I. Co.*, 82 *S. C.* 456.

¹² *Cutler v. Smith*, 57 *Ill.* 252; *Meighan v. Birmingham T. Co.*, 165 *Ala.* 591; *Sommerfield v. St. Louis T. Co.*, 108 *Mo. App.* 718, citing this section.

ages are given as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression, or where the defendant acts wilfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.¹³ In New Hampshire there has been considerable fluctuation of decision; and that state may now be classed with those in which exemplary damages, *ultra* compensation, are denied.¹⁴ But in

¹³ *De Celles v. Casey*, 48 Mont. 568; *Hemsteger v. Nelson*, 181 Ill. App. 377; *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 48 L.R.A. (N.S.) 1, citing this section; *Mississippi Cent. R. Co. v. McClendon*, — Miss. —, 64 So. 460 (denying damages in the absence of a showing of acts evincing "malice, fraud, oppression or wilful wrong"); *Consolidated C. Co. v. Haenni*, 146 Ill. 614, 14 Am. Neg. Cas. 310; *Chicago Con. T. Co. v. Mahoney*, 230 Ill. 562; *Webb v. Atlantic C. L. R. Co.*, 76 S. C. 193, 9 L.R.A. (N.S.) 1218; *Birmingham R., L. & P. Co. v. Murphy*, 2 Ala. App. 588; *Birmingham W. Co. v. Keiley*, 2 Ala. App. 629.

¹⁴ In *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270, a very able, elaborate and exhaustive opinion was delivered by Foster, J., in which the court seemed to be unanimous, against exemplary damages, especially where the act complained of is a criminal offense. While admitting there are many cases sanctioning the recovery of such damages, he contends, with great force of reasoning, not easy to resist on principle:

1. That many of the cases cited in support of exemplary damages, and many loose expressions which are to be found in judicial opinions, when closely scrutinized only favor a liberal allowance of compensation in consideration of aggravations.

2. That where there are such

facts as have generally been deemed to warrant the recovery of vindictive damages, they should be considered only as they enhance the damages which the injured party is entitled to receive; that nothing should be allowed for punishment as a substantive element or purpose.

3. That to permit a plaintiff to recover for his actual damages, including, as they should, his pecuniary loss, and in cases of personal injury, or other torts aggravated by personal abuse or insult, for pain, bodily and mental; and, in addition, a sum by way of punishment, is to subject the defendant to the injustice of a double recovery; for he is thus compelled to pay more than the plaintiff is entitled to receive.

4. If the defendant is subject to be punished criminally for the same act, then the recovery in a civil action of vindictive or punitive damages exposes the wrong-doer to double punishment, besides making full compensation for every element of injury to the injured party.

5. That such double recovery of damages, and such double punishment, are an infraction of the maxims of the common law against being twice vexed for the same cause or twice punished for the same offense; and an infraction of the guaranties found in nearly all

several cases their allowance had been affirmed. The court say in one: "It is extremely well settled that exemplary or vindictive damages may, in certain cases, be recovered; and this is, perhaps, in accordance with the legislative policy which has given pecuniary penalties in numerous instances to private prosecutors of certain offenses. Where the wrong done to the party partakes of a criminal character, though not punishable as an offense against the state, the public may be said to have

American constitutions on the same subject.

He concluded his opinion by saying: "The true rule, simple and just, is to keep the civil and criminal process and practice distinct and separate. Let the criminal law deal with the criminal, and administer punishment for the legitimate purpose and end of punishment,—namely, the reformation of the offender and the safety of the people. Let the individual whose rights are infringed, and who has suffered injury, go to the civil courts, and there obtain full and ample reparation and compensation; but let him not thus obtain the 'fruits' to which he is not entitled, and which belong to others. Why longer tolerate a false doctrine, which, in its practical exemplification, deprives a defendant of his constitutional right of indictment or complaint on oath before being called into court? deprives him of the right of meeting the witnesses against him face to face? deprives him of the right of not being compelled to testify against himself? deprives him of the right of being acquitted, unless the proof of his offense is established beyond a reasonable doubt? deprives him of the right of not being punished twice for the same offense? Punitive damages destroy every constitutional safeguard within their reach.

And what is to be gained by this annihilation and obliteration of fundamental law? The sole object, in its practical results, seems to be to give a plaintiff something which he does not claim in his declaration. If justice to the plaintiff requires the destruction of the constitution, there would be some pretext for wishing the constitution were destroyed. But why demolish the plainest guaranties of that instrument, and explode the very foundation upon which constitutional guaranties are based, for no other purpose than to perpetuate false theories and develop unwholesome fruits? Undoubtedly this pernicious doctrine 'has become so fixed in the law,' to repeat the language of Mr. Justice Campbell, of Michigan, 'that it may be difficult to get rid of it.' But it is the business of courts to deal with difficulties; and this heresy should be taken in hand without favor, firmly and fearlessly. It was once said: 'If thy right eye offend thee, pluck it out; and if thy right hand offend thee, cut it off.' Wherefore, not reluctantly, should we apply the knife to this deformity, concerning which every true member of the sound and healthy body of the law may well exclaim: 'I have no need of thee.'" 2 Greenl. Ev., §§ 253, 273; Boyer v. Barr, 8 Neb. 68, 30 Am. Rep. 814.

an interest that the wrong-doer should be prosecuted and brought to justice in a civil suit; and exemplary damages may, in such cases, encourage prosecutions where mere compensation for the private injury would not repay the trouble and expense of the proceeding.”¹⁵ In a subsequent case¹⁶ this doctrine was approved, and the court add that it “furnishes the most efficient, if not the only, means of correcting many very serious social abuses; and among those that of gross negligence, which puts at unnecessary hazard the life and limbs of large numbers of passengers, must take high rank. It is not, therefore, to be regretted that the law has established an exception to the ordinary rule in respect to damages, and armed the sufferer in such cases with the power to administer a corrective which cannot or will not otherwise be efficiently applied at all.”

§ 392. **Same subject; rule of United States Supreme Court; in what actions recoverable; conflict of laws.** The foregoing views have been sanctioned by the supreme court of the United States. Mr. Justice Grier said:¹⁷ “It is a well established principle of the common law that in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the

¹⁵ *Hopkins v. Railroad*, 36 N. H. 9, 72 Am. Dec. 287.

¹⁶ *Taylor v. Railway*, 48 N. H. 320. See the discussion in *Mayer v. Frobe*, 40 W. Va. 246, which over-

ruled *Pegram v. Stortz*, 31 W. Va. 220, denying the recovery of punitive damages.

¹⁷ *Day v. Woodworth*, 13 How. 371, 14 L. ed. 185.

damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured 'compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction."¹⁸ It was said in a case ruled in the same court in 1892: "In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on

¹⁸ *Stimpson v. Railroad*, 2 Wall. Jr., 164; *Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374; 12 Am. Neg. Cas. 686; *Denver, etc. R. v. Harris*, 122 U. S. 597, 30 L. ed. 1146; *Minneapolis, etc. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585.

It is held in the case last cited and also in *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 563, that statutes which authorize

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the recovery of double the value of stock killed or damage caused thereby by the neglect of railroad companies to comply with the law concerning the fencing of their roads do not infringe the fourteenth amendment to the federal constitution, either as depriving such companies of property without due process of law or denying them the equal protection of the laws.

the part of the defendant is required in order to charge him with exemplary or punitive damages.”¹⁹ The recovery of such damages in the federal courts is not dependent upon their recognition in the courts of the state in which the action arose if the constitution and statutes thereof are silent concerning them.²⁰

In the actions here spoken of the conduct and motives of the defendant are open to inquiry with a view to the amount of damages. If, in committing the wrong complained of, he acted recklessly, oppressively, insultingly or wilfully and maliciously, with a design to oppress and injure, the jury in fixing the damages may disregard the rule of compensation; and beyond that, may, as a punishment of the defendant, and as protection to society against the violation of personal rights and social order award such additional damages as in their discretion they may deem proper.²¹ This rule has been held to apply in all actions for torts—in actions for personal injuries, in cases of a wilful injury to property, in slander, libel, seduction, false imprisonment, malicious prosecution, abuse of process, alienation of affections and in actions for tort founded upon negligence amounting to misconduct and recklessness.²² In

¹⁹ *Lake Shore, etc. R. Co. v. Prentice*, 147 U. S. 101, 107, 37 L. ed. 97, 101, 8 Am. Neg. Cas. 703; *Scott v. Donald*, 165 U. S. 58, 87, 41 L. ed. 632, 637; *Cowen v. Winters*, 37 C. C. A. 628, 96 Fed. 929.

²⁰ *Woldson v. Larson*, 164 Fed. 548, 90 C. C. A. 422.

²¹ *Coal Belt E. R. Co. v. Young*, 126 Ill. App. 651; *Baltimore & O. R. Co. v. Strube*, 111 Md. 119; *Cottrell v. Fountain*, 80 N. J. L. 1; *Canfield v. Chicago, etc. R. Co.*, 59 Mo. App. 354, quoting the text; *Hulbert v. Arnold*, 83 N. J. L. 114.

If such damages are “fixed with due regard to the wrong perpetrated, in the light of the evidence upon which the finding is predicated, with a view of punishment to the end of preventing similar wrongs,

the judgment and discretion of the jury, in determining the amount, should not be disturbed by a court.” *Nashville, etc. R. Co. v. Blackmon*, 7 Ala. App. 530, citing *Louisville & N. R. Co. v. Bizzell*, 131 Ala. 429; *Coleman v. Pepper*, 159 Ala. 310. To the same effect: *Yazoo, etc. R. Co. v. May*, 104 Miss. 422, 44 L.R.A. (N.S.) 1138.

²² *Birmingham Ledger Co. v. Buchanan*, 10 Ala. App. 527; *Pontius v. Kimble*, 56 Ind. App. 144; *Verwers v. Carpenter*, 166 Iowa 273; *Stalker v. Drake*, 91 Kan. 142; *Louisville & N. R. Co. v. Allnutt*, 150 Ky. 831; *Groh v. South*, — Md. —, 89 Atl. 321; *Williams v. Southern Ry. Co.*, — Miss. —, 64 So. 969; *Buckley v. Knapp*, 48 Mo. 152; *Ellis v. Wahl*, 180 Mo. App.

cases of this sort the applicability of the rule is apparent, since express or implied malice, or a wilful disregard of the rights of

- 507; *Colbert v. Journal Pub. Co.*, 19 N. M. 156; *Cooper v. Southern R. Co.*, 165 N. C. 578; *Luther v. Shaw*, 157 Wis. 234, 52 L.R.A. (N.S.) 85; *Woldson v. Larson*, 164 Fed. 548, 90 C. C. A. 422; *Kress v. Lawrence*, 158 Ala. 652; *Iaeger v. Metcalf*, 11 Ariz. 283; *St. Louis, etc. R. Co. v. Stamps*, 84 Ark. 241; *Bogudski v. Baekes*, 83 Conn. 208; *Keane v. Main*, 83 Conn. 200; *Morgan v. Langford*, 126 Ga. 58; *Southern R. Co. v. Hill*, 125 Ga. 354; *Selman v. Barnett*, 4 Ga. App. 375; *Henderson v. McGruder*, 49 Ind. App. 682; *Fleming v. Loughren*, 139 Iowa 517; *Tyler v. Bowen*, 124 Iowa 452; *Hollingsworth v. Western U. Tel. Co.*, 82 Kan. 472; *Martin v. Garlock*, 82 Kan. 266; *Walterscheid v. Crupper*, 79 Kan. 627; *Louisville & N. R. Co. v. Sewell*, 142 Ky. 171; *Chesapeake & O. R. Co. v. Conley*, 136 Ky. 601; *Louisville & N. R. Co. v. Smith*, 135 Ky. 462; *Louisville G. Co. v. Kentucky H. Co.*, 132 Ky. 435; *Louisville & N. R. Co. v. Roth*, 130 Ky. 759; *Bernos v. Canepa*, 114 La. 517; *Lord v. Maine Cent. R. Co.*, 105 Me. 255; *Sisson v. Lampert*, 159 Mich. 509; *Schnider v. Montross*, 158 Mich. 263; *Marlatte v. Weickgenant*, 147 Mich. 266; *Griser v. Schoenborn*, 109 Minn. 297; *Baumgartner v. Hodgdon*, 105 Minn. 22; *Grimestad v. Lofgren*, 105 Minn. 286, 127 Am. St. 566, 17 L.R.A. (N.S.) 990; *Carpenter v. Hamilton*, 185 Mo. 603; *McNamara v. St. Louis T. Co.*, 182 Mo. 676, 66 L.R.A. 486; *Summers v. Keller*, 152 Mo. App. 626; *Schafer v. Ostmann*, 148 Mo. App. 644; *Cook v. Neely*, 143 Mo. App. 632; *Baxter v. Magill*, 127 Mo. App. 392; *Happy v. Prichard*, 111 Mo. App. 6; *Cooper v. Seyoc*, 104 Mo. App. 414; *Shandy v. McDonald*, 38 Mont. 393; *Miller v. Rambo*, 73 N. J. L. 726; *Blackmore v. Ellis*, 70 N. J. L. 264; *Blow v. Joyner*, 156 N. C. 140; *Brame v. Clark*, 148 N. C. 364, 19 L.R.A. (N.S.) 1033; *August v. Finnerty*, 10 Ohio C. C. (N. S.) 433; *Stark v. Epler*, 59 Ore. 262; *Perovich v. Domansky*, 231 Pa. 66; *Wirsing v. Smith*, 222 Pa. 8; *Sperry v. Seidel*, 218 Pa. 16; *Lewis v. Fleer*, 30 Pa. Super. 237; *Guzman v. Herencia*, 4 Porto Rico Fed. 105; *Smith v. Macomber*, 28 R. I. 248; *Hickey v. Booth*, 29 R. I. 466, 132 Am. St. 832; *Lindler v. Southern R. Co.*, 84 S. C. 536; *Cole v. Blue Ridge R.*, 75 S. C. 156; *Bailey v. Walton*, 24 S. D. 118; *St. Louis S. R. Co. v. Thompson*, 102 Tex. 89; *First Bank v. Steffens*, 51 Tex. Civ. App. 211; *Murphy v. Booth*, 36 Utah 285; *Dubois v. Roby*, 84 Vt. 465; *Zell v. Dunaway*, 115 Md. 1; *Singer Mfg. Co. v. Bryant*, 105 Va. 403; *Hunt v. Di Bacco*, 69 W. Va. 449; *Bogue v. Gunderson*, 30 S. D. 1; *Smith v. Fahey*, 63 W. Va. 346; *Davis v. Chesapeake & O. R. Co.*, 61 W. Va. 246, 9 L.R.A. (N.S.) 993; *Stevens v. Friedman*, 58 W. Va. 78; *White v. White*, 140 Wis. 538, 133 Am. St. 1100; *Deragon v. Sero*, 137 Wis. 276, 20 L.R.A. (N.S.) 842; *Moore v. Fisher*, 117 Minn. 339; *Union M. Co. v. Prenzler*, 100 Iowa 540; *O'Connell v. Rosso*, 56 Ark. 603; *Watson v. Hastings*, 1 Penne. 47; *Citizens' St. R. Co. v. Willoeby*, 134 Ind. 563, 8 Am. Neg. Cas. 224; *Lake Erie & W. R. Co. v. Bradford*, 15 Ind. App. 655, 57 Am. St. 245; *Carson v. Smith*, 133 Mo. 606; *White v. Barnes*, 112 N. C. 323;

others forms the basis of plaintiff's action. The elements of malice or wilfulness are necessarily always present. It has

- Hamerlynck v. Banfield, 36 Ore. 36; Matheis v. Mazet, 164 Pa. 580; Wiley v. McGrath, 194 Pa. 498, 75 Am. St. 709; Vogel v. McAuliffe, 18 R. I. 791; Duckett v. Pool, 34 S. C. 311, 17 Am. Neg. Cas. 352, reviewing earlier cases in the state); Samuels v. Richmond, etc. R. Co., 35 S. C. 493, 28 Am. St. 883; Glover v. Charleston & S. R. Co., 57 S. C. 228; Telephone & Tel. Co. v. Shaw, 102 Tenn. 313; Thirkfield v. Mountain View Cemetery Ass'n, 12 Utah 76, citing the text; Farr v. Swigert, 13 Utah 150, citing the text; Mayer v. Frobe, 40 W. Va. 246, overruling Pegram v. Stortz, 31 W. Va. 220, and Beck v. Thompson, 31 W. Va. 459; Vassau v. Madison E. R. Co., 106 Wis. 301; East Tennessee, etc. R. Co. v. Fleetwood, 90 Ga. 23, 8 Am. Neg. Cas. 143; Highland Ave. & B. R. Co. v. Robinson, 125 Ala. 483; Pickens v. South Carolina & G. R. Co., 54 S. C. 498, 507, correcting a statement in Quinn v. South Carolina R. Co., 29 S. C. 381, 10 Am. Neg. Cas. 237, 1 L.R.A. 682, to the effect that wilfulness is not essential to the recovery of exemplary damages; Watt v. South Bound R. Co., 60 S. C. 67, 74, saying that gross negligence is not ground for exemplary damages; Bingham v. Lipman, 40 Ore. 363; Cosgriff v. Miller, 10 Wyo. 234, citing the text; Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152; Eviston v. Cramer, 57 Wis. 570; Templeton v. Graves, 59 Wis. 95; Brown v. Evans, 17 Fed. 912; Sowers v. Sowers, 87 N. C. 303; Johnson v. Allen, 100 id. 131; Webb v. Gilman, 80 Me. 177; Bergmann v. Jones, 94 N. Y. 51; Spear v. Hiles, 67 Wis. 350, 58 Am. Rep. 853; Pittsburg, etc. R. Co. v. Lyon, 123 Pa. 140, 2 L.R.A. 489, 10 Am. St. 517; Alabama, etc. R. Co. v. Hill, 90 Ala. 71, 9 Am. Neg. Cas. 11, 24 Am. St. 764, 9 L.R.A. 442; Kemmitt v. Adamson, 44 Minn. 121; Barlow v. Lowder, 35 Ark. 492; Holt v. Van Eps, 1 Dak. 198; Bates v. Callender, 3 Dak. 256; Smith v. Bagwell, 19 Fla. 117, 45 Am. Rep. 12; Harrison v. Ely, 120 Ill. 83; Wales v. Miner, 89 Ind. 118; State v. Stevens, 103 id. 55, 53 Am. Rep. 482; Farman v. Lauman, 73 Ind. 568; Parkhurst v. Mastellar, 57 Iowa 474; Root v. Sturdivant, 70 Iowa 55; Wilkinson v. Drew, 57 Me. 360; Boetcher v. Staples, 27 Minn. 308; MacGowan v. Duff, 14 Daly 315; Day v. Holland, 15 Ore. 464; Lake Shore, etc. R. Co. v. Rosenzweig, 113 Pa. 519, 10 Am. Neg. Cas. 79; Holmes v. Carolina Cent. R. Co., 94 N. C. 318; Knowles v. Norfolk S. R. Co., 102 id. 59, 8 Am. Neg. Cas. 564; Louisville & N. R. Co. v. Ballard, 85 Ky. 387, 8 Am. Neg. Cas. 294, 88 Ky. 159, 2 L.R.A. 694; Sloan v. Edwards, 61 Md. 89; Voltz v. Blackmar, 64 N. Y. 440; Tift v. Culver, 3 Ill. 180; Tillotson v. Cheetham, 3 Johns. 56, 3 Am. Dec. 459; Wort v. Jenkins, 14 Johns. 352; Taylor v. Railway, 48 N. H. 320; Fleet v. Hollenkemp, 13 B. Mon. 219, 56 Am. Dec. 563; Jennings v. Maddox, 8 B. Mon. 432; Illinois, etc. R. Co. v. Cobb, 68 Ill. 53; Becker v. Dupree, 75 id. 167; Robinson v. Burton, 5 Harr. 335 (but see McCoy v. Philadelphia, etc. R. Co., 5 Houst. 599); Fox v. Stevens, 13 Minn. 272; Young v. Mertens, 27 Md. 114; Elbin v. Wilson, 33 id. 135; Wade v. Thayer, 40 Cal. 578; McWilliams v. Bragg, 3

also been applied in an action for maliciously injuring the business of another under the guise of competition,²³ for maliciously

Wis. 524; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Gilreath v. Allen*, 10 Ired. 67; *Bradley v. Morris*, Busbee, 395; *Stevenson v. Belknap*, 6 Iowa 97, 71 Am. Dec. 392; *Reeder v. Purdy*, 48 Ill. 261; *Chicago, etc. R. Co. v. Williams*, 55 id. 185, 8 Am. Neg. Cas. 160, 8 Am. Rep. 641; *McNamara v. King*, 7 Ill. 43; *Kalb v. O'Brien*, 86 id. 210; *Stillwell v. Barnett*, 60 id. 210; *Bauer v. Gottmanhauser*, 65 id. 499; *Lawrence v. Hagerman*, 56 id. 68, 8 Am. Rep. 674; *Clevenger v. Dunaway*, 84 Ill. 367; *Sherman v. Dutch*, 16 id. 283; *Drohn v. Brewer*, 77 id. 280; *Miller v. Kirby*, 74 id. 242; *Scott v. Bryson*, id. 420; *Farwell v. Warren*, 70 id. 28; *Grable v. Margrave*, 4 id. 373, 38 Am. Dec. 88; *Johnson v. Weedman*, 5 Ill. 495; *Smalley v. Smalley*, 81 id. 70; *McBride v. McLaughlin*, 5 Watts 375; *Allaback v. Utt*, 51 N. Y. 654; *Von Fragstein v. Windler*, 2 Mo. App. 598; *Newman v. St. Louis, etc. R. Co.*, id. 402; *Kennedy v. North M. R. Co.*, 36 Mo. 351; *Green v. Craig*, 47 id. 90; *Molecek v. Tower Grove R. Co.*, 57 id. 17, 8 Am. Neg. Cas. 476; *Klingman v. Holmes*, 54 id. 304; *Graham v. Pacific R. Co.*, 66 id. 536; *Kansas, etc. R. Co. v. Little*, 19 Kan. 267; *Edelman v. St. Louis T. Co.*, 3 Mo. App. 503; *Vicksburg, etc. R. Co. v. Patton*, 31 Miss. 155, 12 Am. Neg. Cas. 187; *Storm v. Green*, 51 Miss. 103; *Memphis, etc. R. Co. v. Whitfield*, 44 id. 466, 4 Am. Neg. Cas. 268; *Burrage v. Milson*, 18 Miss. 237; *Kalb v. Bankhead*, 18 Tex. 228; *Smith v. Sherwood*, 2 Tex. 460; *Bowler v. Lane*, 3 Mete. (Ky.) 311; *Cochran v. Miller*, 13 Iowa 128; *Champion v. Vincent*, 20 Tex. 811; *Greenville, etc. R. Co. v. Partlow*, 14 Rich. 237;

McGea v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341; *Mobile, etc. R. Co. v. Ashcroft*, 48 Ala. 15; *Hefley v. Baker*, 19 Kan. 9; *Sawyer v. Lauer*, 10 id. 466; *Emblen v. Myers*, 6 H. & N. 54; *Baltimore & Y. Turnpike Road v. Boone*, 45 Md. 344, 8 Am. Neg. Cas. 360; *McWilliams v. Holan*, 42 Md. 56; *Philadelphia, etc. R. Co. v. Larkin*, 47 id. 155, 8 Am. Neg. Cas. 360, 28 Am. Rep. 442; *Bradshaw v. Buchanan*, 50 Tex. 492; *Titus v. Corkins*, 21 Kan. 722; *Meidel v. Anthis*, 71 Ill. 241; *Parker v. Shackelford*, 61 Mo. 68; *Shaw v. Brown*, 41 Tex. 446; *Welch v. Durand*, 36 Vt. 182; *Ellsworth v. Potter*, 41 id. 685; *Slater v. Sherman*, 5 Bush, 206; *Huckle v. Money*, 2 Wils. 205; *Tullidge v. Wade*, 3 id. 18; *Merest v. Harvey*, 5 Taunt. 442; *Brewer v. Dew*, 11 M. & W. 625; *Sears v. Lyons*, 2 Stark. 317; *Williams v. Currie*, 1 Man., G. & S. 841; *Bell v. Midland R. Co.*, 10 C. B. (N. S.) 287; *Clissold v. Machell*, 26 Up. Can. Q. B. 422; *Silver v. Dominion Tel. Co.*, 2 Russ. & G. (Nova Scotia), 17; *Gildersleeve v. Overstoltz*, 90 Mo. App. 518; *Coffin v. Spencer*, 2 Hawaii 23.

The malice necessary to authorize the infliction of exemplary damages need not be proved beyond a reasonable doubt. *St. Ores v. McGlashen*, 74 Cal. 148.

The recklessness which will authorize such damages must be manifested under circumstances indicating that the wrongdoer knew that his act was fraught with probable injury to person or property. *Bowles v. Lowery*, 5 Ala. App. 555.

²³ *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 36 L.R.A. (N.S.) 263.

blacklisting an employee,²⁴ and for maliciously obstructing a public highway for an unreasonable time.²⁵ On grounds of public policy exemplary damages have been denied for a tortious injury to property which was employed in an unlawful business.²⁶ It has been ruled that such damages cannot be recovered in an action on the case for fraud in the sale of personal property;²⁷ but it may be doubted whether all the elements which enter into the right to exemplary damages are not present when a fraud is perpetrated.²⁸ Such damages may be recovered for the violation of a statute prohibiting combinations in restraint of trade where the defendant accomplishes his purpose by fraud, malice or recklessness.²⁹ An attorney employed to secure a divorce is liable for such damages if he, in order to secure the payment of the balance of the fee agreed upon, falsely represents to his client that the divorce has been granted, thereby leading her to remarry.³⁰ There is sufficient reason for allowing them where the wrong done involves a violation of duty springing from a relation of trust or confidence, or where a fraud is gross, or malice or willfulness is shown.³¹ A union, its officers and members may be liable for such damages for the unlawful expulsion of members.³² A corporation has the same right to recover punitive damages as an individual for a malicious and oppressive trespass committed upon its property.³³ Under a statute which provided that injuries to the person,

²⁴ *Rhodes v. Granby* C. Mills, 87 S. C. 18.

²⁵ *Tutwiler C., C. & I. Co. v. Nail*, 141 Ala. 374.

²⁶ *Kauffman v. Babcock*, 67 Tex. 241.

²⁷ *Singleton v. Kennedy*, 9 B. Mon. 222.

²⁸ *Batman v. Cook*, 120 Ill. App. 203 (wilful fraud as the result of a conspiracy); *Hobbs v. Smith*, 27 Okla. 830, 34 L.R.A.(N.S.) 697 (decision affected by statute); *Bailey v. Walton*, 24 S. D. 118 (the Code so provides); *Western Cottage P. & O. Co. v. Anderson*, 97 Tex. 432; *Allen v. Cable*, 180 Ill. App.

472; *State v. Stevens*, 103 Ind. 55, 53 Am. Rep. 482; *Holmes v. Carolina Cent. R. Co.*, 94 N. C. 318, 8 Am. Neg. Cas. 563; *Wiley v. McGrath*, 194 Pa. 498, 75 Am. St. 709. See § 1178.

²⁹ *Smith v. Morgantown I. Co.*, 159 N. C. 151.

³⁰ *Hill v. Montgomery*, 84 Ill. App. 300. See § 1178.

³¹ *Russell v. Stoops*, 106 Md. 138.

³² *Schneider v. Local Union*, 116 La. 270, 5 L.R.A.(N.S.) 891, 114 Am. St. 549.

³³ *International, etc. R. Co. v. Telephone & T. Co.*, 69 Tex. 277, 5 Am. St. 45.

whether the same do or do not result in death, shall survive to the executor or administrator, such damages have been allowed where there was an interval between the act which caused the death and that event,³⁴ and also where the death was instantaneous.³⁵ Statutes of this character usually confine the damages to the pecuniary injury sustained by the next of kin or the persons who may recover and are construed to exclude punitive damages.³⁶ But where the action was brought by the person injured, who died during its pendency, another question is presented. Because exemplary damages are not compensatory and, therefore, are not property, it has been contended that the right to recover them does not survive the death of the plaintiff in the action although the cause of action survives. In answer it was said: "It must be borne in mind that, where the action is brought by the representative of one deceased, it is to repair the injury done to the estate, and the damages are assessed with reference to the injury done thereto. Consequently, pain and suffering are not taken into account. Neither can exemplary damages be awarded, as a general rule, for they are peculiar to the person and do not relate to pecuniary or property rights. And, notwithstanding all causes of action now survive, in assessing damages we must look to the wrong to be remedied and the injury to be repaired. When the action is brought by the representative of one deceased it is to right the wrong done to his estate. But when the action, as in this case, is brought by the person injured, who dies during its

³⁴ *Murphy v. New York, etc. R. Co.*, 29 Conn. 496.

The constitution of Kentucky provides that whenever the death of a person shall result from an injury inflicted by negligence or wrongful acts damages may be recovered for such death from the corporations and persons so causing the same. This extends the right of action to recover both compensatory and exemplary damages for injury not resulting in death to cases in which death ensues. *Louisville*

& N. R. Co. v. Kelly, 100 Ky. 421, 1 Am. Neg. Rep. 249.

³⁵ *Couch v. Chesapeake & O. R. Co.*, 45 W. Va. 51, 17 Am. Neg. Cas. 838; *Turner v. Norfolk & W. R. Co.*, 40 W. Va. 675; *Texarkana G. & E. L. Co. v. Orr*, 59 Ark. 215, 43 Am. St. 30; *Halsey v. Mobile & O. R. Co.*, 7 Baxter 239; *Railway Co. v. Doughtry*, 88 Tenn. 751.

³⁶ *Garrick v. Florida Cent. & P. R.*, 53 S. C. 448, 69 Am. St. 874; *Atrops v. Costello*, 8 Wash. 149. See ch. 37.

pendency, the law attempts to remedy the wrong done to him and not necessarily to his estate; and the damages in such case are not only compensatory, but may include exemplary as well. The statute governing the survival of actions has reference to the causes of actions and not to the rule of damages.³⁷ As a rule a court of equity will not award such damages,³⁸ but courts of admiralty will,³⁹ though not in a suit *in rem* against a vessel for a maritime tort.⁴⁰ They cannot be recovered in an action for a statutory penalty,⁴¹ unless the statute provides for it in addition to the actual damages, the imposition of the penalty not being dependent upon circumstances.⁴² The cases are not in harmony concerning the effect of the law of the forum on the right to recover such damages. In Kentucky the local law governs the right.⁴³ In Nevada the local statute providing for such damages will not be enforced if the cause of action arose in a state in which they are not recoverable.⁴⁴ In Mississippi it is not an objection to the recovery of such damages that the cause of action arose in another jurisdiction.⁴⁵

³⁷ Union M. Co. v. Prenzler, 100 Iowa 540.

Under a statute authorizing the personal representative of a decedent to commence and prosecute any action which the latter could have done, and another section to the effect that where a trespasser has died punitive damages may not be recovered from his estate, the death of a party assaulted does not affect the right to recover such damages. Wagner v. Gibbs, 80 Miss. 53.

³⁸ Bird v. Wilmington & M. R. Co., 8 Rich. Eq. 46, 57, 64 Am. Dec. 739; Jones v. Aronson, 45 Pa. Super. 148; Bratton v. Catawba P. Co., 80 S. C. 260; Welborn v. Dixon, 70 S. C. 108; Karns v. Allen, 135 Wis. 48, citing the text; United States v. Bernard, 202 Fed. 728, 121 C. C. A. 190.

In Mississippi a chancellor may award exemplary damages in his discretion; he is not bound to do

so because of the finding of the master. Hines v. Imperial N. S. Co., 101 Miss. 802.

³⁹ Boston Mfg. Co. v. Fiske, 2 Mason, 119, 121. See The Amiable Nancy, 3 Wheat. 546, 4 L. ed. 456.

⁴⁰ The William H. Bailey, 103 Fed. 799.

⁴¹ Johnson v. Larcade, 110 Ill. App. 611; Stovall v. Smith, 4 B. Mon. 378; Giffen v. Barr, 60 Vt. 599.

⁴² Greenberg v. Western T. Ass'n, 140 Cal. 357, 19 Am. Neg. Rep. 721.

⁴³ Louisville & N. R. Co. v. Smith, 135 Ky. 462.

⁴⁴ Christensen v. Floriston P. & P. Co., 29 Nev. 552.

⁴⁵ Louisville & N. R. Co. v. McCaskell, 98 Miss. 20. See Higgins v. Central New England & W. R. Co., 155 Mass. 176.

It is said by a recent writer that, with respect to punitive damages, if the case is one for which such dam-

The doctrine that exemplary damages may be allowed for the purpose of example and punishment, in addition to compensation in certain cases, is held in a large majority of the states of the Union,⁴⁶ in Canada and in England. In some states it is followed with reluctance and deprecating acquiescence; in others, with emphatic indorsement; while in a few it is not, or but partially, accepted.⁴⁷ There is a substantial and practical difference, and not a mere verbal conflict, on two aspects of the subject. First, as to what is intrinsically meant

ages may be given in the discretion of the jury under the *lex delicti*, that law will govern the legal right to demand such damages in another state, unless the *lex fori* should expressly prohibit punitive damages, or the enforcement of the *lex delicti* in this respect should contravene an established policy of the forum. This is a substantive right, not a mere matter of remedy. Minor, Conf. Laws, sec. 198. The writer cites Pullman P. Car Co. v. Lawrence, 74 Miss. 782, and says that in Carson v. Smith, 133 Mo. 696, the right to punitive damages is discussed without reference to the *lex delicti*.

⁴⁶ Indiana has been considered by some courts and writers to be one of the states in which exemplary damages are not recoverable. This misapprehension has probably arisen from *obiter* remarks by individual judges and from the rule long established and consistently adhered to that they cannot be allowed where the act which gives rise to the claim is punishable criminally. It was observed in State v. Stevens, 103 Ind. 55, 53 Am. Rep. 482, that in all that class of torts not rising to the degree of criminality the injured party might, where the elements of fraud, malice, gross negligence or oppression mingled in the controversy, in addi-

tion to full compensation for all other damages, recover exemplary or punitive damages as a punishment or by way of example to deter others from the like offenses. Lytton v. Baird, 95 Ind. 349; Citizens' St. R. Co. v. Willoby, 134 Ind. 563; Henderson v. McGruder, 49 Ind. App. 682; Baltimore, etc. R. Co. v. Davis, 44 Ind. App. 375; Indiana Union T. Co. v. Heller, 44 Ind. App. 385.

The code of Georgia permits the recovery of exemplary damages "either to deter the wrong-doer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." The public good and the desire to deter others cannot justify their imposition Raterree v. Chapman, 79 Ga. 574.

⁴⁷ In Colorado the right to recover exemplary damages has been established by the legislature after its existence had been denied by the court. But the statute has been refused retroactive effect on the ground that it does no more than change the form of the remedy, being penal in its nature, and the constitution forbidding the passage of any *ex post facto* law, or law impairing the obligation of contracts, or retrospective in its operation. French v. Deane, 19 Colo. 504, 24 L.R.A. 387.

by exemplary, vindictive, punitive or punitive damages, those words in general being used indifferently as importing the same thing.⁴⁸ Second, in respect to the consequence to the civil

⁴⁸ *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; *Louisville, etc. R. Co. v. Smith*, 2 Duv. 556, 9 Am. Neg. Cas. 380; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351.

In *Meidel v. Anthis*, 71 Ill. 241, the court gave a construction to the statute providing the remedy of a wife for damages under the liquor law. That act subjects the seller of intoxicating liquors sold contrary to its provisions to punishment by indictment; it also gives a civil remedy in damages to a wife, among others, who is injured in person, property or means of support by the intoxication of her husband, caused by such unauthorized and prohibited sales. *Breese, C. J.*, referred to *Freese v. Tripp*, 70 Ill. 496, and said: "It was held in that case that the statute, being highly penal in its character, and introducing remedies unknown to the common law in which the person prosecuting had decided advantages over the party defending, should receive a strict construction. It was held that anguish or mental pain of the wife was not an element of damage to be considered. The statute contemplates only injury in person or property or means of support. It was also held the jury could not give exemplary damages unless actual damages were proved and found. In support of this *Schneider v. Hosier*, 21 Ohio St. 98, was cited. It was also held that exemplary damages could not be awarded as punishment for the reason the statute itself provides the public shall avail of its preventive provisions by indictment (§§ 6, 8); that putting money in the pocket of the plain-

tiff would be no satisfaction to the public for violation of a penal statute. Appellee in this case insists such damages can be awarded; that the statute allows exemplary damages. This is true, but not damages by way of punishment, but exemplary damages, such as will operate as an example, or a warning to deter the party or others from similar transactions, and aggravating circumstances must be shown. Appellee says such damages are allowed in actions of *tort* at common law. Granted; but this is not an action of *tort* at common law; and the idea of the statute does not seem to be, as it has provided a punishment for the public wrong, that a complaining party in a civil suit should pocket money by way of punishment for the offender. We concede this court is committed to the doctrine that in certain actions of *tort* at the common law the jury can go beyond the question of mere compensation for the injury, and give damages by way of punishment, though eminent law writers protest, and insist that this was not a principle of the ancient and genuine common law. It is insisted, by that law, the civil remedy for a wrong done should not be punitive to the wrong-doer, as well as compensative to the sufferer. 3 *Parsons on Cont.* 170. *Greenleaf*, in his treatise on Evidence, in most emphatic language affirms that the position that damages may be given by way of punishment has not the countenance of any express decision upon the point, though it has the support of several *obiter dicta*; and inquires, if this be a rule of

remedy of the tortious act complained of being an offense punishable under the criminal law.

§ 393. **Same subject; grounds upon which allowed.** Formerly the imposition of damages as punishment and for example was exclusively in the discretion of the jury, subject to review as to the amount allowed. There is a tendency in some courts to consider such damages more in the nature of a right, or following as a legal consequence from the doing of an unlawful act with reprehensible motives. Whether the allowance is discretionary with the jury or may be directed by the court in making it the idea of compensation to the injured party for any immediate or remote loss or injury to him is put out of view.⁴⁹ In determining the amount which the defendant shall pay on this account the turpitude of his conduct and his financial ability are only considered; and such consideration is not in view of the injury or distress of the plaintiff, but in behalf of the public; the wrongful act is regarded as an indication of the actor's vicious mind—as an overt deed of vindictive or wanton wrong, offensive and dangerous to the public good. This is the view of those damages which generally prevails. They are al-

law, how is the party to be protected from double punishment. 2 Greenleaf on Evidence, § 242, in an elaborate note. Although this court is committed to the other doctrine, still the question remains under this statute, can the jury give exemplary damages by way of punishment of the offender? They may give exemplary damages. We understand by this they may, in a proper case, give besides actual damages to the party injured such damages as may operate as a warning to others—they may make an example of the seller by the *quantum* of damages they shall award against him. We cannot believe that it was the design of the legislature to give to the jury in such an action the power to punish the violator of the law in the shape of

damages which go to the party injured, the more especially as, by the very act authorizing exemplary damages, the seller, as punishment for his wrong-doing, is subject to fine and imprisonment in the county jail. Exemplary damages must not be given as punishment—not as vindictive but as exemplary damages. This is a penal statute, and to the words used in it the proper significance must be given. It was enough to comply with the statute for the court to tell the jury that, in addition to actual damages, they might find exemplary damages.”

⁴⁹ In South Carolina such damages are regarded not only as a punishment, but as a vindication of private right. *Beaudrot v. Southern R.*, 69 S. C. 160.

lowed when a wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to misconduct and recklessness.⁵⁰ In answer to the contention that punitive damages cannot be awarded in an action for negligence, Appleton, C. J., said: The law seems well settled that punitive damages may be given in case equally as in trespass. Whatever reasons exist for punitive damages in trespass are equally applicable in case. The objection is that this is merely negligence and not the wilful act of the defendant. But the omission of duty, negligence, may be as injurious and criminal in its consequences as the direct and wrongful application of force. The omission to act, when action is obligatory, is equally criminal with wrongful action when action is forbidden. Action and inaction

⁵⁰ Pratt Engineering & Machine Co. v. Trotti, 142 Ga. 401; Stalker v. Drake, 91 Kan. 142; Louisville & N. R. Co. v. Roth, 130 Ky. 759, citing the text; Illinois Cent. R. Co. v. Outland's Adm'x, 160 Ky. 714; Yazoo, etc. R. Co. v. Williams, 87 Miss. 344; Mills v. Metropolitan St. R. Co., 157 Mo. App. 529; Foley v. Northrup, 47 Tex. Civ. App. 277, quoting the text; Topolewski v. Plankinton P. Co., 143 Wis. 52; Mobile, etc. R. Co. v. Smith, 153 Ala. 127, 127 Am. St. 22; Birmingham R., L. & P. Co. v. Landrum, 153 Ala. 192, 127 Am. St. 25; Birmingham W. Co. v. Keiley, 2 Ala. App. 629; Voltz v. Blackmar, 64 N. Y. 440; Milwaukee, etc. R. Co. v. Arms, 91 U. S. 489, 23 L. ed. 374; Prickett v. Crook, 20 Wis. 358; Caldwell v. New Jersey S. Co., 47 N. Y. 282; Hoadley v. Watson, 45 Vt. 289, 12 Am. Rep. 197; Meibus v. Dodge, 38 Wis. 300, 1 Am. Neg. Cas. 261, 20 Am. Rep. 6; Baltimore & Y. T. Road v. Boone, 45 Md. 344, 8 Am. Neg. Cas. 360; Sherman v. Dutch, 16 Ill. 283; Clevenger v. Dunaway, 84 Ill. 367; Philadelphia,

etc. R. Co. v. Hoefflich, 62 Md. 300, 50 Am. Rep. 223, 8 Am. Neg. Cas. 348; Hoffman v. Northern Pac. R. Co., 45 Minn. 53, 8 Am. Neg. Cas. 444; Trauerman v. Lippincott, 39 Mo. App. 478; Powers v. Manhattan R. Co., 120 N. Y. 178; Brooks v. New York, etc. R. Co., 30 Hun 47; Day v. Holland, 15 Ore. 464; Boyle v. Case, 18 Fed. 880; Berry v. Fletcher, 1 Dill. 67; United States v. Taylor, 35 Fed. 484; Alabama, etc. R. Co. v. Sellers, 93 Ala. 9, 30 Am. St. 17. The text has been approved in Louisville, etc. R. Co. v. Guinan, 11 Lea, 98, 103, 8 Am. Neg. Cas. 624, 47 Am. Rep. 279; Knoxville T. Co. v. Lane, 103 Tenn. 376, 389, 46 L.R.A. 549; Railway Co. v. Lee, 90 Tenn. 570, 573; American L. P. Co. v. Davis, 108 Tenn. 251, 256, 11 Am. Neg. Rep. 601; Rhyne v. Turley, 37 Okla. 159.

Punitive damages need not bear any relation to the compensatory damages; they must bear some relation to the injury and the cause thereof. Louisville & N. R. Co. v. Ritchel, 148 Ky. 701, 41 L.R.A. (N. S.) 958.

alike imply volition. Care and want of care are evidentiary of mental conditions.⁵¹ It is no objection to the allowance of such damages that the declaration does not allege that the negligence was wilful and wanton,⁵² or malicious.⁵³

If a wrong is done wilfully,⁵⁴ that is, if a tort is committed

⁵¹ *Wilkinson v. Drew*, 75 Me. 360; *Hopkins v. Atlantic, etc. R. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Illinois Cent. R. Co. v. Armstrong*, 93 Miss. 583.

⁵² *Wilkinson v. Drew*, 75 Me. 360; *Pierce v. Carpenter*, 65 Mo. App. 191, citing the text.

⁵³ *Lyddon v. Dose*, 81 Mo. App. 64; *Goetz v. Ambs*, 27 Mo. 28.

⁵⁴ In Kentucky the right to exemplary damages is not conditioned upon wilful neglect—the greatest degree of negligence—but it exists if the negligence was gross. *Cincinnati, etc. R. Co. v. Ackerman*, 148 Ky. 435; *Louisville & N. R. Co. v. Eaden*, 122 Ky. 818, 6 L.R.A. (N.S.) 581; *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 15 Am. Neg. Cas. 181; *Maysville & L. R. Co. v. Herrick*, 13 Bush 127; *Louisville & N. R. Co. v. Greer*, 16 Ky. L. Rep. 667; *Same v. McClain*, 23 Ky. L. Rep. 1878; *Smith v. Middleton*, 23 Ky. L. Rep. 2010; *Louisville & N. R. Co. v. Roth*, 130 Ky. 759, citing the text; *Illinois Cent. R. Co. v. Outland's Adm'x*, 160 Ky. 714. But every case of such negligence will not justify punitive damages. Where the injury was sustained through the act of an employee, the negligence complained of being that of the defendant's superintendent, and there being no evidence of motive or recklessness on his part such damages were not recoverable. *McHenry Coal Co. v. Sneddon*, 98 Ky. 684.

The conscious failure to exercise due care and diligence is wanton-

ness. *Birmingham R., L. & P. Co. v. Williams*, 158 Ala. 381.

In Tennessee the gross negligence which will support punitive damages must consist of such entire want of care of such recklessness of conduct as is the equivalent of positive misconduct, or shows a conscious indifference to consequences. *Railway Co. v. Lee*, 90 Tenn. 570; as where the plaintiff was injured by a street car which left the track while being run at a high rate of speed over a switch which was unusually dangerous. *Nashville St. R. v. O'Bryan*, 104 Tenn. 28, 7 Am. Neg. Rep. 316.

In Florida the gross negligence which will justify an award of exemplary damages must be such as evinces reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or evidences that entire want of care which raises the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them. *Florida R. & N. Co. v. Webster*, 25 Fla. 394, 419, 11 Am. Neg. Cas. 292; *Florida S. R. Co. v. Hirst*, 30 Fla. 1, 38, 16 L.R.A. 631.

An award of exemplary damages has been sustained where a railroad company fenced its right of way through the inclosure of the plaintiff without making, after notice to

deliberately, recklessly, or by wilful negligence,⁵⁵ with a present consciousness of invading another's right, or of exposing him to injury, an undoubted case is presented for exemplary

do so, an opening in the fence for him, in accordance with the requirement of the statute, the proper openings having been made for his neighbors. *San Antonio, etc. R. Co. v. Grier*, 20 Tex. Civ. App. 138.

A justice of the peace acts ministerially in making up his record and in issuing a *mittimus*, and if he is actuated by malice in doing so is liable to punitive damages. *Banister v. Wakeman*, 64 Vt. 203, 15 L.R.A. 201; *Gildersleeve v. Overstolz*, 90 Mo. App. 518; *Watts v. South Bound R. Co.*, 60 S. C. 67.

In *Lake Shore, etc. R. Co. v. Rosenzweig*, 113 Pa. 519, 543, 10 Am. Neg. Cas. 79, a passenger was wrongfully put off a train. The court said: "In determining whether the conductor acted in reckless disregard of the plaintiff's rights, the jury ought to have kept in view the fact that he violated an express rule calculated to promote the safety of passengers and those having contractual relations with the defendant. This conductor committed no battery; he made no threats; he acted quickly. A glance at the ticket, a pull at the bell rope, the stopping of the train, a deaf ear to the plaintiff's entreaties to be carried to a place of safety, a few significant words, and the plaintiff followed him to the ground, there to be pointed to a light toward the depot; but not to a bridge or any safe way out of his peril. If there was no wilful misconduct by the conductor how can it be said that he was not recklessly indifferent to the consequences likely to befall the plaintiff? If the suit were against him there could be little question

that the jury would be permitted to give exemplary damages." Compare *Philadelphia T. Co. v. Orbann*, 119 Pa. 37, 10 Am. Neg. Cas. 133; *Philadelphia, etc. R. Co. v. Hoeflich*, 62 Md. 300, 50 Am. Rep. 223.

⁵⁵ *Montgomery L. & T. Co. v. Riverside Co.*, 8 Ala. App. 509; *Williams v. Benson*, 87 Kan. 421; *Whitmer v. El Paso, etc. R. Co.*, 201 Fed. 193, 119 C. C. A. 637; *Greeney v. Pennsylvania W. Co.*, 29 Pa. Super. 136; *Texarkana G. & E. L. Co. v. Orr*, 59 Ark. 215, 43 Am. St. 30.

The negligence must be gross within the strictest signification of the phrase, which means such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness and is indifferent or worse to the danger of injury to the persons or property of others. *Lienkauf v. Morris*, 66 Ala. 406; *Wilkinson v. Searcy*, 76 id. 176.

It is said in *Brooke v. Clarke*, 57 Tex. 105, 114: "If the conduct of the defendant in the discharge of his duty as accoucher was so grossly negligent as to raise the presumption of his criminal indifference to results we very greatly doubt whether it should avail to exempt him from exemplary damages for him to show that he had no bad motive, and that he acted otherwise in a manner tending to show that he was not, at heart, indifferent. Where the act is so grossly negligent as to raise the presumption of indifference, evidence that in other matters connected therewith he had shown due care, and that actual indifference would have been in fact

damages.⁵⁶ To enable a jury to exercise their discretion wisely for the purposes for which such damages are allowable all the facts and circumstances which belong to the principal transaction and tend to develop its character should be submitted to them.⁵⁷ There need not be positive proof of malice or oppression if the transactions or the facts shown in connection therewith fairly imply its existence, and it is left to the jury to look at all the circumstances in order to see whether there was anything in the conduct of the defendant to aggravate the damages.⁵⁸ When the plaintiff is entitled to damages arising from

indifference to his own interest, should, we think, not be allowed for any other purpose than to be considered by the jury in fixing the amount of exemplary damages."

Gross carelessness is not ground for such damages in the absence of oppression, fraud or malice. *Yerian v. Linkletter*, 80 Cal. 135.

⁵⁶ *Schumacher v. Shawhan Distillery Co.*, 178 Mo. App. 361; *Burles v. Oregon Short Line R. Co.*, 49 Mont. 129; *International H. Co. v. Iowa H. Co.*, 146 Iowa 172, 29 L.R.A.(N.S.) 272; *Plourd v. Jarvis*, 99 Me. 161; *Anderson v. International H. Co.*, 104 Minn. 49, 16 L.R.A.(N.S.) 440; *Jennings v. Appleman*, 159 Mo. App. 12; *Cincinnati, etc. R. Co. v. Klute*, *infra*; *Palmer v. Philadelphia, etc. R. Co.*, 218 Pa. 114; *Alabama Consol. Coal & Iron Co. v. Cowden*, 175 Ala. 108; *Cosgriff v. Miller*, 10 Wyo. 190, quoting the text; *Carleton v. Fletcher*, 109 Me. 576.

⁵⁷ *Dannenberg v. Berkner*, 118 Ga. 885; *Plourd v. Jarvis*, 99 Me. 161; *Cathey v. St. Louis, etc. R. Co.*, 149 Mo. App. 134, 4 N. C. C. A. 994; *Cincinnati, etc. R. Co. v. Klute*, 8 Ohio C. C. (N. S.) 409 (affirmed by the supreme court without opinion); *Stark v. Epler*, 59 Ore. 262; *Dubois v. Roby*, 84 Vt. 465; *Hen-*

derson v. Coleman, 19 Wyo. 183; *Mahoney v. Goldblatt*, 163 Ill. App. 563; *Woodward v. Ragland*, 5 D. C. App. Cas. 220; *Alabama, etc. R. Co. v. Frazier*, 93 Ala. 45, 8 Am. Neg. Cas. 17; *Lenfest v. Robbins*, 101 Me. 176 (though not transpiring at the moment the wrong was done); *Harmon v. Harmon*, 61 Me. 233 (slanderous words used more than two years before action begun, and statute of limitations pleaded). The cases cited in the five last preceding notes recognize the rule.

The defendant may testify to his purpose and intent in doing the act complained of. *Norris v. Morrill*, 40 N. H. 399. *Contra*, *Brewer v. Watson*, 71 Ala. 299; *Alabama Co. v. Reynolds*, 79 Ala. 497; *McCormick v. Joseph*, 77 Ala. 236; *Whizenant v. State*, 71 Ala. 383; *Burke v. State*, 71 Ala. 377; *Wheless v. Rhodes*, 70 Ala. 419.

⁵⁸ *McNamara v. St. Louis T. Co.*, 182 Mo. 676, 66 L.R.A. 486; *Johnson v. Perry*, 2 Humph. 569; *Bryan v. McGuire*, 3 Head 530; *Telephone & T. Co. v. Shaw*, 102 Tenn. 313.

In the last case the defendant cut a tree of the plaintiff's after being warned not to do so, the cutting being done in the absence of the plaintiff and against his wife's protest. *Memphis Tel. Co. v. Hunt*, 16

the defendant's intentional wrong the jury may take into consideration those causes even remotely contributing to the injury, not for the purpose of giving damages for the injury thus caused, but that they may have in view all the facts and circumstances of the case in considering the question of exemplary damages.⁵⁹

These damages are allowable only when there is misconduct and malice, or what is equivalent thereto. A tort committed by mistake, in the assertion of a supposed right, or without any actual wrong intention, and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others will not warrant the giving of damages for punishment where the doctrine of such damages prevails.⁶⁰ An exces-

Lea 456, 57 Am. Rep. 327, and Cumberland Tel. & T. Co. v. Poston, 94 Tenn. 696 are similar.

⁵⁹ Pickens v. South Carolina & G. R. Co., 54 S. C. 498; St. Louis S. R. Co. v. Myzell, 87 Ark. 123; Louisville & N. R. Co. v. Earl, 139 Ga. 456.

⁶⁰ Kuehne P. Co. v. Allen, 148 Fed. 666, 78 C. C. A. 418; Southern R. Co. v. Coleman, 153 Ala. 266; Western U. Tel. Co. v. Westmoreland, 151 Ala. 319, citing the text; Birmingham R., L. & P. Co. v. Wise, 149 Ala. 492; Chicago, etc. R. Co. v. Whitten, 90 Ark. 462; St. Louis, etc. R. Co. v. Dysart, 89 Ark. 261; Harris L. Co. v. Morris, 80 Ark. 260; Spencer v. San Francisco B. Co., 5 Cal. App. 126; Hayden v. Fair Haven & W. R. Co., 76 Conn. 355, 15 Am. Neg. Rep. 329; Southern R. Co. v. Davis, 132 Ga. 812; Macon R. & L. Co. v. Mason, 123 Ga. 773, 18 Am. Neg. Rep. 355; Southern R. Co. v. O'Bryan, 119 Ga. 147; Maxwell v. Speth, 9 Ga. App. 745; Jenkins v. Southern Bell Tel. Co., 7 Ga. App. 484; Chicago Union T. Co. v. Lauth, 216 Ill. 176; Steeve v. Smith, 153 Ill. App. 630; Atchison, etc. R. Co. v. Ringle, 71

Kan. 839; Louisville & N. R. Co. v. Wilkins, 143 Ky. 572; National C. Co. v. Powar, 137 Ky. 156; Louisville & N. R. Co. v. McNary, 128 Ky. 408, 129 Am. St. 308, 17 L.R.A. (N.S.) 224; Schulte v. Louisville & N. R. Co., 128 Ky. 627; Southern R. Co. v. Goddard, 121 Ky. 567; Robichaud v. Maheux, 104 Me. 524; Bernheimer v. Becker, 102 Md. 250, 3 L.R.A. (N.S.) 221, 111 Am. St. 356; Western U. Tel. Co. v. Miller, 97 Miss. 225; Cumberland Tel. & T. Co. v. Paine, 94 Miss. 883; Yazoo, etc. R. Co. v. Christmas, 89 Miss. 686; Cumberland Tel. & T. Co. v. Baker, 85 Miss. 486; Mitchell v. United R. Co., 125 Mo. App. 1; Applegate v. Franklin, 109 Mo. App. 293; Magognos v. Brooklyn Heights R. Co., 128 App. Div. (N. Y.) 182; Noonan v. Luther, 119 App. Div. (N. Y.) 701; Warren v. Coharie L. Co., 154 N. C. 34, citing the text; Wilson v. Railroad, 142 N. C. 333; Hayes v. Railroad, 141 N. C. 195; Galvin v. Tibbs, 17 N. D. 600; Vivian v. Challenger, 45 Pa. Super. 1; Malott v. Woods, 109 Ill. App. 512; Adams v. Beaver Valley T. Co., 41 Pa. Super. 403; Hygienic F. U. Co. v.

sive battery is an answer to a plea of *son assault demesne*, and if wantonly or maliciously inflicted subjects the party making

Way, 15 Pa. Dist. 943; Green v. Atlantic C. L. R. Co., 83 S. C. 498; Matheson v. Southern R., 79 S. C. 155; Gwynn v. Citizens' Tel. Co., 69 S. C. 434, 67 L.R.A. 111, 104 Am. St. 819, quoting the text; Baxter v. Campbell, 17 S. D. 475; Lawson v. Goodwin, 37 Tex. Civ. App. 484; Adoue v. Wettermark, 36 Tex. Civ. App. 585; Rugg v. Tolman, 39 Utah 295; Moore v. Duke, 84 Vt. 401; Fink v. Thomas, 66 W. Va. 487; Ladd v. Bedle, 12 Wyo. 362; Darlington County Fair & D. Ass'n v. Atlantic C. L. R. Co., 90 S. C. 436; Straight Creek C. Co. v. Huddleston, 147 Ky. 94; Southern Tel. Co. v. King (Ark.) 146 S. W. 489; Unfried v. Libert, 20 Idaho 708; St. Louis S. R. Co. v. Evens, 104 Ark. 89; Winkler v. Citizens' S. Bank, 89 Kan. 279; Rhyne v. Turley, 37 Okla. 159; Wright v. Philadelphia R. T. Co., 236 Pa. 132; Rhoads v. Que-mahoning C. Co., 238 Pa. 283; Jopling v. Bluefield W. & I. Co., 70 W. Va. 670, 39 L.R.A.(N.S.) 814, citing the text; White v. Naerup, 57 Ill. App. 44; Louisville, etc. R. Co. v. Wurl, 62 id. 381; Biloxi City R. Co. v. Maloney, 74 Miss. 738, 4 Am. Neg. Cas. 419; Bullock v. Delaware, etc. R. Co., 61 N. J. L. 550; Cone v. Central R. Co., 62 N. J. L. 99, 4 Am. Neg. Rep. 650; Waters v. Greenleaf-J. L. Co., 115 N. C. 648, 17 Am. Neg. Cas. 136; Atchison, etc. R. Co. v. Chamberlain, 4 Okla. 542; Talbott v. West Virginia, etc. R. Co., 42 W. Va. 560; Vassau v. Madison E. R. Co., 106 Wis. 301; Lyles v. Perrin, 119 Cal. 264; Gibney v. Lewis, 68 Conn. 392; Florida S. R. Co. v. Hirst, 30 Fla. 1, 16 L.R.A. 631, 11 Am. Neg. Cas. 292, 9 Am. Neg. Cas. 177; Atchison, Suth. Dam. Vol. II.—3.

etc. R. Co. v. Stewart, 55 Kan. 667; Burruss v. Hines, 94 Va. 413, citing the text; Richardson v. Huston, 10 S. D. 484; Farwell v. Warren, 70 Ill. 28; Mansur-T. I. Co. v. Smith, 65 Ill. App. 319; Hamilton v. Morgan's L. & T. R. & S. Co., 42 La. Ann. 824; Norfolk, etc. R. Co. v. Neely, 91 Va. 539, 545, 10 Am. Neg. Cas. 375, 8 Am. Neg. Cas. 652, quoting the text; Smith v. Philadelphia, etc. R. Co., 87 Md. 48; Norfolk & W. R. Co. v. Lipscomb, 90 Va. 137, 20 L.R.A. 817; State v. Jungling, 116 Mo. 162; Wamsganz v. Wolff, 86 Mo. App. 205; Alabama, etc. R. Co. v. Arnold, 84 Ala. 159, 5 Am. St. 354; Patterson v. South & N. A. R. Co., 89 Ala. 318, 11 Am. Neg. Cas. 71; Sullivan v. Dee, 8 Ill. App. 263; Holmes v. Carolina Cent. R. Co., 94 N. C. 318, 8 Am. Neg. Cas. 563; Jackson v. Crum, 62 Tex. 401; Nordhaus v. Peterson, 54 Iowa 68; Inman v. Ball, 65 Iowa 543 (it is not enough to authorize the imposition of exemplary damages that the defendant acted with good reason to believe that he was doing wrong); Powers v. Manhattan R. Co., 120 N. Y. 178 (a delay of two years to commence condemnation proceedings will not subject a railroad company to punitive damages if it has legislative and judicial authority to support its acts); O'Brien v. Loomis, 43 Mo. App. 29; Richmond & D. R. Co. v. Vance, 93 Ala. 144, 9 Am. Neg. Cas. 11, 30 Am. St. 41 (see Alabama, etc. R. Co. v. Hill, 93 Ala. 514, 525, 30 Am. St. 65), 9 Am. Neg. Cas. 11; Kolb v. O'Brien, 36 Ill. 210; Floyd v. Hamilton, 33 Ala. 235; Devaughn v. Heath, 37 id. 595; Hamilton v. Third Ave. R. Co., 53 N. Y. 25, 8

it to the same liability to exemplary damages as if he had been the original wrong-doer.⁶¹ So the fact that a person who has acted oppressively and cruelly in dispossessing another in inclement weather believed he had a right to eject him will not be a protection from exemplary damages if he had not such right.⁶²

Am. Neg. Cas. 552; *Wallace v. Mayor*, 9 Abb. Pr. 40; *Moody v. McDonald*, 4 Cal. 297; *St. Peter's Church v. Beach*, 26 Conn. 355; *Phelps v. Owen*, 11 Cal. 11; *Goetz v. Ambs*, 27 Mo. 28; *Biggs v. D'Aquin*, 13 La. Ann. 21; *Jones v. Rahilly*, 16 Minn. 321; *Beveridge v. Welch*, 7 Wis. 465; *Blodgett v. Brattleboro*, 30 Vt. 579; *Smith v. Wunderlich*, 70 Ill. 426; *Stillwell v. Barnett*, 60 id. 210; *Tripp v. Grouner*, id. 474; *Elliott v. Herz*, 29 Mich. 202, 1 Am. Neg. Cas. 150; *Walker v. Fuller*, 29 Ark. 448; *Brown v. Allen*, 35 Iowa 306; *Scripps v. Reilly*, 38 Mich. 10; *Hyatt v. Adams*, 16 id. 180; *Allison v. Chandler*, 11 id. 542.

The legislature may provide for the imposition of exemplary damages for doing what it prohibits regardless of the motive or feeling of the wrongdoer. *Duckworth v. Stalnaker*, 68 W. Va. 197.

Deliberation and unnecessary violence in committing an assault are not cause for imposing liability for such damages. There must be an element of fraud, malice, evil intent or oppression. *Philadelphia, etc. R. Co. v. Green*, 110 Md. 32.

In the absence of any evidence tending to authorize the infliction of such damages it is proper to instruct that they cannot be allowed. *Florida Cent. & P. R. Co. v. Moonsey*, 45 Fla. 286, 20 Am. Neg. Rep. 686, 110 Am. St. 73; *Chicago, etc. R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 873; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 4 L.R.A. 710, 13 Am. St. 84.

⁶¹ *Philadelphia, etc. R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442, 8 Am. Neg. Cas. 360; *McNatt v. McRae*, 117 Ga. 898; *Ickemoth v. St. Louis T. Co.*, 102 Mo. App. 597. See § 151.

⁶² *Raynor v. Nims*, 37 Mich. 34, 26 Am. Rep. 493.

There is a very instructive and reasonable *résumé* of the discussions on the general subject in *Hendrickson v. Kingsbury*, 21 Iowa 379, an action for assault and battery. In the instructions to the jury the trial court thus defined and stated the law of exemplary damages: "Exemplary damages are given whenever elements of oppression or fraud or malice enter into the commission of the offense; and in such cases the jury are not limited to actual compensation, nor are they required to scrutinize very closely the amount of their verdict; but blending together the rights of the injured party and interests of the community, they may give such a verdict as will compensate for the injury, and at the same time inflict some punishment upon the defendant for his wrongful act, protect society and manifest the detestation in which the act is held by them." On appeal Mr. Justice Cole said: "As to the right of the jury to increase the amount of the verdict so as 'to manifest the detestation in which the act is held by them,' we think that such language, or its equivalent, cannot be found in any authoritative report of any adjudicated case."

One who sues out an attachment under circumstances which make him liable for such damages is not relieved from liability

cated case in England or this country. Mr. Sedgwick, in his article in reply to Professor Greenleaf's review of his text, both of which may be found in the appendix to Sedgwick on the Measure of Damages (2d and 3d ed.), quotes that language, and cites Lives of the Lord Chancellors, vol. 5, p. 249. We have the second American from the third London edition of that most excellent work, and on pages 213 and 214 the learned author and justly distinguished jurist, Lord Campbell, after stating the circumstances of the discharge under *habeas corpus* of Mr. Wilkes from arrest for libel under a 'general warrant,' issued by Lord Halifax, says: 'The immense popularity which Lord Chief Justice Pratt (afterward Lord Camden) now acquired *led him into some intemperance of language*, although his decisions might be sound. Many actions were brought in his court and tried before him for arrests under general warrants; and, the juries giving enormous damages, applications were made to set aside the verdicts and to grant new trials. It might be right to refuse to interfere, but not in terms such as these: * * * The defendants claim a right, under a general warrant and bad precedents, to force houses, break open escritaires, seize papers, where no inventory is made of things taken, and no persons' names specified in the warrant, so that messengers are to be vested with a discretionary power to search wherever their suspicions or their malice may lead them. As to the damages, I continue of the opinion that the jury are not limited to the injury received. Damages are designed,

not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, and as proof of the detestation in which the wrongful act is held by the jury.' Lord Campbell himself italicises the last lines in his quotation, and thereby points to that as the 'intemperate language' into which Lord Camden had been led by the 'immense popularity' acquired by the discharge of Mr. Wilkes, a member of parliament, from his arrest under a general warrant for publishing a seditious libel. The discharge was based upon his privilege as a member of parliament to be free from arrest in all cases except treason, felony and actual breach of the peace. Upon the reassembling of parliament after Mr. Wilkes' discharge, both houses declared (as if in condemnation of Lord Camden's decision) 'that privilege of parliament does not extend to the case of writing or publishing seditious libels.' It was after this resolution of parliament, and in Mr. Wilkes' own action for that particular arrest, that Lord Chief Justice Pratt is said, by Lord Campbell, to have used the language quoted; but in a note to page 14 of the Lives of the Lord Chancellors, the case of Boardman v. Carrington, 2 Wils. 233, is cited. Now, if Lord Campbell, who writes of Lord Camden as 'one of the brightest ornaments of my profession, and of *my party*,' can so unequivocally condemn this particular language as intemperate and unsound; and when the circumstances under which it was uttered are so clearly indicative of a controversy between the king and parliament on the one hand, and the court and

therefor because he made a fair statement of his case to his attorney before acting; his exemption from that liability must

people on the other, as would naturally (if not properly) stimulate to the use of strong and partisan language, is it reasonable to hold upon this authority alone that such language is the law of the land, and ought to be given as such by way of instruction to the jury? It should also be borne in mind that even Lord Camden himself did not give this language in instructions to the jury, but only used it in argument to sustain his judgment and refusal to set aside the verdict on the ground of excessive damages. Without passing just here upon the correctness of other portions of the instruction, we think that after telling the jury that they may compensate the plaintiff, punish the defendant and protect society, and not scrutinize these amounts very closely, that they may also add such further sum as will manifest the detestation in which the act is held by them, is, to speak mythologically, 'piling Pelion and Ossa on Olympus,' and is without good foundation as we think in principle or precedent."

As to the right of the jury to give damages by way of punishment he continued: "He would be a bold jurist who, in view of these authorities [over one hundred different cases which the learned judge said he had carefully examined, and a majority of which decide that vindictive or punitive damages may be given in cases where the element of fraud or oppression is shown], should hold that the doctrine of exemplary, vindictive or punitive damages had no foundation in law. Since the time of the controversy between Professor Greenleaf and

Mr. Sedgwick (1847) on this subject, a large majority of the appellate courts in this country have followed the doctrine advocated by Mr. Sedgwick in that controversy; and our own supreme court has expressly denied, on the authorities, the correctness of Professor Greenleaf's views (*Funk & Co. v. Coe*, 4 G. Greene, 55, 61 Am. Dec. 141); and in the same case expressed the opinion that, under certain circumstances, exemplary damages should be entertained. . . . *Cochrane v. Miller*, 13 Iowa 128; *Thomas v. Isett*, 1 G. Greene 470; *Denslow v. Van Horn*, 16 Iowa 476; *King v. Palmer*, 18 Iowa 377; R. S. 1860, §§ 2112, 3113, 3183. It seems that the terms *exemplary*, *vindictive*, *punitive*, *imaginary*, *presumptive*, *speculative*, and *smart money* are used in the law as synonymous; and the first three were expressly held in *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406, to be synonymous terms. While these words certainly have a literal or technical difference of signification as defined by lexicographers, yet they have been too long used as synonymous by legal writers to now justify the making of any distinction of meaning in construing the decisions or opinions of judges, or other law writings in which they are used. The controversy on this subject between Professor Greenleaf and Mr. Sedgwick may, perhaps, after all the attention and discussion it has excited, be found to be a controversy as to the terminology of the law, rather than as to the extent of the right of recovery or real measure of damages. Professor Greenleaf holds that, while the plaintiff can only re-

rest on his *bona fide* belief that he had good ground for suing

cover compensation, he is not confined to the proof of actual pecuniary loss, but that the jury may take into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind, his quiet and sense of security, in the enjoyment of his rights; in short, his happiness. But it must affect his happiness, not his neighbors'; and, therefore, to this question alone the jury should be restricted. Sedg. on Meas. of Dam. 609. While Mr. Sedgwick holds that whenever the elements of fraud, malice, gross negligence or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language, of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive or exemplary damages; in other words, it blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender. Sedg. on Meas. of Dam. 623.

"The difference arises, not in the statement of the respective propositions, but in the restatement or construction which each puts upon the rule stated; 'in short,' says Professor Greenleaf, 'his happiness;' while Mr. Sedgwick says, 'in other words, blends together the interest of society and the aggrieved individual,' etc. But some of the courts, which follow the rule as stated by Mr. Sedgwick, place a construction upon it not at all in antagonism to the rule as stated by Mr. Greenleaf. In *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406, the court say,

'every recovery for personal injury, with or without vindictive damages, operates in some degree as a punishment, but it is the punishment which results from the redress of a private wrong, and does not, therefore, violate the meaning or spirit of the constitution,' prohibiting more than one punishment for the same offense. * * * The damages are allowed as compensation for the loss sustained, but the jury are permitted to give exemplary damages on account of the nature of the injury. It is, therefore, the increase of the damages resulting from the character of the defendant's conduct that is denominated punitive or vindictive. Under the rule as stated by Mr. Greenleaf this increase of damages resulting from the nature of the defendant's conduct showing fraud, malice or oppression is given to the plaintiff as a compensation for the invasions of his 'peace of mind, his quiet and sense of security in the enjoyment of his rights;' while under the rule as stated by Mr. Sedgwick this increase is given as 'punitive, vindictive or exemplary damages.' In either case and under either rule, the amount given by the jury is 'imaginary,' 'presumptive' or 'speculative' with them; that is, the jury have not, and, in the nature of things, cannot have, in either case, any pecuniary standard by which to measure the amount of compensation or damages to which the plaintiff is entitled.

"It is, perhaps, true that the broad and general language of the rule, as stated by Mr. Sedgwick, tends more to convey to a jury the idea of their unlimited and unrestrained power, jurisdiction or control over

out the writ.⁶³ It is not cause for denying such damages that the actual damage is small. It was regarded as a sufficient reply to such suggestion to say that it is the boast of the common law that the lowest shall have its benefits as well as the highest feel its power, and that consistency must characterize the administration of the law lest error creep into the state.⁶⁴

§ 394. **Malice in law and malice in fact.** As has been shown, the liability to exemplary damages does not rest solely on the

the amount of their verdict than the rule as stated by Mr. Greenleaf; and that under that rule jurors would more frequently return verdicts based more or less upon their passions and prejudices than under the other rule. For instance, the instruction as given in this case, omitting the objectionable clause heretofore considered, would tend very strongly to convey to the jury the idea of complete control over the amount of their verdict, unrestrained by any legal rule whatever. But suppose they had been instructed that in estimating the amount of plaintiff's damages they would ascertain and give: First, the actual pecuniary loss directly sustained, as the value of the clothing destroyed. Second, the consequential pecuniary loss, as the value of the time lost by the plaintiff, the expenses, if any, incurred for medicine, physician's bills, compensation to the attendant, and board while sick, or the like. Third, the physical suffering consequent upon the injury, including any temporary, protracted or permanent deformity, disability or disfiguring, as by scars, or the like. Fourth, the mental anguish, loss of honor and sense of shame, caused by the act of the defendant, as by the exposure of his naked person to the public, the sense of wrong inflicted, insult effected, the degradation felt, and the

like. Fifth, the injury to the business, reputation, social standing, and the like. Is it not unreasonable to suppose that such an instruction would more certainly exclude passion and prejudice, and that a jury would feel themselves more constrained to limit their verdict to compensation to the plaintiff for the injuries inflicted by the defendant, and, at the same time, would render a verdict which would amply compensate for the injury in every phase and manner wherein it could operate? And, indeed, it seems to us that under such an instruction the verdict would be more likely to approximate to justice and to exclude passion and prejudice than under the loose and general instruction as given by the court in this case, and justified by the rule laid down by Mr. Sedgwick, and sustained by the general current of the authorities. And yet it is doubtless true that such an instruction might mislead and confound a jury: and they would not, in any event, have any pecuniary standard by which to measure the damages under the third, fourth and fifth subdivisions of the instructions as specified."

⁶³ Union M. Co. v. Trenzler, 100 Iowa 540.

⁶⁴ Telephone & T. Co. v. Shaw, 102 Tenn. 313.

fact that the defendant has done wrong by infringing on the legal rights of the plaintiff. The wrong must be aggravated by the manner in, or the purpose for, which it was done. The spirit which actuated the wrong-doer may doubtless be inferred from the circumstances surrounding the parties and the transaction. If it appears that he is a lunatic he is not liable for anything beyond compensatory damages because he is incapable of exercising the volition upon which depends his liability therefor.⁶⁵ There is some difference of opinion concerning the effect to be given an act which is done without other malice than is implied from the doing of an unlawful act. It is said that every act done wilfully or purposely, to the injury of another, without or upon slight provocation, is as against such person malicious, and the law so presumes; and whenever a grievous or wanton assault is committed actual malice need not be shown to entitle the aggrieved party to exemplary damages.⁶⁶ Malice in law is not personal hate or ill-will of one person towards another; it refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward that citizen.⁶⁷ It is implied from the doing of

⁶⁵ *Feld v. Brodofski*, 87 Miss. 727, citing the text; *Moore v. Horne*, 153 N. C. 413, 138 Am. St. 675; *Foley v. Northrup*, 47 Tex. Civ. App. 277, quoting the text; *McIntire v. Sholty*, 121 Ill. 660, 2 Am. St. 140.

If the wrong lies in the intent and the intent is an impossibility there can be no recovery. *Jewell v. Colby*, 66 N. H. 399; *Krom v. Schoonmaker*, 3 Barb. 647; *Williams v. Hays*, 143 N. Y. 442, 26 L.R.A. 153.

⁶⁶ *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152.

Such damages are not recoverable for an assault if, in making due allowance for the infirmities of human temper, the defendant has a reasonable excuse, arising from the provocation or fault of the plaintiff, though they were not sufficient

to justify the act done. *Ward v. Blackwood*, 41 Ark. 295, 13 Am. Neg. Cas. 314, 48 Am. Rep. 41. See §§ 151, 1255.

In actions for personal injuries exemplary damages must rest on actual malice or on such a reckless and conscious indifference to the rights of others as would, in a criminal proceeding, sustain an inference of legal malice. The motive of the defendant becomes material; there must be some wrong motive accompanying the wrongful act. *Greenwood v. Union T. Co.*, 30 Pa. Super. 488.

⁶⁷ *Bowles v. Lowery*, 5 Ala. App. 555; *Cohen v. Fox*, 26 Colo. App. 55; *Chicago, etc. R. Co. v. Whitten*, 90 Ark. 462, citing the text; *Farrow v. Hoffeecker* (Del.) 79 Atl. 920; *Mills v. Larrance*, 217 Ill. 446;

an unlawful and injurious act with a wrong motive,⁶⁸ and from continued neglect of duty to remedy a known dangerous condition.⁶⁹

"The term 'malice' is variously used, according to the nature of the litigation in which it is sought to be established. In legal parlance malice may be actual or implied, and in general it may be implied whenever there is a deliberate intention to do a grievous wrong without legal justification or excuse. In civil controversies the very essence of malice is a disposition or willingness to do a wrongful act greatly injurious to another."⁷⁰ The right of the jury to assess punitive damages in cases of false imprisonment, says Thayer, J., does not neces-

Prussner v. Brady, 136 Ill. App. 395; *Pratt v. Davis*, 118 Ill. App. 161 (unauthorized surgical operation); *Shoemaker v. Sonju*, 15 N. D. 518, quoting the text; *Thomasson v. Southern R.*, 72 S. C. 1; *Willis v. Miller*, 29 Fed. 238; *Cincinnati, etc. R. Co. v. Cooper*, 120 Ind. 469, 16 Am. St. 334, 6 L.R.A. 241; *Palmer v. Chicago, etc. R. Co.*, 112 Ind. 250, 11 Am. Neg. Cas. 507; *Lake Erie & W. R. Co. v. Bradford*, 15 Ind. App. 655; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632.

⁶⁸ *Hemsteger v. Nelson*, 181 Ill. App. 377; *First State Bank v. Noser*, 133 Ill. App. 173; *McMillen v. Elder*, 160 Mo. App. 399; *Adams v. St. Louis, etc. R. Co.*, 149 Mo. App. 278; *Ickenroth v. St. Louis T. Co.*, 102 Mo. App. 597; *Baldwin v. Fries*, 46 Mo. App. 288; *Winters v. Cowen*, 90 Fed. 99; *Bromage v. Prosser*, 4 B. & C. 247, 255; *White v. Spangler*, 68 Iowa 222; *Lampert v. Judge & D. D. Co.*, 238 Mo. 409, 37 L.R.A.(N.S.) 533. See *Stevens v. Nater*, 4 Porto Rico Fed. 158; *Kramer v. Greenville, etc. R. Co.*, 94 S. C. 59.

⁶⁹ *Thompson v. Seaboard A. L. R.*, 81 S. C. 333, 20 L.R.A.(N.S.) 426.

Exemplary damages may be re-

covered from the owner of a dog which has frightened a horse by attacking it on the highway, causing the horse to run and thereby injuring the driver, if the dog was harbored and kept wilfully and maliciously, with knowledge of his vicious habits and practices, no effort being made to restrain him or protect the public from him. *Cameron v. Bryan*, 89 Iowa 214; *Koestel v. Cunningham*, 97 Ky. 421; *Dillehay v. Hickey*, 24 Ky. L. Rep. 760.

⁷⁰ *Wendelken v. Stone* (N. J. L.) 86 Atl. 377; *Smith v. Morgantown I. Co.*, 159 N. C. 151; *Williams v. Williams*, 20 Colo. 51, 63.

A constructive levy upon chattels will not support an award of exemplary damages in the absence of proof of special injury. *Jones v. First State Bank* (Tex. Civ. App.) 140 S. W. 116.

Malice implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations. *Philadelphia, etc. R. Co. v. Quigley*, 21 How. 202, 214, 16 L. ed. 73, 76; *Smith v. Philadelphia, etc. R. Co.*, 87 Md. 48, 52; *Boyer v. Coxen*, 92 Md. 366, 370.

sarily depend upon the existence of malice, using that term in its ordinary sense. They may be awarded when a wrongful act is done wilfully, in a wanton or oppressive manner, or even when it is done recklessly, in open disregard of the rights of others. The cases on the subject show that in the matter of assessing damages for a false imprisonment, or for an assault or trespass, it is the duty of the jury to consider not only all the circumstances of aggravation attending the wrongful act, but in some measure, at least, the nature of the right that has been invaded and the effect upon social order of permitting a wrong-doer to escape without substantial punishment, in case of a flagrant violation of the law and the rights of others.⁷¹ A statute which imposes liability to exemplary damages for wilful neglect contemplates an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured either in preventing or avoiding the injury.⁷² It has generally been held that civil damage laws which authorize the recovery of such damages do not go so far as to allow them to be imposed unless the violation of the law was wilful, wanton or reckless, or otherwise merited punishment beyond that which followed the recovery of compensatory damages.⁷³ In Iowa, Illinois, and New York, however, the wilful violation of the statute supports the recovery of punitive damages.⁷⁴ In Maine, where the seller of liquors and the

⁷¹ *Fotheringham v. Adams Exp. Co.*, 36 Fed. 252, 1 L.R.A. 474.

⁷² *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119.

⁷³ *Kreiter v. Nichols*, 28 Mich. 496; *Mayer v. Frobe*, 40 W. Va. 246; *McMaster v. Dyer*, 44 W. Va. 644; *Rosecrantz v. Shoemaker*, 60 Mich. 4; *Kadym v. Miller*, 13 Ill. App. 474; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625; *Neu v. Kechnie*, 95 N. Y. 632, 47 Am. Rep. 89; *Franklin v. Schermerhorn*, 8 Hun 112; *Reid v. Terwilliger*, 116 N. Y. 530; *Meidel v. Anthis*, 71 Ill. 241; *Wilber v. Dwyer*, 69 Hun 507. See § 399. *Contra*, *Bean v. Green*, 33

Ohio St. 444; *Miller v. Gleason*, 18 Ohio C. C. 374. See *Rude v. Fakes*, 143 Ill. App. 456.

⁷⁴ *Fox v. Wunderlich*, 64 Iowa 187; *Miller v. Hammers*, 93 Iowa 746; and in Illinois, *Mahoney v. Goldblatt*, 163 Ill. App. 563.

It is held in *McMahon v. Sankey*, 133 Ill. 636, which is approved in *Wolfe v. Johnson*, 152 Ill. 280, that if a dramshop keeper continues to sell liquors to a man in the habit of drinking to excess, in wanton disregard of the request and warning of the latter's wife, to her damage, the jury may award her exemplary damages. A later case holds that a

owner of the building in which they were sold in violation of law were joined as defendants, and a wilful and wanton violation of law, in utter disregard of the consequences, was shown on the part of both an award of exemplary damages was sustained.⁷⁵ These cases and the adjudications generally do not proceed on the theory that the wrong-doer must act with a spirit of ill-will toward the individual who is injured by his act or omission. Indeed, so far as punitive damages are based on the principle that the public good requires, or is subserved by, their allowance the consequences of the wrong-doer's conduct are more important than the motive which prompted it, or are the sure *indicia* of the motive, so far at least as to throw upon him the duty of establishing the facts which exempt him from punitive liability for doing an act in itself wrongful to another. In suits for libel the general rule is that if the publication is libelous *per se* exemplary damages may be awarded without proof of express malice; ⁷⁶ if it is not so libelous the falsity of it is sufficient proof of malice to sustain such damages if the jury award them.⁷⁷ If the words published were qualifiedly privi-

sale is wilful, so as to subject the seller to such damages, if made after warning by the wife of the purchaser. *Siegle v. Rush*, 173 Ill. 559, aff'g 72 Ill. App. 485. It is also wilful if made to an intoxicated person with knowledge that he is an habitual drunkard or that he is already intoxicated. *England v. Cox*, 89 Ill. App. 551; *Lafier v. Fisher*, 121 Mich. 60.

The sale of liquor without a license is a basis for exemplary damages. *Davis v. Standish*, 26 Hun 608.

The sale of liquor with knowledge that the buyer had been confined in an asylum as the result of his excessive use of it and had been discharged as cured, is wilful and wanton. *Leverenz v. Stevens*, 124 Ill. App. 401. Knowledge that the buyer was in the habit of becoming intoxicated is cause for imposing

exemplary damages. *Earp v. Lilly*, 120 Ill. App. 123.

"A sale by a dram-shop keeper of intoxicating liquor to a minor, the seller knowing the fact of minority, is as much a wilful violation of the law as a sale to an adult husband after request to desist therefrom by his wife." *Ellsworth v. Cummins*, 134 Ill. App. 397.

⁷⁵ *Campbell v. Harmon*, 96 Me. 87.

⁷⁶ *Wood v. Hilbish*, 23 Mo. App. 389; *Regensperger v. Kiefer*, (Pa.) 20 W. N. C. 97; *Times Pub. Co. v. Carlisle*, 36 C. C. A. 475, 94 Fed. 762, and cases cited; *Reid v. Sun Pub. Co.*, 158 Ky. 727. See § 1216.

⁷⁷ *Malloy v. Bennett*, 15 Fed. 371; *Buckley v. Knapp*, 48 Mo. 152; *Bergmann v. Jones*, 94 N. Y. 51; *Samuels v. Evening Mail Ass'n*, 75 id. 604; *Holmes v. Jones*, 121 id. 461.

leged, actual malice must be shown in order to authorize the imposition of damages beyond those which are compensatory.⁷⁸ In Wisconsin exemplary damages cannot be recovered for a libel unless it was published with special ill-will or bad intent, which may be inferred from all the circumstances, but not alone from the falsity of the charge and its evil consequences.⁷⁹

It is said in a recent case that the adjudications tend to the conclusion that the presence or absence of a malicious intent in the mind of the defendant is a question of fact to be determined by the jury from the evidence; that they may allow punitive damages if they believe that such intent existed, but that if the battery was the consequence of a sudden heat resulting from provocation first offered by the plaintiff, and not of a design for his injury deliberately formed by the defendant, and that the force used was not so disproportionate to the provocation as to repel the inference that it was induced thereby, exemplary damages should not be given.⁸⁰ It is believed that it is not required that the malice upon which exemplary damages are based should have been the product of deliberation; if, independently of the conduct of the plaintiff, it existed but for a moment before the blow was struck such damages may be imposed in the discretion of the jury.⁸¹ General malice is not cause for imposing damages by way of punishment; the malice must exist as to the very matter in issue.⁸² The code of Georgia expresses that in every tort there may be aggravating circumstances, either in the act or the intention, and in that

⁷⁸ *Fresh v. Cutter*, 73 Md. 87, 10 L.R.A. 67, 25 Am. St. 575.

⁷⁹ *Eviston v. Cramer*, 57 Wis. 570; *Templeton v. Graves*, 59 Wis. 95. See *Neeb v. Hope*, 111 Pa. 145; *Hamilton v. Eno*, 81 N. Y. 116.

⁸⁰ *Badostain v. Grazide*, 115 Cal. 425, citing *Lee v. Woolsey*, 19 Johns. 319, 10 Am. Dec. 230; *Robinson v. Rupert*, 23 Pa. 523; *Ward v. Blackwood*, 41 Ark. 295; 300, 48 Am. Rep. 41; *Crosby v. Humphreys*, 59 Minn. 92, 96; *Kiff v. Youmans*, 86 N. Y. 324, 48 Am. Rep. 543;

Childers v. San Jose Pub. Co., 105 Cal. 284, 291, 45 Am. St. 40. "Suppose two persons fight by mutual consent; each is punishable criminally, but neither may recover exemplary damages in a suit against the other; so, even though they fought 'with great spirit and brutality.'" *Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538.

⁸¹ *Lowe v. Ring*, 123 Wis. 107; *Riddle v. Moffitt*, 159 Mo. App. 470.

⁸² *Moore v. Duke*, 84 Vt. 401.

event the jury may give additional damages, either to deter the wrong-doer from repeating the trespass or as compensation for the wounded feelings of the plaintiff. Under this provision exemplary damages have been awarded for wrongfully disintering a dead body, that having been done wantonly or maliciously, or as the result of gross negligence or in reckless disregard of the rights of others equivalent to an intentional violation of them;⁸³ and so where the plaintiff, after traveling with the dead body of a relative, and reaching the gate of a cemetery in which he had a right to inter the remains, and in which the defendant had, under a contract with the plaintiff, prepared the grave, was denied access to the grounds for the purpose of burial.⁸⁴ Later cases lay down the rule that if damages are given as compensation for wounded feelings punitive damages cannot also be allowed. "If in any event both compensatory and punitive damages may be recovered for wounded feelings, the punitive damages should be assessed for the purpose of deterring the wrongdoer, and not for the purpose of compensating the plaintiff."⁸⁵

§ 395. Restriction and denial of exemplary damages. In some jurisdictions the term "exemplary damages" is in use, but signifies only a liberal extension of compensation to the injured party in view of the bad motive which induced or characterized the wrong, the mental distress resulting therefrom and the remoter pecuniary consequences. The courts here accept, in the main, the views of Prof. Greenleaf. He says: "Damages are given as a compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less; and this, whether it be to his person or estate. All damages must be the result of the injury complained of. It is frequently said that in actions *ex delicto* evidence is admissible in aggravation or in mitigation

⁸³ *Jacobus v. Children of Israel*, 107 Ga. 522, 1 Am. Neg. Cas. 103, 73 Am. St. 141.

⁸⁴ *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884, 52 L.R.A. 621.

See § 974 as to the liability of telephone companies.

⁸⁵ *Georgia R. & E. Co. v. Davis*, 6 Ga. App. 645; *Southern R. Co. v. Jordan*, 129 Ga. 665.

of damages. But this, it is conceived, means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in mitigation of the injury itself. The circumstances thus proved ought to be those only which belong to the act complained of. The plaintiff is not justly entitled to receive compensation beyond the extent of his injury, nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive. Injuries to the person or to the reputation consist in the pain inflicted, whether bodily or mental, and in the expenses and loss of property which they occasion. The jury, therefore, in the estimation of damages are to consider not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily sufferings, and, if the injury was wilful, his mental agony also; the injury to his reputation, the circumstances of indignity and contumely under which the wrong was done and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act and tending to the plaintiff's discomfort." ⁸⁶

§ 396. Same subject; New Hampshire rule; reasons for denying exemplary damages. In the New Hampshire case referred to, Foster, J., said his review of the cases compelled the conclusion that the modern erroneous idea of exemplary damages "originated in, and is in fact the same thing as, damages for wounded feelings, as distinguished from damages for an injury to the person or property. Damages for lacerated sensibilities, insulted honor, tyrannical oppression, and so forth, being much emphasized, and often being the principal damage suffered by the plaintiff, and language being loosely used and not preserving the true distinction carefully, * * * it finally came to be understood that damages might be given in a civil suit as a punishment for an offense against the public; an idea that is certainly not plainly declared in the early cases. * * * I venture to say that no case will be found in which a judge explicitly told a jury that they might in an action for assault and battery give the plaintiff four damages, viz.: 1. For loss of property, or for injury to his apparel, loss of labor and

⁸⁶ 2 Greenlf. Ev., § 267.

time, expenses of surgical assistance, nursing, etc. 2. For bodily pain. 3. For mental suffering. 4. For punishment of the defendant's crime. But a critical examination of the cases will show, as I believe, that this fourth is, in fact, comprehended in the third, but has grown into and become a separate and additional item by inconsiderate, if not intemperate and angry, instructions given to juries when the court was too much incensed by the exhibition of wanton malice, revenge, insult and oppression to weigh with coolness and deliberation the meaning of language previously used by other judges; and instructions prompted by impulses of righteous indignation, swift to administer supposed justice to a guilty defendant, but expressed with too little caution and without pausing to reflect that the court was thus encouraging the jury to give the plaintiff more than he was entitled to; to give him, in fact, as damages, the avails of a fine imposed for the vindication of the criminal law and for the sake of public example."⁸⁷

In a subsequent case in the same state⁸⁸ the court approved the foregoing, and said, by Cushing, J.: "Ordinarily, in actions for torts, the rule of damages is compensation in money for the damage sustained by reason of the natural and obvious consequence of the wrongful act. * * * When, however, the element of malice enters into the wrong the rule of damages is different and more liberal. It is equally well settled that in such cases there enters into the question of damages considerations which cannot be made the subject of exact pecuniary compensation,—such as were described in the charge of the court as mental distress and vexation, what in common language might be spoken of as offenses to the feelings, insult, degradation, offenses against honest pride, and all matters which cannot arise except in those wrongs which are attended with malice. * * * In the endeavor to bring such considerations within the grasp of the law, and as far as possible to compensate such wrongs by damages, courts have used the terms punitive, vindictive, exemplary. I do not think the cases show, in so far as I have examined them, that this has ever been considered as

⁸⁷ *Fay v. Parker*, 53 N. H. 342, ⁸⁸ *Bixby v. Dunlap*, 56 N. H. 456.
16 Am. Rep. 270.

punishing an offense against the criminal law of the state, but simply as a mode of stating the matter so as to bring this almost intangible subject within the grasp of the law. Whenever the law is so held that the jury are instructed that they may leave the domains of actual pecuniary value and go into speculations in regard to compensation for the wounded feelings, the offended pride, the outraged sense of decency and delicacy, they have come into the domain of what the law has been accustomed to call punitive, vindictive or exemplary damages. It is of little consequence under what name it goes. The substance of the thing must be retained unless a very large class of cases are to be stricken from the list of actionable wrongs. * * * According to these views, it is incorrect to separate what is called actual damage from what is called exemplary damage. The rule is not, as I understand it, to instruct the jury in the first place to determine the actual money damage which the plaintiff has sustained, and then further instruct the jury that, if they find that the defendant has been malicious, they may give another separate sum in damages by way of example or for the sake of punishment. The true rule, as I understand it, is to instruct the jury that if they find the defendant has been malicious the rule of damages will be more liberal; that instead of awarding damages only for those matters which are capable of exact pecuniary valuation they may take into consideration all the circumstances of aggravation,—the insults, afforded feelings, degradation, and so on,—and endeavor, according to their best judgment, to award such damages by way of compensation or indemnity as the plaintiff, on the whole, ought to receive, and the defendant ought to pay.”

§ 397. **Same subject; Massachusetts rule.** In Massachusetts the same doctrine appears to be held; compensation is allowed to be fixed by considering all those circumstances which are generally the basis of exemplary damages; but there seems to be no countenance given to the infliction of additional damages for the punishment of the offender.⁸⁹ In an action by a father for harboring and secreting his minor daughter, and persuading

⁸⁹ *Malone v. Belcher*, 216 Mass. Brockton Pub. Co., 198 Mass. 538, 209, 49 L.R.A.(N.S.) 753; *Ellis v.* 126 Am. St. 454; *Paine v. Kelley*,

her to remain absent from his family and service without his consent, it was held that he was entitled to recover for mental suffering caused by the injury, though it was erroneous to admit the evidence thereof distinct from and in addition to that which showed the nature and extent of the injury.⁹⁰ If there is a wantonness or mischief, causing additional bodily or mental damage, in the injurious act of a servant within the scope of his employment, that wantonness or mischief will enhance the damages against the master.⁹¹ When the gist of the action is the breaking and entering the plaintiff's close the circumstances which accompany and give character to the trespass may always be shown either in aggravation or mitigation.⁹² He who is guilty of a wilful trespass, or one characterized by gross carelessness and want of ordinary attention to the rights of another, is bound to make full compensation. Under such circumstances the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions of tort. Acts of gross carelessness, as well as those of wilful mischief, often inflict a serious wound upon the feelings when the injury done to property is comparatively trifling. No rule of law requires the mental suffering of the plaintiff or the misconduct of the defendant to be disregarded. The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness.⁹³ In one case Chief Justice Shaw said: "It is immaterial," speaking of the particular case, "whether the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant. In either case the plaintiff would be entitled to recover in damages the actual amount of loss sustained, and no more, in the form of vindictive damages or otherwise."⁹⁴

197 Mass. 22; *Smith v. Holcomb*, 99 Mass. 552; *Austin v. Wilson*, 4 Cush. 273.

⁹⁰ *Stowe v. Heywood*, 7 Allen 118; *Phillips v. Hoyle*, 4 Gray 568.

⁹¹ *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383.

⁹² *Meagher v. Driscoll*, 99 Mass.

281, 96 Am. Dec. 759; *Bracegirdle v. Orford*, 2 M. & S. 77; *Merest v. Harvey*, 5 Taunt. 442; *Brewer v. Dew*, 11 M. & W. 625.

⁹³ *Meagher v. Driscoll*, *supra*; *Fillebrown v. Hoar*, 124 Mass. 580.

⁹⁴ *Barnard v. Poor*, 21 Pick. 380.

§ 398. **Same subject; Nebraska rule.** In Nebraska the court say:⁹⁵ "To this court the question of punitive, vindictive or exemplary damages is *tabula rasa*, it now being presented for the first time. And being thus called upon to lay the foundation for future adjudications on this subject in this state we are warned to avoid a line of construction which seems to have been the fruitful source of so much difficulty elsewhere, and to follow those precedents and authorities which are most satisfactory to our judgment, and which do not seem to have led to any embarrassing complications in their administration." And the court disapproved an instruction to a jury that, in addition to compensating the plaintiff for injury actually committed, they might assess other damages of a punitive or exemplary character.⁹⁶ In an action for libel evidence of express malice is improper if received for the purpose of influencing the jury in fixing the damages.⁹⁷

§ 399. **Same subject; Michigan rule.** In Michigan, also, the element of punishment is rejected. Mr. Justice Campbell stated the question and defined the accepted doctrine with great clearness and force in a libel case. He said: "It is in connection with the various degrees of blameworthiness chargeable on wrong-doers that the discussions have arisen upon the subject of vindictive damages, which, inasmuch as they rest upon actual fault, are by some authorities said to be designed to punish the wrong intent; while, according to others, the damages usually so called are only meant to recompense the sense of injury which is, in human experience, always aggravated or lessened in proportion to the degree of perversity exhibited by the offender. While the term exemplary or vindictive damages has become so fixed in the law that it may be difficult to get rid of it, yet it should not be allowed to be used so as to mislead; and we think the only proper application of damages, beyond those to the person, property or reputation, is to make

⁹⁵ *Boyer v. Barr*, 8 Neb. 68, 30 Am. Rep. 814. The later cases are in harmony with the early one. *Boldt v. Budwig*, 19 Neb. 739; *Winkler v. Roeder*, 23 Neb. 706; *Fordyce v. Richmond*, 78 Neb. 752.

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⁹⁶ See *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 376, 21 Am. Rep. 757.

⁹⁷ See *Pub. Co. v. World Pub. Co.*, 59 Neb. 713.

reparation for the injury to the feelings of the person injured. This is often the greatest wrong which can be inflicted; and injured pride or affection may, under some circumstances, justify very heavy damages. * * * The injury to the feelings is only allowed to be considered in those torts which consist of some voluntary act or very gross neglect, and practically depends very closely on the degree of fault evinced by all the circumstances. It has been very wisely left to the jury to determine each case upon its own surroundings, because the only safe rule of damages in matters of feeling is to give what, to the ordinary apprehension of impartial men, would seem proportionate to an injury which must be measured by the instincts of our common humanity.”⁹⁸ A recent case adheres

⁹⁸ *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447.

Some years later the same judge again discussed this subject. In *Welch v. Ware*, 32 Mich. 84, he said: “The common sense of mankind has never failed to see that the injury done by a wilful wrong to person or reputation, and in some cases to property, cannot be measured by the consequent loss in money. A person assaulted may not be disabled, or even disturbed in his business, and may not be put to any outlay in repairs or medical services. He may not be made poorer in money, directly or consequentially. He may incur no pecuniary damage whatever. And it is very clear that the shame and mental anxiety and suffering or indignation consequent on such a wrong are not capable of a money measurement. No one would avow in advance that he would be willing for a given sum to meet that experience; and no one who should seek it as a means of putting money into his pocket would be likely to receive compensation at the hands of a jury. So a person who is

struck down by a blow from the arms of a wind-mill may be much more seriously hurt than by a blow from a fist or a whip. But no one would dream of comparing these injuries by their physical effect. When the law gives an action for wilful wrongs it does it on the ground that the injured person ought to receive pecuniary amends from the wrong-doer. It assumes that every such wrong brings damages upon the sufferer, and that the principal damage is mental and not physical. And it assumes further, that this is actual and not metaphysical damage, and deserves compensation. When this is once recognized, it is just as clear that the wilfulness and wickedness of the act must constitute an important element in the computation, for the plain reason that we all feel our indignation excited in direct proportion with the malice of the offender, and that the wrong is aggravated by it.

“If actual damage is not confined to pecuniary consequences and cannot be measured by a money standard, all redress in damages must

to the rule announced in the earlier cases, viz.: "that where the damages are capable of pecuniary estimation vindictive

partake of a punitive character to some extent; and the line between actual and what are called exemplary damages cannot be drawn with much nicety. In every such case the jury are compelled to determine from their own sense of justice and their knowledge of human nature what the amount of damages should be. When the amount to be recovered must in all cases rest in their fair and deliberate discretion, the law can give them to precise instructions. It aims to do justice by directing them to distinguish between provoked grievances and those which are unprovoked, or for which the provocation is in great disproportion to the wrong, making adequate compensation in all cases, but giving heavier damages in all cases where the wrong is aggravated by bad motives or malice. It would be of very little use to present the law to a jury upon any theoretical basis. The rule is intelligible and has not been found to work badly in practice. But whether this rule involves merely compensation or whether it is based on a theory of punishment is not very important in practice and does not come within the domain of law so long as the jury are obliged to estimate by their own good judgment. It is not an open question in this state that damages are to be given not only for grievances beyond pecuniary losses, but also in accordance with the malice of the offender." Previous cases in that state illustrating the general doctrine concerning aggravation of damages by wilful and wanton misconduct, and the powers and duties of jurors in actions of tort, are cited. *Tefft v.*

Windsor, 17 Mich. 486; *Warren v. Cole*, 15 Mich. 265; *Brushaber v. Stegemann*, 22 Mich. 266; *Swift v. Applebone*, 23 Mich. 252, 1 Am. Neg. Cas. 149; *Leonard v. Pope*, 27 Mich. 145; *Sheahan v. Barry*, 27 Mich. 217.

In *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668, Judge Campbell had to deal with this subject again in an action by a female for assault and battery aggravated by an alleged attempt to ravish. He said: "This is nothing more than trespass for an assault and battery. There is no such thing as a private action for a crime as such. The civil grievance here charged was an assault described as was proper with its attendant circumstances of enormity including an attempt to ravish. This, however, does not make it differ from an action for a lighter grievance except as showing a heavier ground of complaint, for which if made out the damages would be likely to be larger." Further on he says: "There was no dispute but that the plaintiff below received some blow or blows, or, what was equivalent, was pushed with more or less force by the defendant. If this was done by him as the first assailant, he was unquestionably guilty of an assault. And as an assault cannot very well be purely accidental, and is not pretended to have been anything but intentional, if committed at all, it was such an act as must be regarded as wilful, whether serious or trivial. Being so, it authorized the jury to give such damages as would, in their sound judgment, be required by the character and extent of its atrocity. If the jury believed that

damages can never be allowed; that for any wrongful injuries where the grievance created is purely pecuniary in its nature, and is susceptible of a full and definite money compensation, it is not permissible to abandon a certain rule, which will do complete justice for an uncertain one that can hardly fail to do injustice.⁹⁹ And in *Wilson v. Bowen*¹ it is said that it is not the province of the jury, after full damages have been found for the plaintiff, so that he is fully compensated for the wrong committed by the defendant, to mulct the defendant in an additional sum to be handed over to the plaintiff as a punishment

there was any assault at all they could not help believing it was an indecent one, if not felonious, because there was no proof of any other. We need not, therefore, consider anything except the instructions given concerning what are called exemplary damages, as the case was fit for them if they were allowed at all. The question of the propriety of their allowance is not an open one in this state. The argument that a person is thereby punished twice within the constitutional and common-law rule is, in our opinion, entirely fallacious. The maxim at common law that no one shall be twice vexed for the same cause, where it applied at all, prevented a second prosecution as well as a second punishment; and if it applied to civil damages would cover the whole and not merely what is assumed to be part of them. But there is no analogy between the civil and criminal remedies. The punishment by criminal prosecution is to redress the grievance of the public, while the civil remedy is for private redress. In the eye of the law, where both actions lie, there is a double injury, and one has never, therefore, been allowed to be pleaded in abatement or bar of the other, simply because they are contentions

between different parties. But when we look at the rules which have been provided for enforcing the redress of either the public or the private complainant, we are not so much concerned with any supposable theories on which such rules may be based as with the rules themselves. Civil actions never lie, except for the vindication of broken laws, any more than criminal. It is a matter of arbitrary regulation, and not of principle, whether a given violation of law shall be redressed by a civil or criminal prosecution, or by both; and where new crimes are created out of what were before civil wrongs, the civil remedy has seldom been lessened or narrowed by reason of the new criminal prosecution. Whether we call the process punitive or exemplary or remedial, we get no nearer a conclusion if the law has given the rule of procedure." *Scripps v. Reilly*, 38 Mich. 10; *Stilson v. Gibbs*, 53 id. 283; *Wilson v. Bowen*, 64 Mich. 133. See *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. 608; *Durfee v. Newkirk*, 83 Mich. 522.

⁹⁹ *Warren v. Cole*, 15 Mich. 273.

¹ 64 Mich. 133; *Stuyvesant v. Wilcox*, 92 Mich. 233; *Haviland v. Chase*, 116 Mich. 214, 72 Am. St. 519.

for the wrong he has done to such plaintiff.”² The disinclination to allow exemplary damages is so strong that a civil damage act expressly permitting their recovery is construed not to justify an award by way of punishment, but rather to empower the jury to award a sum in addition to the actual proven damages as compensation for injured feelings.³

§ 400. **Same subject; rule in Colorado, West Virginia, Washington and Connecticut.** The early cases in Colorado supported, at least by strong inference, the doctrine of exemplary damages. In 1884 they were reviewed and the conclusion was reached that the question was not *res judicata*. It was then held that such damages are not recoverable for an act which is punishable under the criminal laws.⁴ Four years later it was ruled that nothing beyond liberal compensation is recoverable.⁵ In the following year the legislature provided for the recovery of exemplary damages.⁶

In West Virginia the right to recover punitive damages was

² *Durfee v. Newkirk*, *supra*. The opinion continues: “There is a class of cases, such as seduction (see *Watson v. Watson*, 53 Mich. 168, 51 Am. Rep. 111), where the damages are not capable of accurate measurement by a money standard and where they must necessarily be left to the proper discretion of the jury. In such cases increased damages are permitted for circumstances of aggravation in the wrongdoing, but they are not given by the law, as interpreted by this court, in punishment of the wrong-doer, but as extra compensation to the person wronged, for the reason that the injury is considered greater because of such circumstances of aggravation, and therefore the compensation ought to be greater. Wilful trespasses, assaults and batteries, libels and slanders, false imprisonment and, perhaps, other actions, where the injury is in part to the feelings of the plaintiff, to his

shame and humiliation, are cases where ‘increased’ damages may be given.”

³ *Hink v. Sherman*, 164 Mich. 352, overruling *Thiesen v. Johns*, 72 Mich. 285; *Ford v. Cheever*, 105 Mich. 679; *Haviland v. Chase*, 116 Mich. 214, 217, 72 Am. St. 519; *McChesney v. Wilson*, 132 Mich. 252; *Boyd v. Haberstumpf*, 129 Mich. 137.

⁴ *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366.

⁵ *Greeley, etc. R. Co. v. Yeager*, 11 Colo. 345; *Howlett v. Tuttle*, 15 Colo. 454.

⁶ *Laws 1889*, p. 64. See *French v. Deane*, 19 Colo. 504, 24 L.R.A. 387; *Gray v. Linton*, 38 Colo. 175.

The words, in the act referred to, “wrong done to the person,” are not restricted to physical or bodily injuries, but include injuries to the mind and sensibilities. *Williams v. Williams*, 20 Colo. 51.

denied, after apparently full discussion,⁷ in 1888, by a unanimous court. In 1895, a complete change in the *personnel* of the court having taken place in the meantime, there was a change of position, and the rule generally recognized was approved.⁸

In Washington exemplary damages are not recoverable,⁹ except where allowed by statute, and then they are not to be punitive in extent. The code allows such damages in an action on an attachment bond if the attachment was maliciously sued out. This is construed not to permit damages by way of punishment, but to authorize them as compensation for injury to reputation, feelings, and other damage of an intangible nature. Exemplary damages are not recoverable if the attachment was sued out on the advice of an attorney after a full disclosure of the facts, nor if actual damages were not recoverable.¹⁰

In Connecticut the cases in which punitive damages may be awarded are only those actions of tort founded on the malicious or wanton misconduct of the defendant, or upon such culpable neglect as is tantamount thereto. The expenses of litigation are not an element of actual or compensatory damages, and can only be considered in those cases in which exemplary damages may be awarded. Such expenses in excess of taxable costs, in cases in which they may be considered, limit the amount of punitive damages which can be awarded. In cases where they may be considered it is not usual to prove the expenses of litigation actually incurred, but the court may admit evidence for that purpose.¹¹

⁷ *Pegram v. Stortz*, 31 W. Va. 220; *Beck v. Thompson*, 31 W. Va. 459, 13 Am. St. 870.

⁸ *Mayer v. Trobe*, 40 W. Va. 246; *Stevens v. Friedman*, 58 W. Va. 78; *McMaster v. Dyer*, 44 W. Va. 644.

⁹ *Corcoran v. Postal Telegraph-Cable Co.*, 80 Wash. 570, L.R.A. 1915B, 552; *Longfellow v. City of Seattle*, 76 Wash. 509; *Caldwell v. Northern Pac. R. Co.*, 56 Wash. 233; *Woodhouse v. Powles*, 43 Wash. 617,

8 L.R.A.(N.S.) 783, 117 Am. St. 1079, and cases cited; *Spokane Truck & D. Co. v. Hoefer*, 2 Wash. 45, 11 L.R.A. 689, 26 Am. St. 842; *Phillips v. Thomas*, 70 Wash. 533, 42 L.R.A.(N.S.) 582.

¹⁰ *Levy v. Fleischer*, 12 Wash. 15.

¹¹ *Distin v. Bradley*, 83 Conn. 466; *Hull v. Douglass*, 79 Conn. 266; *Shupack v. Gordon*, 79 Conn. 298; *Meisenbacker v. Society Con-*

§ 401. **Exemplary damages as compensation and punishment; who may recover.** The difference between allowing all the circumstances belonging to a tort, tending to show that it was induced or aggravated by malice, to be shown and considered merely for more ample compensation to the party injured and permitting it to be done with that view, and also that the amount shall operate as a punishment and a warning, is that to the extent the latter object influences the jury the verdict will be increased; and the cases are very numerous which show that very large additions must have been made for punitive effect to the amount which would otherwise have been found. Nor is this result surprising to those who have frequently participated in or witnessed the trial of tort actions, and observed the effect of the indignant denunciations of counsel, seconded by the apparently dispassionate instructions of the court, submitting the very same considerations to the jury as warranting them, in their discretion, for the good of the public, in awarding a larger sum.

In a New York case ¹² the court say: "In vindictive actions—and this [for assault and battery] is agreed to come within that class—jurors are always authorized to give exemplary damages where the injury is attended with circumstances of aggravation; and the rule is laid down without qualification that we are not to regard either the possible or the actual punishment of the defendant by indictment and conviction at the suit of the people. * * * We concede that smart money allowed by a jury and a fine imposed at the suit of the people depend on the same principle. Both are penal and intended to deter others from the commission of the like crime. The former, however, becomes *incidentally* compensatory for damages, and at the same time answers the purposes of punishment. The recovery of such damages ought not to be made dependent on what has been done by way of criminal prosecution any more than on what may be done. Nor are we prepared to concede

cordia, 71 Conn. 369, 378, 71 Am. 4 L.R.A.(N.S.) 907; Seidler v. St. 213; List v. Miner, 74 Conn. 50; Burns, 86 Conn. 249.
 Hassett v. Carroll, 85 Conn. 23; ¹² Cook v. Ellis, 6 Hill 466, 41
 Hanna v. Sweeney, 78 Conn. 492, Am. Dec. 757.

that either a fine, an imprisonment, or both, should be received in evidence to mitigate the damages. True, if excluded, a double punishment may sometimes ensue, but the preventive lies with the criminal rather than the civil courts." It obviously should be assumed that such double punishment occurs in every instance where the same act is the subject of a civil and a criminal suit, and in each the malicious act is submitted to the jury, with the usual instructions, in the former, in respect to exemplary damages for punishment. If the idea of punishment is excluded and the aggravations are permitted to be considered only as elements of the injury to the wronged party the civil action is merely a means of private redress for the particular injury such party suffers from an act which, in a general way, affects the whole community.¹³ He is entitled to that redress without prejudice from the existence of a liability to respond to the public. Where this view of the purpose of such damages prevails it is quite consistent therewith to permit their recovery by a husband in an action by him and his wife for injuries maliciously inflicted upon her, his recovery of compensatory damages being for the loss of her society and services.¹⁴ It has been ruled in Kentucky, however, that such damages are recoverable only by the party who was the object of the improper treatment.¹⁵ In that state punitive damages are given as compensation, and are not imposed solely as a punishment.¹⁶ The personal representative of a decedent who might have recovered such damages in an action brought by him may recover them where he is substituted as plaintiff.¹⁷

§ 402. Exemplary damages for penal offenses. The courts of some states only allow exemplary damages, including the punitive element, for such tortious acts, accompanied with malice or wanton misconduct, as are not criminal offenses.¹⁸

¹³ *Carmody v. St. Louis T. Co.*, 122 Mo. App. 338, citing the text.

¹⁴ *May v. Western U. Tel. Co.*, 157 N. C. 416.

¹⁵ *Louisville & N. R. Co. v. Scott*, 141 Ky. 538, 34 L.R.A.(N.S.) 206.

¹⁶ *Tennessee Cent. R. Co. v. Brasher's Guardian*, 29 Ky. L. Rep. 1277;

Louisville & N. R. Co. v. Ritchel, 148 Ky. 701, 41 L.R.A.(N.S.) 958.

¹⁷ *Union M. Co. v. Prenzler*, 100 Iowa 540.

¹⁸ *White v. Sun Pub. Co.*, 164 Ind. 426; *Borkenstein v. Schrack*, 31 Ind. App. 200; *Anderson v. Evansville B. Ass'n*, 49 Ind. App. 403; *Wabash*

Though a corporation is not indictable for false pretences, if these were made by agents who have been punished criminally therefor its liability is not greater than theirs, and consequently punitive damages are not recoverable.¹⁹ If the act done was accompanied with the concomitants which are the basis of such damages the nature of it is immaterial if the defendant is not liable to punishment under the criminal law.²⁰ But more generally liability to punishment in a prosecution for the same act as an offense against the state is held not to affect the civil remedy; the jury have, notwithstanding, the same discretion to allow damages beyond compensation for punishment.²¹ The

P. & P. Co. v. Crumrine, 123 Ind. 89; *Tracy v. Hackett*, 19 Ind. App. 133, 65 Am. St. 398; *Austin v. Wilson*, 4 Cush. 273, 50 Am. Dec. 766; *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366; *Farman v. Lauman*, 73 Ind. 568; *Koerner v. Oberly*, 56 id. 284, 26 Am. Rep. 34; *State v. Stevens*, 103 Ind. 55, 53 Am. Rep. 482; *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Stowe v. Heywood*, 7 Allen 118; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *Bixby v. Dunlap*, 56 N. H. 456; *Cherry v. McCall*, 23 Ga. 193; *Butler v. Mercer*, 14 Ind. 479; *Guest v. Macpherson (Quebec)* 3 Legal News 84.

The legislature may provide for the recovery of punitive damages in cases where an injury is caused by an illegal act, although the same act may subject the defendant to a criminal prosecution. *State v. Schoonover*, 135 Ind. 526, 21 L.R.A. 767.

¹⁹ *Hartford L. Ins. Co. v. Hope*, 40 Ind. App. 354; *Patterson v. New Orleans, etc. L. & P. Co.*, 110 La. 797.

²⁰ *Baltimore, etc. R. Co. v. Davis*, 44 Ind. App. 375.

²¹ *Colbert v. Journal Pub. Co.*, 19 N. M. 156; *Luther v. Shaw*, 157

Wis. 234, 52 L.R.A.(N.S.) 85; *Irby v. Wilde*, 155 Ala. 388; *Crane v. Schaefer*, 140 Ill. App. 647; *Brannon v. Silvernail*, 81 Ill. 434; *Doerhoefer v. Shewmaker*, 123 Ky. 646; *Summers v. Keller*, 152 Mo. App. 626; *Saunders v. Gilbert*, 156 N. C. 463, 38 L.R.A.(N.S.) 404; *Wirsing v. Smith*, 222 Pa. 8; *Baldwin v. Fries*, 46 Mo. App. 288; *Cole v. Tucker*, 6 Tex. 266; *Roach v. Calbeck*, 64 Vt. 593; *Hauser v. Griffith*, 102 Iowa 215; *Rhodes v. Rogers*, 151 Pa. 634; *Jackson v. Wells*, 13 Tex. Civ. App. 275; *Shook v. Peters*, 59 Tex. 393; *Bundy v. Maginess*, 76 Cal. 532; *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12; *Boetcher v. Staples*, 27 Minn. 308; *Brown v. Evans*, 17 Fed. 912; *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; *Sowers v. Sowers*, 87 N. C. 303; *Barr v. Moore*, 87 Pa. 385, 30 Am. Rep. 367; *Wiley v. Keokuk*, 6 Kan. 94; *Jockers v. Borgman*, 29 id. 109, 121, 44 Am. Rep. 621; *Cook v. Ellis*, 6 Hill 466, 41 Am. Dec. 757; *Corwin v. Walter*, 18 Mo. 71, 59 Am. Dec. 285; *Jefferson v. Adams*, 4 Harr. 321; *Wilson v. Middleton*, 2 Cal. 54; *Edwards v. Leavitt*, 46 Vt. 126; *Hoadley v. Watson*, 45 id. 289, 12 Am. Rep. 197; *Phillips v. Kelly*, 29 Ala. 628; *Roberts*

reasoning upon which this double liability to punishment is maintained is not very satisfactory. It is not a cogent answer to the objection that the additional damages imposed for punishment in the civil action go to the injured party. He is not entitled to them if he is otherwise compensated; nor does the fact that this mulct goes to him instead of the state render its imposition any less a punishment, which is repeated and duplicated when, upon the same principle and for the same public purpose, he is fined again in a prosecution in the name of the state.²²

v. Mason, 10 Ohio St. 277; Garland v. Wholeham, 26 Iowa 185; Lucas v. Flinn, 35 id. 9; Hendrickson v. Kingsbury, 21 id. 379; Wheatley v. Thorn, 23 Miss. 62; Fry v. Bennett, 4 Duer, 247; Pike v. Dilling, 48 Me. 539; Goddard v. Grand Trunk R. Co., 57 Me. 202; Johnson v. Smith, 64 Me. 553; Wolff v. Cohen, 8 Rich. 144; Cosgriff v. Miller, 10 Wyo. 190, citing the text; Wagner v. Gibbs, 80 Miss. 53.

²² In Ward v. Ward, 41 Iowa 687, Beck, J., said: "It is the settled rule in this state that, in cases of this kind, where the proper facts are shown, and it appears that the act complained of is punishable under the criminal statutes, punitive and exemplary damages may be allowed. Guengerich v. Smith, 36 Iowa 587; Garland v. Wholeham, 26 id. 185; Hendrickson v. Kingsbury, 21 id. 379. Among the objects attained by the allowance of exemplary damages are the punishment of the wrong-doer, and the example whereby others are deterred from the commission of like wrong—and it is often said such damages are allowed for these purposes. Sedg. on Measure of Damages, p. 287, note; 1 Hilliard on Torts, p. 251, note *a*; Anthony v. Gilbert, 4 Blackf. 348; Taylor v. Church, 8 N. Y. 452, 460;

Bailey v. Dean, 5 Barb. 297, 303; Roberts v. Mason, 10 Ohio St. 277, 280. Indeed, it appears that one of the objects of punishment in all cases is to prevent the repetition of the crime by the culprit and others. The example of punishment, it is presumed, will deter others from the commission of the offense in the future. Counsel for defendant insists that while in proper cases exemplary damages may be allowed for the purpose of punishing the defendant, they ought not to be carried to the extent that they may serve as an example to others; that is, the defendant ought not to suffer for the purpose of public good. It is true that vindictive damages are never allowed alone for the purpose of public good, through the example given in their assessment. The effect upon the public is but an incident, just as the effect of punishment in criminal cases incidentally operates to deter others from the commission of crime."

In Brown v. Swineford, 44 Wis. 285, 28 Am. Rep. 582, Ryan, C. J., said: "A very able and solemn appeal was made to the court to exclude the rule of exemplary damages in actions of tort, when the tort is punishable as a crime. The position was founded upon the

When punitive damages are allowed the law uses the suit of a private party as an instrument of public protection, not

clause in section 8, article II, of the constitution, that no person, for the same offense, shall be twice put in jeopardy of punishment. It was argued with very great force, that punitive damages given in the right of the public, in addition to full compensation to the sufferer by an act which is at once a tort and a crime, as in this case, and in *McWilliams v. Bragg*, 3 Wis. 424, and *Birchard v. Booth*, 4 id. 67, subjects the tort-feasor to punishment twice for the same offense. And it might have been added, that while the statute limits the pecuniary fine upon criminal prosecution for such an act, there is but vague limit to the punitive damages which a jury may find in a civil action. It certainly appears to be an incongruity that one may be punished by the public for the crime, upon criminal prosecution, by fine limited by statute, and again punished in favor of the sufferer, but in right of the public, for the same act, by punitive damages, with little limit but the discretion of the jury. This is but another illustration of what appears to be the incongruity of the entire rule of exemplary damages. On this subject the writer adheres to what he said in *Bass v. Railway Co.*, 42 Wis. 672, confirmed by comments which he has seen about it in legal periodicals. And he believes that his views of punitive damages, as an original question, are sanctioned by every present member of the court.

"The particular view now insisted on was overlooked in *McWilliams v. Bragg*, *Birchard v. Booth*, and all the cases in this court in which the action was against the actual tort-

feasor, subject to criminal conviction for the act. In *Railroad Co. v. Finney*, 10 Wis. 388; *Bass v. Railway Co.*, 36 id. 450, 8 Am. Neg. Cas. 663, 17 Am. Rep. 495, 42 Wis. 654, 24 Am. Rep. 437; *Craker v. Railway Co.*, 36 Wis. 657, 17 Am. Rep. 504, and other cases where the action was against the master for the tort of the servant, it could not well arise. So far, therefore, it is a question of first impression here. It would have been no subject of regret to the court if the obligation of the constitution called upon it to abridge the application of the rule. But the court is unable to hold that the constitutional provision has any controlling bearing on the question. The constitution only re-enacts what was the general, if not literally universal, rule at common law. See authorities collected in 1 Bish. Crim. Law, §§ 980-987. The word *jeopardy* is therefore used in the constitution in its defined technical sense at the common law. And in this use it is applied only to strictly criminal prosecutions by indictment, information, or otherwise. *Commonwealth v. Cook*, 6 Serg. & R. 577, 9 Am. Dec. 465; *State v. McKee*, 1 Bailey 651; *People v. Goodwin*, 18 Johns. 187, 9 Am. Dec. 203; *United States v. Gibert*, 2 Sumn. 19; *United States v. Haskell*, 4 Wash. C. C. 402. See, also, *State v. Crane*, 4 Wis. 400. The cases generally hold that the rule in criminal cases, that one shall not twice be put in jeopardy, implies no more than the bar of a judgment to an action for the same cause. But no case is known where a conviction upon an indictment has been held a bar to a civil action for dam-

for the sake of the suitor, but for that of the public. It is not the form of the action that gives the right to the jury to give such damages, but the moral culpability of the defendant.²³ After there has been one trial in which his culpability has been tried with a view to punishment in the interest of the public any other trial for the same purpose, whatever may be the form of the proceeding, is in substance and effect putting the accused again in jeopardy of punishment for the same offense,

ages growing out of the same act; *a fortiori*, none in which a recovery in a civil action has been held a bar to an indictment for the same act. And the whole purview of section 8 plainly shows that the putting in jeopardy prohibited is confined to criminal prosecutions. Indeed, this is manifest, in the clause itself, which is confined to the same *offense*, used in the same sense as *criminal offense*, in the first clause of the section. Of course the same act may be an offense (in the sense of crime) against the state, and an offense (in the sense of tort) against a private person. It is manifest that a judgment for one is not a bar to the other. And it might be difficult on principle to hold a criminal conviction as a bar to the recovery of punitive damages in a civil action, and not a bar to the recovery of compensatory damages; not a bar to any civil action. See *Jacks v. Bell*, 3 C. & P. 316.

"The radical difficulty in the position of counsel appears to be that judgment for the criminal offense is for the offense against the public; judgment for the tort is for the offense against the private sufferer; that though punitive damages go in the right of the public for example, they do not go by way of public punishment, but by way of private damages; for the act as a tort, and not as a crime; to the private suf-

ferer, and not to the state. Though they are allowed beyond compensation of the private sufferer, they still go to him for himself, as damages allowed to him by law in addition to his actual damages; like the double and treble damages sometimes allowed by statute. Considered as strictly punitive, the damages are for the punishment of the private tort, not of the public crime. It is unfortunate that damages should ever have been suffered to go beyond actual compensation, under a liberal rule like that given in *Craker v. Railway Co.*, 36 Wis. 657, 17 Am. Rep. 504. But the rule so given and so generally established is a sin against sound judicial principle, not against the constitution. * * * The argument and consideration of this case have gone to confirm the present members of this court in their disapprobation of the rule of exemplary damages which they have inherited. But they fear to complicate the difficulties and incongruities of the rule by the exception urged; and do not feel at liberty to change or modify the rule at so late a day, against the general current of authority elsewhere." See *Malone v. Murphy*, 2 Kan. 250; *Whitney v. Hitchcock*, 4 Denio 461; *Wheeler v. Randall*, 48 Ill. 182.

²³ *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25.

and vexing him again for the same cause. Nor is the objection removed though the first verdict and the judgment thereon be provable on the second trial in mitigation, though this would, to the extent of the mitigation, lessen the injury resulting from double punishment. And in some jurisdictions it is provable in mitigation.²⁴ It is not competent to show anticipated punishment in mitigation.²⁵ If the defendant desires to show that punishment has affected his resources he must make an offer of what he expects to prove in that respect.²⁶

§ 403. **Exemplary damages as matter of right; power of court over verdict.** It is for the court to determine whether the evidence tends to show facts which warrant exemplary damages; the sufficiency of the facts is for the jury.²⁷ There is a difference of opinion as to whether damages for punitive effect can be claimed as a matter of right. The affirmative is well maintained in a Wisconsin case (which has been overruled in deference to the weight of authority²⁸) where the jury were told that they ought to give exemplary damages if the facts justified their allowance. In answer to an exception to this instruction it was said: "It cannot be assumed that the law, in

²⁴ *Wirsing v. Smith*, 222 Pa. 8; *Taylor v. Carpenter*, 2 Woodb. & M. 1, 22; *State v. Autery*, 1 Stew. 399; *Johnston v. Crawford*, Phillips 342; *Porter v. Seiler*, 23 Pa. 424, 62 Am. Dec. 341; *Southwick v. Ward*, 7 Jones 64, 75 Am. Dec. 453; *Shook v. Peters*, 59 Tex. 393.

²⁵ *Saunders v. Gilbert*, 156 N. C. 463, 38 L.R.A. (N.S.) 404.

²⁶ *Dubois v. Roby*, 84 Vt. 465.

²⁷ *Duroth Mfg. Co. v. Cauffiel*, 243 Pa. 24; *Hemsteger v. Nelson*, 181 Ill. App. 377; *Chicago Consol. Traction Co. v. Mahoney*, 230 Ill. 562, citing the text; *Southern R. Co. v. Hawkins*, 121 Ky. 415; *Madigan v. St. Louis T. Co.*, 117 Mo. App. 118; *Greeney v. Pennsylvania W. Co.*, 29 Pa. Super. 136; *Topolewski v. Plankinton P. Co.*, 143 Wis. 52; *Alabama G. S. R. Co. v. Arrington*, 1 Ala.

App. 385; *Chicago, etc. R. Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590; *Heil v. Glanding*, 42 Pa. 493, 82 Am. Dec. 537; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Milwaukee R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374; *Hawk v. Ridgway*, 33 Ill. 473; *Mabb v. Stewart*, 133 Cal. 556, 565; *Kenyon v. Cameron*, 17 R. I. 122; *MERCHANTS' & P.'S O. Co. v. Kentucky Ref. Co.*, 16 C. C. A. 212, 69 Fed. 218; *Whitmer v. El Paso, etc. R. Co.*, 201 Fed. 193, 119 C. C. A. 637; *Bennett v. Columbia El. St. R., L. & P. Co.*, 92 S. C. 72; *Hahn v. Mackay*, 63 Ore. 100.

²⁸ *Robinson v. Superior R. T. R. Co.*, 94 Wis. 345, 59 Am. St. 896, 34 L.R.A. 205; *Haberman v. Gasser*, 104 Wis. 98.

giving this power of punishment to juries, designed that it should be exercised arbitrarily, wantonly or capriciously. It was not designed that it should be withheld or applied from any personal motive of favoritism or animosity existing in the breast of the jury. On the contrary, it must have been designed that it should be exercised in a uniform and equal manner, without respect to persons and with the single purpose of accomplishing the object of granting the power at all, that of protecting the community from such injuries. This can only be accomplished by giving juries to understand that where the facts are such as authorize them to exercise the power it ought to be exercised; regard being had, in fixing the amount of the punishment to be inflicted in each instance, to all the circumstances of the case bearing upon the degree of malice, insult and aggravation.”²⁹ Under the Iowa civil damage statute the jury may be instructed that the plaintiff is entitled to exemplary damages if they find in his favor.³⁰ In a majority of the states in which the question has been passed upon, punitive damages cannot be claimed as matter of right aside from statute.³¹ The amount which may be recovered as punishment is

²⁹ *Wilson L. Co. v. Alderman*, 75 S. C. 299, and local cases cited; *Dagnall v. Southern R.*, 69 S. C. 110; *Beaudrot v. Same*, 69 S. C. 160; *Hooker v. Newton*, 24 Wis. 292; *Hodgson v. Milward*, 3 Grant's Cas. 406; *Platt v. Brown*, 30 Conn. 336; *Goodall v. Thurman*, 1 Head 209; *Coryell v. Colbaugh*, 1 N. J. L. 77, 1 Am. Dec. 192; *Mayer v. Duke*, 72 Tex. 445; *Fox v. Wunderlich*, 64 Iowa 187; *Thill v. Pohlman*, 76 Iowa 638; *Matheis v. Mazet*, 164 Pa. 580; *Nolan v. Mendere*, 6 Tex. Civ. App. 203; *Beaudrot v. Southern R.*, 69 S. C. 160, and local cases cited; (but see *Shieder v. Same*, 83 S. C. 455).

³⁰ *Miller v. Hammers*, 93 Iowa 746; *Peterson v. Brackey*, 143 Iowa 75; *Merrinane v. Miller*, 148 Mich. 412.

³¹ *Birmingham R., L. & P. Co. v. Coleman*, 181 Ala. 478; *Lewis v. Hayes*, 165 Cal. 527; *Welsh v. Haalen*, 157 Iowa 647; *White v. International Text Book Co.*, 164 Iowa 693; *Geary v. St. Louis, etc. R. Co.*, 173 Mo. App. 248; *Di Benedetto v. Milwaukee E. R. & L. Co.*, 149 Wis. 566; *Meighan v. Birmingham T. Co.*, 165 Ala. 591; *Coleman v. Pepper*, 159 Ala. 310; *Davis v. Hearst*, 160 Cal. 143; *Distin v. Bradley*, 83 Conn. 466; *Ahrens v. Fenton*, 138 Iowa 559; *Chesapeake & O. R. Co. v. Conley*, 136 Ky. 601; *Southern R. Co. v. Goddard*, 121 Ky. 567; *Anderson v. International H. Co.*, 104 Minn. 49, 16 L.R.A. (N.S.) 440; *Sneve v. Lunder*, 100 Minn. 5; *Berg v. St. Paul City R. Co.*, 96 Minn. 513; *Summers v. Keller*, 152 Mo. App. 626; *Humphreys*

for the jury in the first instance,³² but subject to the power of the court to set aside the verdict if it is so excessive that it is convinced that the jury have been influenced by passion or prejudice.³³ Where the court tries the facts the allowance of punitive

v. Pile, 144 Mo. App. 28; Bosch v. Miller, 136 Mo. App. 482; Carmody v. St. Louis T. Co., 122 Mo. App. 338, citing the text; Hagerman I. Co. v. McMurray, 16 N. M. 172; Nagognos v. Brooklyn Heights R. Co., 128 App. Div. (N. Y.) 182; Eupes v. Nephue, 120 App. Div. (N. Y.) 621; Blow v. Joyner, 156 N. C. 140; Hayes v. Railroad, 141 N. C. 195; Louisville, etc. R. Co. v. Satterwhite, 112 Tenn. 185, citing the text; Duckworth v. Stalnaker, 68 W. Va. 197; Carpenter v. Hyman, 67 W. Va. 4; Fink v. Thomas, 66 W. Va. 487; Topolewski v. Plankinton P. Co., 143 Wis. 52; Tilton v. Gates L. Co., 140 Wis. 197; Browning v. Jones, 52 Ill. App. 597; Mansur-T. I. Co. v. Smith, 65 id. 319; Martin v. Leslie, 93 id. 44; Consolidated C. Co. v. Haenni, 146 Ill. 614, 628, 14 Am. Neg. Cas. 310; Carter v. Illinois Cent. R. Co., 17 Ky. L. Rep. 1352; Nicholson v. Rogers, 139 Mo. 136; Carson v. Smith, 133 Mo. 606; Chellis v. Chapman, 125 N. Y. 214, 11 L.R.A. 784; Jacobs v. Sire, 4 N. Y. Misc. 398; Kenyon v. Cameron, 17 R. I. 122; Ferguson v. Moore, 98 Tenn. 342; Robinson v. Superior R. T. R. Co., 94 Wis. 345, 34 L.R.A. 205, 59 Am. St. 897; Snow v. Carpenter, 49 Vt. 426; Boardman v. Goldsmith, 48 Vt. 403; New Orleans, etc. R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689; Kentucky Cent. R. Co. v. Gastineau, 83 Ky. 119; Louisville & N. R. Co. v. Brooks, id. 129, 4 Am. St. 135, 15 Am. Neg. Cas. 189; Wabash, etc. R. Co. v. Rector, 104 Ill. 296; McNay v. Stratton, 9 Ill.

App. 215; Webb v. Gilman, 80 Me. 177; Louisville & N. R. Co. v. Bizzell, 131 Ala. 429, 437; Gambrill v. Schooley, 93 Md. 48, 65, 52 L.R.A. 87; Linblom v. Sonstelie, 10 N. D. 140; Tucker v. Winders, 130 N. C. 147.

Under the Texas homicide statute the jury may be instructed to allow exemplary damages if the defendant acted wilfully. Morgan v. Barnhill, 118 Fed. 24.

³² Hildreth v. Hancock, 55 Ill. App. 572; Doremus v. Hennessy, 62 id. 391; Union Mill Co. v. Prenzler, 100 Iowa 540; Reizenstein v. Clark, 104 Iowa 287; Graham v. Pacific R. Co., 66 Mo. 536; New Orleans, etc. R. Co. v. Burke, *supra*; Southern R. Co. v. Kendrick, 40 Miss. 374, 9 Am. Neg. Cas. 491, 90 Am. Dec. 332; Johnson v. Smith, 64 Me. 553; Avondale Mills v. Bryant, 10 Ala. App. 507; White v. International Text Book Co., 164 Iowa 693.

³³ De Celles v. Casey, 48 Mont. 568; Dundore v. McCormick, 21 Pa. Dist. 856; Coleman v. Pepper, 159 Ala. 310; Chicago Consol. Traction Co. v. Mahoney, 230 Ill. 562; Ahrens v. Fenton, 138 Iowa 559; Rogers v. Henry, 32 Wis. 327; Louisville & N. R. Co. v. Roth, 130 Ky. 759; Belknap v. Railroad, 49 N. H. 358; McCarthy v. Niskern, 22 Minn. 90; McConnell v. Hampton, 12 Johns. 234; Gregory v. Coleman, 3 Tex. Civ. App. 166.

It is said in Leonard v. Hoboken P. Co., 69 N. J. L. 238 that a court cannot say that the sum fixed as punitive damages is excessive. And in Illinois cases that an award of

damages rests in its discretion³⁴ and in Kentucky, it seems, failure to allow them is not reversible error.³⁵ In South Carolina the plaintiff is as much entitled to punitive damages as to those which are compensatory.³⁶

§ 404. Enhancement and mitigation of exemplary damages.

The expenses of the particular action to redress a wrong, except as they may be taxed as costs, are not allowed for the purpose of compensation. But in some courts, where the wrong is accompanied by such aggravations or induced by such motives as to justify exemplary damages, a less strict rule governs in determining the extent of compensation; in other words, damages are given with a more liberal hand,³⁷ and may be made to embrace losses and injuries which would otherwise be excluded;

such damages will not be set aside unless the jury ignored the evidence. *Thomas v. Kerr*, 137 Ill. App. 479; *Fidelity & C. Co. v. Gibson*, 135 id. 290.

It is held in some cases that the punitive damages should be in reasonable proportion to the actual damages. *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15; *Fynberg v. Cohen*, 76 Tex. 416; *Flannery v. Wood*, 32 Tex. Civ. App. 250 (actual damages \$56; verdict for \$2,344 exemplary damages reduced to \$500); *Haight v. Turner*, 44 Tex. Civ. App. 595; *Buford v. Hopewell*, 140 Ky. 666. Where the former have been in the proportion of eight or more to the latter the judgments have been reversed. *Willis v. McNeill*, 57 Tex. 465; *Railroad Co. v. Nichols*, cited in the last case; *International, etc. R. Co. v. Telephone & T. Co.*, 69 Tex. 277, 5 Am. St. 45. It is probably the doctrine of these cases, not that the compensatory damages shall bear any exact or approximate ratio to the exemplary, but that the imposition of the latter in a large sum, if the former are small, may be considered for the

purpose of determining whether the jury was influenced by improper motives.

Where the evidence shows not only unlawful sales of intoxicants to plaintiff's husband, but actual physical injury sustained by thrusting him out of a saloon and the breaking of his leg, and the jury finds \$300 compensatory and \$900 punitive or exemplary damages, the latter amount so found cannot be said to be so out of proportion to the compensatory damages found, as to evince bias, partiality or prejudice on the part of the jury, and thus vitiate their verdict. *Duckworth v. Stalnaker*, 74 W. Va. 247.

The defendant will not be heard to object to a verdict for compensatory damages because the plaintiff was also entitled to punitive damages. *Wilson L. Co. v. Alderman*, 75 S. C. 299.

³⁴ *American Sand & Gravel Co. v. Spencer*, 55 Ind. App. 523.

³⁵ *Carter v. Illinois Cent. R. Co.*, 17 Ky. L. Rep. 1352.

³⁶ *Wilcox v. Southern R. Co.*, 91 S. C. 71.

³⁷ *Emblen v. Myers*, 6 H. & N. 54.

and among these the counsel fees and other expenses not included in the costs taxed.³⁸ But these are, perhaps, more fre-

³⁸ *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *International H. Co. v. Iowa H. Co.*, 146 Iowa 172, 29 L.R.A.(N.S.) 272; *August v. Finnerty*, 10 Ohio C. C. (N. S.) 433; *Duff v. Read*, 74 Kan. 730; *United P. Co. v. Matheny*, 81 Ohio 204, 28 L.R.A.(N.S.) 761, citing local cases; *Fulton v. Spear*, 13 Ohio N. P. (N. S.) 473. See *Evans v. Central L. Ins. Co.*, 87 Kan. 641, 41 L.R.A.(N.S.) 1130.

In *St. Peter's Church v. Beach*, 26 Conn. 364, *Ellsworth, J.*, said: "It is part of the case that the actual damage suffered by the plaintiffs in the destruction of their property does not exceed \$10, and that defendant's conduct was not wanton or malicious. Of course, the plaintiffs were entitled, as the court stated, to recover their actual damage; but the court further instructed the jury that if the plaintiffs had been compelled to come into court to vindicate their rights, the jury might take into consideration the expenses attending such vindication beyond the taxable costs as actual damage. If this be a just interpretation of the rule of actual damages, such damages will become just and legal in every case, whether of tort or contract; for the plaintiff may always say that he is compelled to come into court to vindicate his rights. But not to criticise the form or language of the charge, we think there is in it a radical error, viz.: that in cases where a penal sum or smart money are not to be allowed the expenses of the litigation may be allowed as damages; for the judge stated that none but actual damages were to be assessed, and proceeded to say that

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the expenses might be allowed; and, although the actual loss or injury did not exceed \$10, the jury rendered a verdict for \$197.91. Now, the expenses of litigation are never damages sued for in any case, when the action is brought for the wrong itself, not even if the tort be wanton or malicious. They are not 'the natural and proximate consequence of the wrongful act,' which is the universal rule, but are remote, future and contingent. They may follow the wrong, and are very likely to, but not of course, or necessarily. Besides, damages sued for must be such as exist, and can be, and are, in some form satisfactory to the law, stated in the declaration and made matter of proof; but these expenses accrue subsequently to the bringing of the suit, and cannot be stated in the declaration, nor can they become matter of proof.

"In actions of tort founded on the misconduct or culpable neglect of the defendant, it is usually and entirely proper for the judge to say to the jury that they are not necessarily confined in assessing damages to the actual loss of property to the plaintiff, but may allow smart money, measured by the circumstances of aggravation; and may, from their general knowledge of the course of the courts, if the case warrants it in their judgment, take into account the expenses of the trial beyond the taxable costs."

In *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55, and several earlier cases the court sustained instructions in accordance with the above views, as damages appropriate only to actions in which smart money may be given. *Linsley v.*

quently rejected.³⁹ Injury to the standing and credit of the plaintiff may be considered in awarding exemplary damages,⁴⁰ as may his mental suffering.⁴¹ As to the admissibility of evidence of the social standing of the parties and wealth of the defendant there are diverse rulings, not corresponding to the conflict in respect to vindictive damages. In an action for false imprisonment Thompson, C. J., said in an early New York case:⁴² "Although the defendant is a man of very large fortune, the plaintiff's injury is not thereby enhanced." In a case in New Hampshire, by a passenger against a railroad company for wrongful expulsion from its cars, Sargent, J., said: "We must remember that in considering this question of actual damage, of compensation for actual injury, it is immaterial what may be the character, standing, condition or means of the defendant. The rule of damages is compensation for the plaintiff's injury; that is all; and that would be the same whether the defendant be a railroad or a private individual, whether the private individual were rich or poor. The question is not how much the defendant is able to pay, but what is a fair compensation to this plaintiff for all the injury he has suffered? That injury is the same whether the defendant is the richest railroad or the poorest individual in the

Bushnell, 15 Conn. 225, 38 Am. Dec. 79; Beecher v. Derby B. Co., 24 Conn. 132; Ives v. Carter, id. 392; Mason v. Hawes, 52 id. 12, 52 Am. Rep. 552; Wynne v. Parsons, 57 Conn. 73.

In Kansas the same doctrine is held. Titus v. Corkins, 21 Kan. 722. And in Ohio, that in such cases these expenses may be taken into account in estimating compensatory damages. Roberts v. Mason, 10 Ohio St. 277; Winters v. Cowen, 90 Fed. 99. See Marshall v. Betner, 17 Ala. 832; Bracken v. Neill, 15 Tex. 109; Flack v. Neill, 22 id. 253; New Orleans, etc. R. Co. v. Allbritton, 38 Miss. 242, 75 Am.

Dec. 98; Thompson v. Powning, 15 Nev. 195.

³⁹ Day v. Woodworth, 13 How. 363, 14 L. ed. 181; Earl v. Tupper, 45 Vt. 275; Barnard v. Poor, 21 Pick. 378; Fairbanks v. Witter, 18 Wis. 287, 86 Am. Dec. 765; Warren v. Cole, 15 Mich. 265; Kelly v. Rogers, 21 Minn. 146; Howell v. Scoggins, 48 Cal. 355; Falk v. Waterman, 49 Cal. 224.

⁴⁰ Mayer v. Duke, 72 Tex. 445.

⁴¹ Gosa v. Southern R. Co., 67 S. C. 347; Duff v. Read, 74 Kan. 730.

⁴² McConnell v. Hampton, 12 Johns. 236; Western U. Tel. Co. v. Cashman, 132 Fed. 805, 65 C. C. A. 607; Rueping v. Chicago & N. W. R. Co., 123 Wis. 319.

community. * * * In regard to the question of exemplary damages, * * * it would be very different from the one we have been considering. In that case the jury undertake, first, to give the plaintiff damages as a compensation for his injury; and second, they undertake also to punish the offender for the wrong he has done; and when that element is introduced it becomes proper to inquire into the condition and circumstances of the defendant; because what would be a severe punishment for a poor man, by way of fine or exemplary damages, might not be felt by one that was rich. What would be sufficient as damages, by way of example and punishment, for a day laborer would be nothing by way either of example or as a punishment for this defendant as a corporation. Not only the ability of the defendant, but the motives and intentions accompanying the act, the malice or oppression exhibited, the wrong and injustice of the act may be inquired into with a view to fix the proper measure of punitive or exemplary damages.”⁴³

In other cases it has been held, and the better doctrine from its intrinsic reasonableness is, that so far as the cause of action rests upon an injury to character or an insult to the person compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful act the greater.⁴⁴ But in such cases as it is rather the reputation for, than the possession of, wealth which is the cause of this increased rank, the testimony should correspond and only the general question as to his circumstances can be asked, and not the details.⁴⁵ Where there is more than

⁴³ *Belknap v. Railroad*, 49 N. H. 373, 374; *Smith v. Wunderlich*, 70 Ill. 437; *Tamke v. Vangsnes*, 72 Minn. 236; *Stockham v. Malcolm*, 111 Md. 615; *Luther v. Shaw*, 157 Wis. 234, 52 L.R.A.(N.S.) 85.

⁴⁴ *Johnson v. Smith*, 64 Me. 553; *Humphries v. Parker*, 52 Me. 507; 2 Greenlf. Ev., § 269. See §§

1218, 1219, 1238, 1254; *Mullin v. Spangenberg*, 112 Ill. 140, 145; *Geringer v. Novak*, 117 Ill. App. 160; *Zell v. Dunaway*, 115 Md. 1; *Burch v. Bernard*, 107 Minn. 210; *Nichols v. Nichols*, 147 Mo. 387; *Love v. Love*, 98 Mo. App. 562; *Leavell v. Leavell*, 114 Mo. App. 24.

⁴⁵ *Stanwood v. Whitmore*, 63 Me.

one defendant the wealth of any of them may be shown, since each is liable for full compensation.⁴⁶

§ 405. **Same subject; wealth of defendant; scope of inquiry.** But when exemplary damages are claimed a different question is presented. The defendant's pecuniary ability is then a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of small means than to one of larger.⁴⁷ For this purpose the reputed wealth of the defendant may be proven, subject to his right

209; *Johnson v. Smith*, *supra*; Missouri cases, *supra*.

⁴⁶ *Leavell v. Leavell*, 114 Mo. App. 24.

⁴⁷ *Groh v. South*, — Md. —. 89 Atl. 321; *Davis v. Richardson*, 76 Ark. 348 citing the text; *Greenberg v. Western T. Ass'n*, 140 Cal. 357, 19 Am. Neg. Rep. 721; *Johnson v. Lamm*, 156 Ill. App. 287; *White v. White*, 76 Kan. 82; *Stockham v. Malcolm*, 111 Md. 615; *McMillen v. Elder*, 160 Mo. App. 399; *Bolles v. Kansas City S. R. Co.*, 134 Mo. App. 696; *Baxter v. Magill*, 127 Mo. App. 392; *Calder v. Southern R. Co.*, 89 S. C. 287; *Elms v. Southern P. Co.*, 79 S. C. 502; *Singer Mfg. Co. v. Bryant*, 105 Va. 403; *Winterscheid v. Reichle*, 45 Mont. 238; *Shields v. Rowland*, 151 Ky. 136; *Carmichael v. Southern Bell Tel. & T. Co.*, 162 N. C. 333; *Brown v. Evans*, 17 Fed. 912; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *Jones v. Greeley*, 25 Fla. 629; *Drohn v. Brewer*, 77 Ill. 280; *White v. Murtland*, 71 id. 250, 22 Am. Rep. 100; *Mullin v. Spangenberg*, 112 Ill. 140; *Buckley v. Knapp*, 48 Mo. 152; *Bell v. Morrison*, 27 Miss 68; *Webb v. Gilman*, 80 Me. 177; *Spear v. Hiles*, 67 Wis. 350; *Spear v. Sweeney*, 88 Wis. 545, 550; *Reeves v. Winn*, 97 N. C. 246, 2 Am. St. 287; *Tucker v. Winders*,

130 N. C. 147; *Sloan v. Edwards*, 61 Md. 89; *Johnson v. Allen*, 100 N. C. 131; *Johnson v. Smith*, 64 Me. 553; *Belknap v. Railroad*, 49 N. H. 373; *McBride v. McLaughlin*, 5 Watts 375; *Jones v. Jones*, 71 Ill. 562; *McCarthy v. Niskern*, 22 Minn. 90; *Winn v. Peckham*, 42 Wis. 493; *Birchard v. Booth*, 4 id. 67; *Barnes v. Martin*, 15 id. 240, 82 Am. Dec. 670; *Wagner v. Gibbs*, 80 Miss. 53; *Cosgriff v. Miller*, 10 Wyo. 190, citing the text; *Whitfield v. Westbrook*, 40 Miss. 311; *Courvoisier v. Raymond*, 23 Colo. 113, 118; *Cumberland Telegraph & T. Co. v. Poston*, 94 Tenn. 696; *Nashville St. R. v. O'Bryan*, 104 Tenn. 28, 7 Am. Neg. Rep. 316; *Telephone & T. Co. v. Shaw*, 102 Tenn. 313; *Matheis v. Mazet*, 164 Pa. 580. See §§ 1218, 1219, 1238, 1254.

Under the Georgia code the worldly circumstances of the parties cannot be considered, except where the entire injury is to the peace, happiness or feelings of the plaintiff (*Georgia R. Co. v. Homer*, 73 Ga. 251, 8 Am. Neg. Cas. 129), as in malicious prosecution. *Coleman v. Allen*, 79 Ga. 637, 11 Am. St. 449; *Georgia R. & B. Co. v. Benton*, 117 Ga. 785; *Southern R. Co. v. Chambers*, 126 Ga. 404, 7 L.R.A.(N.S.) 926.

to controvert the plaintiff's evidence,⁴⁸ and the proof may be directed to his wealth at the time of the trial.⁴⁹ The wealth of the stockholders of a corporation is irrelevant in an action against it.⁵⁰ In cases where it is competent for the plaintiff to prove the wealth of the defendant to increase the damages it is equally competent for the defendant to show a want of it to diminish them. And in Maine he cannot be deprived of this right by the omission of the plaintiff to offer any proof on that point, or to make any claim of damages on that ground;⁵¹ the rule is otherwise in Illinois.⁵² In actions for breach of promise to marry proof of the defendant's wealth is allowed as a material consideration in fixing compensation.⁵³ In Iowa such proof, even with a view to punitive damages, is not allowed;⁵⁴ and such is the rule in Kentucky.⁵⁵ In some states if a case warrants exemplary damages evidence of the pecuniary condition of the plaintiff and of his family is admissible.⁵⁶ This view has been disapproved in a very satisfactory discussion.⁵⁷ There must be proof of the rank and influence of the parties, else a charge on the point is erroneous; and if there are several

⁴⁸ *Schmitt v. Kurrus*, 234 Ill. 578, aff'g 140 Ill. App. 132; *Thomas v. Williams*, 139 Wis. 467; *Nelson v. Halvorson*, 117 Minn. 255; *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143; *White v. Murtland*, 71 Ill. 250, 261, 22 Am. Rep. 112; *Bogue v. Gunderson*, 30 S. D. 1.

If a corporation is the defendant its officers may be asked as to its entire paid-up capital stock, its liabilities, assets, surplus; and the dividends paid for five years past and how they were paid. *Pullman P. Car Co. v. Lawrence*, 74 Miss. 782.

⁴⁹ *Marriott v. Williams*, 152 Cal. 705, 125 Am. St. 87.

⁵⁰ *Humphries v. Union, etc. R. Co.*, 84 S. C. 202.

⁵¹ *Johnson v. Smith*, 64 Me. 553.

⁵² *Mullin v. Spangenberg*, 112 Ill. 140.

⁵³ See ch. 23.

⁵⁴ *Hunt v. C. & N. W. R. Co.*, 26 Iowa 363; *Guengerech v. Smith*, 34 id. 348.

⁵⁵ *Givens v. Berkley*, 108 Ky. 236, 21 Ky. L. Rep. 1653 overruling *Louisville, etc. R. Co. v. Mahoney*, 7 Bush 238, 15 Am. Neg. Cas. 161; *Beavers v. Bowen*, 24 Ky. L. Rep. 882 is to the same effect; *Shields v. Rowland*, 151 Ky. 822 overruling s. c. 151 Ky. 136.

⁵⁶ *Dailey v. Houston*, 58 Mo. 368; *Beck v. Dowell*, 40 Mo. App. 71, 111 Mo. 506, 33 Am. St. 507; *Baxter v. Magill*, 127 Mo. App. 392; *Leavell v. Leavell*, 114 Mo. App. 24.

⁵⁷ *Griser v. Schoenborn*, 109 Minn. 297. The law is held otherwise in *Southern R. Co. v. Phillips*, 136 Ga. 282; *Robertson v. Conklin*, 153 N. C. 1; *Schafer v. Ostmann*, 172 Mo. App. 602.

defendants the rank and influence of some of them ought not to be cause for increasing the damages against those who were without either.⁵⁸

In actions for torts, the damages for which cannot be measured by a legal standard, all the facts constituting and accompanying the wrong should be proved; and though there be a legal standard for the principal wrong, if aggravations exist they may be proved to enhance damages; and every case of personal tort must necessarily go to the jury on its special facts; these embrace the *res gestæ*, the age, sex, *status* and acts and conduct of the parties; this, whether the case be one for compensation only or also for exemplary damages, where damages of that character are allowed.⁵⁹ To rebut the claim of

⁵⁸ *Singer Mfg. Co. v. Bryant*, 105 Va. 403; *Leavell v. Leavell*, 114 Mo. App. 24; *Schafer v. Ostmann*, 148 Mo. App. 644; *Martin v. Leslie*, 93 Ill. App. 41, 55.

The right of the jury to regard the wealth of the defendant, irrespective of evidence, seems to be conceded in South Carolina; *Webber v. Jonesville*, 94 S. C. 189.

⁵⁹ *Walker v. Chanslor*, 153 Cal. 118, 17 L.R.A.(N.S.) 455, 126 Am. St. 61; *Georgia R. & E. Co. v. Davis*, 6 Ga. App. 645; *Louisville & N. R. Co. v. Forrest*, 6 Ga. App. 766; *Same v. Roth*, 130 Ky. 759; *Summers v. Keller*, 152 Mo. App. 626; *White v. Metropolitan St. R. Co.*, 132 Mo. App. 339; *Cody v. Gremmler*, 121 Mo. App. 359; *Elfers v. Woolley*, 116 N. Y. 294; *Galvin v. Starin*, 132 App. Div. (N. Y.) 577; *Gosa v. Southern R.*, 67 S. C. 347; *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467; *St. Louis S. R. Co. v. Thompson*, 102 Tex. 89; *Temple v. Duran* (Tex. Civ. App.), 121 S. W. 253; *Rea v. Schow*, 42 Tex. Civ. App. 600; *Knoche v. Knoche*, 160 Mo. App. 257; *Holland v. Closs* (Tex. Civ. App.), 146 S. W. 671; *Carmichael v. Southern Bell Tel. & T. Co.* 162 N. C. 333; *Turner v*

Stephens (Tex. Civ. App.), 155 S. W. 1009; *East Tennessee, etc. R. Co. v. Fleetwood*, 90 Ga. 23, 8 Am. Neg. Cas. 143; *Hildreth v. Hancock*, 55 Ill. App. 572; *Huckle v. Money*, 2 Wils. 205; *Craker v. Chicago, etc. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Lyon v. Hancock*, 35 Cal. 372; *Jones v. Jones*, 71 Ill. 562; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Fowler v. Chichester*, 26 Ohio St. 9; *Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341; *Bell v. Morrison*, 27 Miss. 68; *Scripps v. Reilly*, 38 Mich. 10; *Andrews v. Askey*, 8 C. & P. 7; *Hall v. Hollender*, 4 B. & C. 660. The text is quoted with approval in *Beck v. Dowell*, 111 Mo. 506, in which evidence of the pecuniary condition of the plaintiff was received, the action being for personal injuries and punitive damages being recoverable. But see § 1254.

In *Craker v. Railroad Co.*, *supra*, *Ryan, C. J.*, said: "In *Wilson v. Young*, 31 Wis. 574, *Lyon, J.*, inadvertently fell into some subtleties found in Mr. Sedgwick's excellent work, which appear to us all now to confuse compensatory and exemplary damages. The distinction

malice the defendant is entitled to show any pertinent facts tending to excuse or exculpate him, or to place the blame upon

was not in that case, and the passage in Sedgwick was cited and approved, as such high authorities often are, without sufficient consideration. We all now concur in disapproving the distinction. In giving the elements of damages Mr. Sedgwick distinguishes between 'the mental suffering produced by the act or omission in question: vexation; anxiety;' which he holds to be ground for compensatory damages; and 'the sense of the wrong or insult, in the sufferer's breast, from an act dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade or insult,' which he holds to be ground for exemplary damages only. Sedgwick's Meas. Dam. 35. Mr. Sedgwick himself says that the rule in favor of exemplary damages 'blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender,' (id. 38); and following him, this court held in the leading case of *McWilliams v. Bragg*, 4 Wis. 424, and has often since reaffirmed, that exemplary damages are 'in addition to actual damages.' In actions of tort, as a rule, when the plaintiff's right to recover is established, he is entitled to full compensatory damages. When proper ground is established for it, he is also entitled to exemplary damages in addition. The former are for the compensation of the plaintiff; the latter for the punishment of the defendant and for example to others. This is Sedgwick's blending together of the interest of society and the interest of the plaintiff. And it is plain that there

cannot well be common ground for the two. The injury to the plaintiff is the same, and for that he is entitled to full compensation, malice or no malice. If malice be established, then the interest of society comes in to punish the defendant and deter others in like cases by adding exemplary to compensatory damages. We need add no authority to Mr. Sedgwick's that in actions for personal tort, mental suffering, vexation and anxiety are subject of compensation in damages. And it is difficult to see how these are to be distinguished from the sense of wrong and insult arising from injustice and intention to vex and degrade. The appearance of malicious intent may, indeed, add to the sense of wrong; and equally whether such intent be really there or not. But that goes to mental suffering, and mental suffering to compensation. So it seems to us. But if there be a subtle, metaphysical distinction, which we cannot see—what human creature can penetrate the mysteries of his own sensations, and parcel out separately his mental sufferings and his sense of wrong!—so much for compensatory and so much for vindictive damages? And if one cannot scrutinize the anatomy of his own, how impossible to dissect the mental agonies of another, as a surgeon does corporal muscles. If possible, juries are surely not metaphysicians to do it. And we must hold that all mental suffering directly consequent upon tort, irrespective of all such inscrutable distinctions, is ground for compensatory damages in an action for the tort."

In *Wilson v. Young* it was held

the plaintiff;⁶⁰ the advice of counsel as to acts usually thus influenced is admissible to rebut the presumption of malice,⁶¹

that in an action for assault and battery *compensatory* (as distinguished from *punitivc*) damages are of two kinds: (1) Those which may be recovered for the actual personal or pecuniary injury and loss; the elements of which are, loss of time, bodily suffering, impaired physical or mental powers, mutilation and disfigurement, expenses of surgical and other attendance, and the like. (2) Those which may be recovered for injuries to the feelings arising from the insult or indignity, the public exposure and contumely, and the like. The compensation of the first kind is to be determined without reference to the question whether the defendant was influenced by malicious motives in the act complained of; and, on the other hand, evidence of threatening or aggravating language, or malicious conduct on the plaintiff's part (not constituting a legal *justification* of the defendant's act), cannot be considered in mitigation of such damages. The compensatory damages of the second kind depend entirely upon the *malice* of the defendant; and as evidence of such malice may be given to increase that kind of damages, so evidence of threatening or malicious words or acts on plaintiff's part, just previous to the assault, though not constituting a legal justification, should be admitted to mitigate or even defeat such damages.

In an action in New Jersey by a parent for the abduction of his infant children (*Magee v. Holland*, 57 N. J. L. 86, 72 Am. Dec. 341), Elmer, J., said: "The right of the jury to consider all the circumstances of the case and to award ex-

emplary damages necessarily drew with it the right to consider the injury done to the feelings of the father, as well as other circumstances of aggravation. * * * It was not insisted on behalf of the defendant that exemplary damages cannot be awarded in any case, that principle being too well established in this state to admit of question. The argument urged was, that to justify such damages there must be fraud, wantonness, malice or oppression, and that all these ingredients were wanting in this case. I am not willing to concede that, in an action of this kind, the jury might not properly look at all the circumstances, and apportion the damages to the actual wrong done to the plaintiff's feelings and paternal affection and rights, without any positive proof of malice or oppression."

⁶⁰ *Hermann v. St. Joseph R., L. H. & P. Co.*, 144 Mo. App. 147; *Cook v. Neely*, 143 Mo. App. 632; *Galvin v. Tibbs*, 17 N. D. 600; *Brown v. Thompson*, 75 N. J. L. 832; *St. Louis S. R. Co. v. Myzell*, 87 Ark. 123; *Palmer v. Baum*, 123 Ill. App. 584.

The acts of the father of the decedent, joined with his wife as plaintiff, in an action to recover under a civil damage act, in consenting to the sale of liquors to the decedent on other occasions are relevant on the issue of exemplary damages and their amount. *Beckerle v. Brandon*, 229 Ill. 323.

⁶¹ *Laurens Tel. Co. v. Enterprise Bank*, 90 S. C. 50; *Walker v. Chancellor*, 153 Cal. 118, 17 L.R.A.(N.S.) 455, 126 Am. St. 61; *Union M. Co. v. Prenzler*, 100 Iowa 540; *Jacobs*

and to prevent or mitigate exemplary damages;⁶² but the adviser must be one entitled to act in that capacity⁶³ by being an attorney at law in good standing,⁶⁴ or believed by the defendant to be an attorney;⁶⁵ and the statement of facts submitted must be full and fair, else the advice given will not justify the presumption that there was no malice.⁶⁶ In such case it is a material question whether the defendant acted prudently, wisely and in good faith, and for this purpose information on which he acted, whether true or false, is original and material evidence.⁶⁷ Provocation by the plaintiff, if recent and adequate, may be shown, as may an agreement of the parties to engage in a fight.⁶⁸ The defendant may not show that the plaintiff has been convicted in a criminal prosecution of the use of profane and vulgar language in the presence of women while a passenger on its cars on the occasion of his expulsion therefrom.⁶⁹

§ 406. Exemplary damages based on actual damages; nominal damages as a predicate. Bad motive by itself is not a tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.⁷⁰ But one who does an act maliciously must be careful to see that it is lawful; otherwise, though the actual injury may be slight, the

v. Crum, 62 Tex. 401; §§ 1240, 1286.

⁶² Grimestad v. Lofgren, 105 Minn. 286, 17 L.R.A. (N.S.) 990, 127 Am. St. 566; Grambling-S. Co. v. Parker, 3 Ala. App. 325; Cochrane v. Tuttle, 77 Ill. 361; Stone v. Swift, 4 Pick. 389, 16 Am. Dec. 349; Bonesteel v. Bonesteel, 30 Wis. 511. See Jasper v. Parnell, 67 Ill. 358; Dyer v. Denham, 54 Ga. 224; Johnson v. Camp, 51 Ill. 219; Carpenter v. Barker, 44 Vt. 441; Cole v. Curtis, 16 Minn. 182; Ash v. Marlowe, 20 Ohio 119; § 1240.

⁶³ Olmstead v. Partridge, 16 Gray 381; Stanton v. Hart, 37 Mich. 539; Livingston v. Burroughs, 33 Mich. 511; Strand v. Young, 36 Md. 246.

⁶⁴ Roy v. Goings, 112 Ill. 656, holding that such standing will not be inferred because the attorney consulted was commissioned as state's attorney. See § 1240.

⁶⁵ Murphy v. Larson, 77 Ill. 172.

⁶⁶ Thomas v. Kerr, 137 Ill. App. 479; Roy v. Goings, 112 Ill. 656; § 1240.

⁶⁷ Livingston v. Burroughs, 33 Mich. 511.

⁶⁸ § 151.

⁶⁹ Seaboard A. L. R. v. O'Quin, 124 Ga. 357, 2 L.R.A. (N.S.) 472.

⁷⁰ Boardman v. Marshalltown G. Co., 105 Iowa 445; Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543; Jenkins v. Fowler, 24 Pa. 308, 310; Cooley on Torts, 690. See § 3.

exemplary damages may be considerable. Actual damage must be found as a predicate for the recovery of exemplary damages.⁷¹ The latter have been denied in some jurisdictions when the former was merely nominal.⁷² In an action for libel in which the jury had rendered a verdict for one dollar, and a motion was made to set it aside for inadequacy,⁷³ Peters, J., said:

⁷¹ *White v. International Text Book Co.*, 164 Iowa 693; *Dees v. Thompson*, — Tex. Civ. App. —, 166 S. W. 56; *New Sharon C. Co. v. Knowlton*, 132 Iowa 672; *Cole v. Gray*, 70 Kan. 705; *Courtney v. Kneib*, 131 Mo. App. 204; *Brennan v. Maule*, 108 Mo. App. 336; *Hygienic F. U. Co. v. Way*, 15 Pa. Dist. 943; *Thouron v. Skirvin* (Tex. Civ. App.), 122 S. W. 55; *Lightfoot v. Murphy*, 47 Tex. Civ. App. 112; *Lawson v. Goodwin*, 37 Tex. Civ. App. 484; *Adoue v. Wettermark*, 36 Tex. Civ. App. 585; *Bushong v. Alderson* (Tex. Civ. App.), 143 S. W. 200; *Hanewacker v. Ferman*, 152 Ill. 321; *Martin v. Leslie*, 93 Ill. App. 44; *Dickinson v. Atkins*, 100 id. 401; *Boardman v. Marshalltown G. Co.*, 105 Iowa 445; *Girard v. Moore*, 86 Tex. 675; *Hilfrich v. Meyer*, 11 Wash. 186; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543; *Stacy v. Portland Pub. Co.*, 68 Me. 287; *Kuhn v. Chicago, etc. R. Co.*, 74 Iowa 137, 8 Am. Neg. Cas. 252; *Schippel v. Norton*, 38 Kan. 567; *Trawick v. Martin-Brown Co.*, 79 Tex. 460; *Maxwell v. Kennedy*, 50 Wis. 648; *Jones v. Mathews*, 75 Tex. 1; *Flanary v. Wood* (Tex. Civ. App.), 73 S. W. 1072; *Freese v. Tripp*, 70 Ill. 499; *Reed v. Horn*, 73 id. 596; *McNay v. Stratton*, 9 Ill. App. 215; *Schimmelfenig v. Donovan*, 13 id. 47; *Hoagland v. Forest Park H. A. Co.*, 170 Mo. 335, citing the text. See *Courtney v. Blackwell*, 150 Mo. 245, as to

the effect of the inadvertent failure of the jury to separately assess compensatory damages, the whole award being designated as punitive damages.

It is said in *McNay v. Stratton*, *supra*, that the rule does not apply in trespass, but it is apprehended that much may depend upon the circumstances.

In *Hefley v. Baker*, 19 Kan. 9, the jury found actual damages when there was only a right to nominal damages and such as might have been awarded as punitive; because the last was not given the judgment was reversed.

The recovery of exemplary damages has been sustained in Canada, in the absence of actual injury, for sending a postal card with matter on it charging the plaintiff with having engaged in a confidence game. *O'Brien v. Semple*, *Montreal L. R.*, 6 Super. Ct. 344.

Actual damages of \$50, the cost of reinstating a race horse, have been sufficient to support a verdict for \$700. *Carleton v. Fletcher*, 109 Me. 576.

⁷² *Shaffer v. Austin*, 68 Kan. 234; *Seal v. Holcomb*, 48 Tex. Civ. App. 330; *Schwartz v. Davis*, 90 Iowa 324; *First Nat. Bank v. Kansas Grain Co.*, 60 Kan. 30 (compare *Hefley v. Baker*, 19 Kan. 9, stated in preceding note); *Barber v. Kilbourn*, 16 Wis. 485.

⁷³ *Stacy v. Portland Pub. Co.*, 63 Me. 287.

"The legal signification of the verdict is either that there was no actual and express malice entertained toward the plaintiff by the defendant's agent, or that, if there was, it did the plaintiff no injury. There is no room for punitive damages here. There is no foundation for them to attach to or rest upon. It is said in vindication of the theory of punitive damages that the interests of the individual injured and of society are blended. Here the interests of society have virtually nothing to blend with. If the individual has but a nominal interest society can have none. Such damages are to be awarded against a defendant for punishment. But if the individual injury is merely technical and theoretical what is punishment to be inflicted for? If a plaintiff upon all such elements of injury as were open to him is entitled to recover but nominal damages shall he be the recipient of penalties awarded on account of an injury or a supposed injury to others besides himself? If there is enough in the defense to mitigate the damages to the individual, so did it mitigate the damages to the public as well. Punitive damages are the last to be assessed in the elements of injury to be considered by the jury and should be the first to be rejected by facts in mitigation. We think the irresistible inference is that if the instruction had been given as it was requested the verdict would not have been increased thereby to the extent of a cent. There may be cases, no doubt, where the actual damage would be but small and the punitive damages large. But this is not of such a kind. It would have been proper in this case for the presiding justice to have informed the jury that if the actual damages were nominal and no more, they need not award punitive damages."⁷⁴

The argument in favor of the opposing view has no little weight. It is thus put by Judge Bond of the St. Louis court of appeals: "Having a clear legal right to actual or general damages and such punitive damages as the jury might award,

⁷⁴ See *Meidel v. Anthiss*, 71 Ill. 241; *Ganssly v. Perkins*, 30 Mich. 492.

The *quantum* of punitive damages must have some relation to the in-

jury and the cause of it, and must not be disproportionate to the one or the other. *Buford v. Hopewell*, 140 Ky. 666. See note to § 403.

how can it be logically said that because the jury only gave him one, he must be deprived of that? Had the jury given him a substantial amount as actual damages, and also awarded punitive damages, the validity of their verdict would be beyond question under the facts showing that the publication was false, and under the law permitting a separate recovery for actual and punitive damages in cases of libel. This being so, with what reason can the defendant complain that the jury found against him for damages of the one kind when they had the undoubted right to find against him for both kinds? Appellants' theory that punitive damages are conditioned upon a further finding of some substantial sum as actual damages is occasioned by a misapprehension of the essence and object of punitive damages. These are recoverable in certain civil actions, not to compensate the plaintiff, but solely to punish the defendant. This legal motive would suffer defeat if punitive damages could not be given for a malicious attack upon a reputation too well established to receive substantial injury at the hands of a libeler. Moreover, wherever there is an infringed legal right entitling a party to recover both kinds of damages, there can be no reason depriving a jury of the power to inflict punitive damages because the compensating damages were found by them to be only nominal. A verdict for nominal damages of itself establishes the full actionable right of the plaintiff, and as that right implies in law permission to the jury to give punitive, as well as actual, damages, it is a mere logical sequence that a verdict for nominal damages establishes the right of the plaintiff to a verdict upon the issue as to punitive damages.⁷⁵ Where punitive damages are awarded and

⁷⁵ *Ferguson v. Evening Chronicle Pub. Co.*, 72 Mo. App. 462; *Mills v. Taylor*, 85 id. 111; *Batson v. Higginbotham*, 7 Ga. App. 835; *Selman v. Barnett*, 4 Ga. App. 375; *Pratt v. Davis*, 118 Ill. App. 161; *Moore v. Maxey*, 152 Ill. App. 647; *Saunders v. Gilbert*, 156 N. C. 463, 38 L.R.A.(N.S.) 404; *Lampert v.*

Judge & D. D. Co., 238 Mo. 409, 37 L.R.A.(N.S.) 533; *Prince v. Brooklyn Eagle*, 16 N. Y. Misc. 186; *Wilhelm v. Western U. Tel. Co.*, 90 S. C. 536, 5 N. C. C. A. 656. Without noticing the local cases the Springfield court of appeals has held otherwise. *Summers v. Keller*, 152 Mo. App. 626.

it appears that actual damages were sustained the failure to assess the latter is not ground of exception by the defendant.⁷⁶

The Alabama supreme court also takes issue with the rule which generally prevails. The true theory of exemplary damages is that of punishment, involving the ideas of retribution for wilful misconduct and an example to deter from its repetition. The position of the supreme court of Maine can be sustained in principle, it seems to us, only by assuming that which is manifestly untrue, namely, that no act is criminal which does not inflict individual injury capable of being measured and compensated for in money. Many acts denounced as crimes by our statutes or by the common law involve no pecuniary injury to the individual against whom they are directed, and which, while the party aggrieved could not recover damages as compensation beyond a nominal sum, are yet punished in the criminal courts, and may also be punished in civil actions by the imposition of "smart money," and on the same principle, acts readily conceivable which involve malice, wilfulness, or wanton and reckless disregard of the rights of others, though not within the calendar of crimes, and inflicting no pecuniary loss or detriment measurable by a money standard on the individual, yet merit such punishment as the civil courts may inflict by the imposition of exemplary damages.⁷⁷ In South Carolina, also, punitive damages are recoverable for an intentional invasion of the rights of a person although the resulting damage is nominal;⁷⁸ and a verdict awarding the former has been sustained though it did not include any actual damage.⁷⁹

In substance, the same view is held by the court of appeals of the second circuit. The action was for the infringement of a copyright. The Texas cases referred to in the opening

⁷⁶ *Adams v. St. Louis, etc. R. Co.*, 149 Mo. App. 278.

⁷⁷ *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. 17 following earlier cases; *Mattingly v. Houston*, 167 Ala. 167; *Goodson v. Stewart*, 154 Ala. 660; *Louisville & N. R. Co. v. Smith*, 141 Ala. 335.

⁷⁸ *Doster v. Western U. Tel. Co.*, 77 S. C. 56; *Arial v. Western U. Tel. Co.*, 70 S. C. 418.

⁷⁹ *Fields v. Lancaster C. Mills*, 77 S. C. 546, 11 L.R.A. (N.S.) 822, 122 Am. St. 593; *Bethea v. Western U. Tel. Co.*, 97 S. C. 385.

of this section are disposed of by saying that the law of that state is peculiar on the subject of exemplary damages. The applicability of the cases cited from Iowa, Maine and Wisconsin is conceded. "They are, however, plainly at variance with the theory upon which exemplary damages are awarded in the federal courts, namely, as something additional to, and in no-wise dependent upon, the actual pecuniary loss of the plaintiff, being frequently given in actions 'where the wrong done to the plaintiff is incapable of being measured by a money standard.'⁸⁰ * * * But if it be once conceded that such additional damages may be assessed against the wrong-doer, and, when assessed, may be taken by the plaintiff,—and such is the settled law of the federal courts,—there is neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost ten dollars, and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury, but is unable to prove that he is poorer in pocket by the wrong doing of defendant."⁸¹ The extent of the damage done or the force used to accomplish the act complained of does not determine the question whether the defendant is liable for punitive damages or not.⁸² If the injury done was not theoretical or fanciful, but quite substantial, and the plaintiff failed to recover substantial damages only because of his pleading, exemplary damages may be awarded.⁸³ One of the Texas courts of civil

⁸⁰ Citing *Day v. Woodworth*, 13 How. 370, 14 L. ed. 184; *Wilson v. Vaughn*, 23 Fed. 229.

⁸¹ *Press Pub. Co. v. Monroe*, 19 C. C. A. 429, 51 L.R.A. 353, 73 Fed. 196.

⁸² *Keane v. Main*, 83 Conn. 200; *McInturf v. Western U. Tel. Co.*, 81 Kan. 476; *Western U. Tel. Co. v. Bodkin*, 79 Kan. 792, 21 Am. Neg. Rep. 16; *Vlasservitch v. Augusta & A. R. Co.*, 85 S. C. 291; *Smith v. Philadelphia, etc. R. Co.*, 87 Md. 48, 51; *Louisville & N. R. Co. v. Ritchel*, 148 Ky. 701, 41 L.R.A. (N.S.) 958.

The proof of actual damages will sustain a verdict for exemplary damages though the verdict is silent as to the *quantum* of the former. *McConathy v. Deck*, 34 Colo. 461, 4 L.R.A. (N.S.) 358.

In a case of trespass a verdict for \$1 as compensatory damages supported an award of \$19 as exemplary damages; the former was not a nominal sum. *Moore v. Duke*, 84 Vt. 401.

⁸³ *Favorite v. Cottrill*, 62 Mo. App. 119.

appeals, while recognizing the rule established by the supreme court of the state that exemplary damages must rest upon actual damages, holds that where actual recoverable damage has been sustained and settled for, without including in the settlement the claim for vindictive damages, a recovery of the former, whether nominal or substantial, is not a prerequisite to the recovery of the latter.⁸⁴ If officers refuse to obey a peremptory *mandamus* commanding them to levy a tax they will be liable for exemplary damages although the actual damages resulting to the plaintiff were nominal.⁸⁵ Mental suffering alone is a good predicate for the allowance of punitive damages.⁸⁶

§ 407. Joint liability for exemplary damages. If a wrong is done by two or more persons jointly and all are sued together, if only one of them, or less than all, acted upon such motives as are condemned by the law and punished by exemplary damages the motive of some will not be imputed to the others, and the liability of the latter will not extend beyond compensatory damages.⁸⁷ In such a case the plaintiff has his election to proceed against any or all of the wrongdoers. By making them all

⁸⁴ Gregory v. Coleman, 3 Tex. Civ. App. 166.

In Flanary v. Wood, the action being for an assault and battery on the plaintiff's wife and to recover the value of property carried away, the actual damages were fixed at \$56, and the punitive at \$2,344. The latter were set aside because excessive. Compare New Orleans, etc. R. Co. v. Hurst, 36 Miss. 660.

⁸⁵ Wilson v. Vaughn, 23 Fed. 229.

Actual damages need not be large to sustain an award of \$90 as punitive damages. Welsh v. Haleen, — Iowa —.

⁸⁶ Pye v. Gillis, 9 Ga. App. 725.

⁸⁷ Corkings v. Meier, 112 Ill. App. 655, citing the text; Sloan v. Pierce, 74 Kan. 65; Plymouth G. M. Co. v. United States F. & G. Co., 35 Mont. 23; St. Louis S. R.

Co. v. Thompson, 102 Tex. 89; Faroux v. Cornwell, 40 Tex. Civ. App. 529; Clark v. Newsam, 1 Ex. 131; Becker v. Dupree, 75 Ill. 167; Boutwell v. Marr, 71 Vt. 1, 11, 43 L.R.A. 803. To the contrary is Reizenstein v. Clark, 104 Iowa 287 applying, apparently, the rule which governs compensatory damages against joint tort-feasors.

The acts and words of one charged jointly in trespass, after the unlawful entry, may be shown. Sheftall v. Zipperer, 133 Ga. 488, 27 L.R.A. (N.S.) 442.

An attorney who directs the service of a writ and advises that resistance to it be followed by legal proceedings is not liable for exemplary damages because of unauthorized acts done under it. Marks v. Culmer, 6 Utah 419.

defendants he waives his right to exemplary damages if some of them are not subject thereto.⁸⁸ But the rule does not apply where the plaintiff has no such choice, as where a married woman commits a tort and the law does not give a right of action against her alone. The husband is liable as husband, though he was free from blame;⁸⁹ but in Tennessee his liability is limited to making compensation.⁹⁰ The business relations between defendants may be such as to make them jointly liable for exemplary damages though the immediate cause of the wrong was the result of the act of one only, as where a railroad company is sued jointly with a sleeping car company for the neglect of the servant of the latter.⁹¹ It is not cause for refusing such damages where parties are sued jointly that one of them is wealthy and the other poor.⁹² In some states the verdict against joint defendants is not required to be for an entire sum, and it is competent to make awards for compensatory and exemplary damages separately. In these the latter may be awarded against some of the defendants only or they may be apportioned against each for different sums according to their culpability.⁹³ And independently of such practice it has been declared in a recent case that punitive damages are assessable against one joint defendant only, or, if they are assessed against all, they may be graded according to the defendants' financial ability or the degree of malice which actuated them.⁹⁴ Some statutes declaring the liability of sellers of intoxicants impose liability for exemplary damages upon the owner of the property in which sales are made, he being joined as a defendant with the lessee.⁹⁵ While the ratification of a trespass by one who did not participate in it will make him

⁸⁸ *Moore v. Duke*, 84 Vt. 401; *Young v. Aylesworth*, 35 R. I. 259.

⁸⁹ *Lombard v. Batchelder*, 58 Vt. 558; *Munter v. Bande*, 1 Mo. App. 484; *Patterson v. Frazer* (Tex. Civ. App.), 93 S. W. 146. See ch. 36.

⁹⁰ *Price v. Clapp*, 119 Tenn. 425, 123 Am. St. 730.

⁹¹ *Calder v. Southern R. Co.*, 89 S. C. 287.

⁹² *White v. White*, 140 Wis. 538, 133 Am. St. 1100.

⁹³ *Mauk v. Brundage*, 68 Ohio 89, 62 L.R.A. 477; *Davis v. Hearst*, 160 Cal. 143; *St. Louis S. R. Co. v. Thompson*, 102 Tex. 89.

⁹⁴ *Nelson v. Halvorson*, 117 Minn. 255.

⁹⁵ *Beckerle v. Brandon*, 229 Ill. 323; *Nagle v. Keller*, 141 Ill. App. 444.

liable for compensatory damages it will not have that effect as to punitive damages,⁹⁶ at least where the relation of master and servant⁹⁷ or principal and agent does not exist.⁹⁸ If several persons enter into an unlawful enterprise or a conspiracy to commit an unlawful act, each one concerned in and participating in it will be chargeable with the malice which prompted it.⁹⁹

§ 408. Parties liable; master for servant. Where the master or employer is liable for the tort of his servant or agent he is liable for full compensation in view of all the concomitant aggravations. If the servant commits a tort in his master's service, in the exercise of his employment or agency, it is deemed, at least for the purpose of compensation to the party injured, as the act and tort of the master. But it is otherwise as to the torts which the servant steps aside from, or goes beyond, his master's employment to commit.¹ The master is only liable for the act of his servant when the latter acts within the scope of his employment; when he, injuriously to others, disregards by tortious act or omission their rights in the conduct

⁹⁶ *Pardridge v. Brady*, 7 Ill. App. 639; *Grund v. Van Vleck*, 60 Ill. 487.

⁹⁷ See § 408.

⁹⁸ *Jacobs v. Crum*, 62 Tex. 401; *Robinson v. Goings*, 63 Miss. 500.

⁹⁹ *Dunshee v. Standard Oil Co.*, 165 Iowa 625, citing *Young v. Gormley*, 119 Iowa 546; *Reizenstein v. Clark*, 104 Iowa 287; *Burns v. Campbell*, 71 Ala. 271; *Nightingale v. Scannell*, 18 Cal. 315.

¹ *Western R. E. Trustees v. Hughes*, 172 Fed. 206, 96 C. C. A. 658; *Kress v. Lawrence*, 158 Ala. 652; *City D. Co. v. Henry*, 139 Ala. 161; *St. Louis, etc. R. Co. v. Dowgiallo*, 82 Ark. 289; *Same v. Grant*, 75 Ark. 579; *Southern R. Co. v. Chambers*, 126 Ga. 404, 7 L.R.A.(N.S.) 926; *Philadelphia, etc. R. Co. v. Green*, 110 Md. 32; *Merrill v. Coates*, 101 Minn. 43; *Milton v. Missouri Pac. R. Co.*, 193 Suth. Dam. Vol. II.—6.

Mo. 46, 4 L.R.A.(N.S.) 282; *Collette v. Rebori*, 107 Mo. App. 711; *Stewart v. Carey L. Co.*, 146 N. C. 47 quoting the text; *Berryman v. Pennsylvania R. Co.*, 228 Pa. 621, 30 L.R.A.(N.S.) 1049; *McKain v. Baltimore & O. R. Co.*, 65 W. Va. 233, 23 L.R.A.(N.S.) 289, 131 Am. St. 964; *McManus v. Crickett*, 1 East 106; *Howe v. Newmarch*, 12 Allen 49; *Wright v. Wilcox*, 19 Wend. 343; *Richmond T. Co. v. Vanderbilt*, 1 Hill 480; *Illinois Cent. R. Co. v. Downey*, 18 Ill. 259; *Pittsburgh, etc. R. Co. v. Donahue*, 70 Pa. 119; *Rounds v. Delaware, etc. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Foster v. Essex Bank*, 17 Mass. 479, 1 Am. Neg. Cas. 502; *Crocker v. New London, etc. R. Co.*, 24 Conn. 249, 8 Am. Neg. Cas. 100; *Horner v. Lawrence*, 37 N. J. L. 46; *St. Louis, etc. R. Co. v. Wilson*, 70 Ark. 136, 144.

of the master's business.² This general principle does not relieve the master from liability where he has knowledge of the habitual acts of his employees, done on his premises, while in his employ and under his control, if he fails to use reasonable means to suppress them. Under these circumstances he may be liable for the malicious acts of such servants without the scope of their employment.³ The general rule stated applies where a corporation is the principal and the employment in the course of which the servant commits the tort is within the scope of the corporate powers.⁴ In their appropriate sphere, corporations

² *Id.*; *Illinois Cent. R. Co. v. Black*, 122 Ill. App. 439; *Fairbanks v. Boston S. W. Co.*, 189 Mass. 419, 13 L.R.A.(N.S.) 422, 109 Am. St. 646; *Usher v. Western U. Tel. Co.*, 122 Mo. App. 98; *Kiernan v. New Jersey I. Co.*, 74 N. J. L. 175, 20 Am. Neg. Rep. 431; *Daniel v. Railroad*, 136 N. C. 517, 67 L.R.A. 455; *Canon v. Sharon & W. St. R. Co.*, 216 Pa. 408; *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416, 14 Am. Neg. Cas. 421; *Hibbard v. New York & E. R. Co.*, 15 N. Y. 455, 8 Am. Neg. Cas. 516; *Philadelphia, etc. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502, 10 Am. Neg. Cas. 602; *Redding v. South Carolina R. Co.*, 3 S. C. 1, 16 Am. Rep. 681; *Toledo, etc. R. Co. v. Harmon*, 47 Ill. 298, 11 Am. Neg. Cas. 429, 95 Am. Dec. 489; *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380; *Chamberlain v. Chandler*, 3 Mason 242; *O'Connell v. Strong*, *Dudley* 265; *Brasher v. Kennedy*, 10 B. Mon. 28; *Brackett v. Lubke*, 4 Allen 138, 15 Am. Neg. Cas. 666, 81 Am. Dec. 694; *Tuel v. Weston*, 47 Vt. 634; *Hays v. Millar*, 77 Pa. 238, 18 Am. Rep. 445; *Reynolds v. Hanrahan*, 100 Mass. 313; *Smith v. Webster*, 23 Mich. 298, 16 Am. Neg. Cas. 86; *Mahoney v. Mahoney*, 51 Cal. 118; *Southwick v. Estes*, 7 Cush. 385; *Bulmier*

v. Erie R. Co., 34 N. J. L. 151; *Luttrell v. Hazen*, 3 Sneed 20, 17 Am. Neg. Cas. 506; *Barden v. Felch*, 109 Mass. 154; *Kreiter v. Nichols*, 28 Mich. 496; *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361; *Eastern Counties R. Co. v. Broom*, 6 Ex. 314; *Seymour v. Greenwood*, 7 H. & N. 355.

³ *Hogle v. Franklin Mfg. Co.*, 128 App. Div. (N. Y.) 403, and cases cited.

⁴ *Stowers F. Co. v. Brake*, 158 Ala. 639; *Aygarn v. Rogers G. Co.*, 141 Ill. App. 402; *Amann v. Chicago Con. T. Co.*, 148 Ill. App. 151; *Williams v. Southern R.*, 115 Ky. 320; *Barrett v. Minneapolis, etc. R. Co.*, 106 Minn. 51, 18 L.R.A.(N.S.) 416, 130 Am. St. 585; *Yazoo, etc. R. Co. v. Shelby*, 95 Miss. 155; *Barree v. Cape Girardeau*, 197 Mo. 382, 6 L.R.A.(N.S.) 1090, 114 Am. St. 763; *Reed v. New York & R. G. Co.*, 93 App. Div. (N. Y.) 453; *Stewart v. Cary L. Co.*, 146 N. C. 47; *Hayes v. Railroad*, 141 N. C. 195; *Cincinnati, etc. R. v. Klute*, 29 Ohio C. C. 702; *Johnston v. Chicago, etc. R. Co.*, 130 Wis. 492; *St. Louis, etc. R. Co. v. Kilpatrick*, 67 Ark. 47; *Hanson v. European, etc. R. Co.*, 62 Me. 84, 8 Am. Neg. Cas. 336, 16 Am. Rep. 404; *Goddard v. Grand*

incur liability under the same conditions as private persons; they may thus be guilty of assault and battery,⁵ slander and

Trunk R. Co., 57 Me. 202; Atlantic, etc. R. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Passenger R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Brokaw v. New Jersey, etc. R. Co., 32 N. J. L. 328, 90 Am. Dec. 659; Monument Bank v. Globe Works, 101 Mass. 57; Philadelphia, etc. R. Co. v. Derby, 14 How. 468, 14 L. ed. 502; Noyes v. Rutland, etc. R. Co., 27 Vt. 110; Jeffersonville, etc. R. Co. v. Rogers, 38 Ind. 116, 8 Am. Neg. Cas. 207, 10 Am. Rep. 103; Ramsden v. Boston, etc. R. Co., 104 Mass. 117, 6 Am. Rep. 200; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277, 8 Am. Neg. Cas. 341; Green v. Omnibus Co., 7 C. B. (N. S.) 290; Hopkins v. Atlantic, etc. R. Co., 36 N. H. 9, 72 Am. Dec. 287; Malecek v. Tower Grove, etc. R. Co., 57 Mo. 17.

The supreme court of the United States has often affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible, in the same manner and to the same extent as an individual is responsible under similar circumstances. Philadelphia, etc. R. v. Quigley, 21 How. 202, 210, 16 L. ed. 73, 75; National Bank v. Graham, 100 U. S. 699, 702, 25 L. ed. 750, 751; Salt Lake City v. Hollister, 118 id. 256, 261; Denver & R. G. R. v. Harris, 122 U. S. 597, 608, 30 L. ed. 1146, 1148. A corporation is doubtless liable like an individual to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. Philadelphia & R. R. v.

Derby, 14 How. 468, 14 L. ed. 502; New Jersey S. Co. v. Brockett, 121 U. S. 637, 30 L. ed. 1049, 8 Am. Neg. Cas. 702; Howe v. Newmarch, 12 Allen 49; Ramsden v. Boston & A. R., 104 Mass. 117; [New York Cent. R. v. United States, 212 U. S. 481]. A corporation may even be held liable for a libel or a malicious prosecution by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. Philadelphia, etc. R. v. Quigley, *supra*; Salt Lake City v. Hollister, *supra*; Reed v. Home Sav. Bank, 130 Mass. 443, 445, and cases cited; Krulevitz v. Eastern R., 140 Mass. 573; McDermott v. Evening Journal, 43 N. J. L. 488, 44 id. 430; Bank v. Owston, L. R. 4 App. Cas. 270. Per Justice Gray in Lake Shore, etc. R. Co. v. Prentice, 147 U. S. 101, 109, 37 L. ed. 97, 101.

The question whether the servant's act was within the scope of his authority is for the jury. Cooper v. Southern R. Co., 165 N. C. 578.

"A corporation can only be held liable for a malicious act by imputing to it the wrong of its agent, and, if the agent be found not to have acted maliciously, there is no malice to impute to the corporation." Dunshee v. Standard Oil Co., 165 Iowa 625, citing White v. International Textbook Co., 150 Iowa 27; McGinnis v. Chicago, R. I. & P. R. Co., 200 Mo. 347, 9 L.R.A. (N.S.) 880, 118 Am. St. Rep. 661, 9 Ann. Cas. 656; Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co., 165 Ind. 361.

⁵ Avondale Mills v. Bryant, 10

libel,⁶ malicious prosecution, false imprisonment,⁷ fraud,⁸ and trespass.⁹ An action for a wrong lies against a corporation where its act—the thing done—is within the purpose of the corporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual.¹⁰ There is a legal unity of principal and agent as well

Ala. App. 507; *Miller-B. L. Co. v. Stewart*, 166 Ala. 657; *Coal Belt E. R. Co. v. Young*, 126 Ill. App. 651; *Singer S. M. Co. v. Phipps*, 49 Ind. App. 116; *Baltimore & O. R. Co. v. Strube*, 111 Md. 119; *Deck v. Baltimore & O. R. Co.*, 100 Md. 168, 108 Am. St. 399; *Grant v. Singer Mfg. Co.*, 190 Mass. 489, 20 Am. Neg. Rep. 351, 6 L.R.A. (N.S.) 567; *Carmody v. St. Louis T. Co.*, 122 Mo. App. 338; *Rand v. Butte E. R. Co.*, 40 Mont. 398; *Moore v. Camden & T. R. Co.*, 74 N. J. L. 498, 122 Am. St. 399; *Roberts v. Railroad*, 143 N. C. 176, 8 L.R.A. (N.S.) 798; *Waalor v. Great Northern R. Co.*, 22 S. D. 256, 18 L.R.A. (N.S.) 297; *Mobile & O. Co. v. Seales*, 100 Ala. 368; *Denver, etc. R. v. Harris*, 122 U. S. 597, 30 L. ed. 1146; *Atlantic, etc. R. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Neg. Cas. 571, 8 Am. Rep. 78; *Higgins v. Watervliet I. & R. Co.*, 46 N. Y. 23, 8 Am. Neg. Cas. 552, 7 Am. Rep. 293; *Craker v. Chicago, etc. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Eastern Counties R. Co. v. Brown*, 6 Ex. 314; *Seymour v. Greenwood*, 7 H. & N. 355; *Monument Bank v. Globe Works*, 100 Mass. 57.

⁶ *Nava v. Northwestern Tel. Ex.*, 112 Minn. 199; *Penas v. Chicago, etc. R. Co.*, 112 Minn. 203, 30 L.R.A. (N.S.) 627; *Samuels v. Evening Mail Ass'n*, 9 Hun 288; *Philadel-*

phia, etc. R. Co. v. Quigley, 21 How. 202, 16 L. ed. 73; *Whitfield v. South Eastern R. Co.*, 96 Eng. C. L. 115; *Maynard v. Firemen's Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Aldrich v. Press P. Co.*, 9 Minn. 133.

⁷ *Whitman v. Atchison, etc. R. Co.*, 85 Kan. 150, 34 L.R.A. (N.S.) 1029; *Baltimore, etc. R. Co. v. Ennalls*, 108 Md. 75, 16 L.R.A. (N.S.) 1100; *Jackson v. American Tel. & T. Co.*, 139 N. C. 347, 70 L.R.A. 738; *Topolewski v. Plankinton P. Co.*, 143 Wis. 52; *Green v. Omnibus Co.*, 7 C. B. (N. S.) 290; *Vance v. Erie R. Co.*, 32 N. J. L. 334, 90 Am. Dec. 665; *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439; *Goff v. Great Northern R. Co.*, 3 El. & E. 672; *Roe v. Birkenhead, etc. R. Co.*, 7 Ex. 36; *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571; *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529; *Jordan v. Alabama, etc. R. Co.*, 74 Ala. 85, 49 Am. Rep. 800, overruling *Owsley v. M. & W. P. R. Co.*, 37 Ala. 360, which held that a corporation was not liable for malicious prosecution. See § 1234.

⁸ *Id.*; *Birkett v. Postal Tel.-C. Co.*, 107 App. Div. (N. Y.) 115; *Story on Agency*, § 452.

⁹ *Lesch v. Great Northern R. Co.*, 93 Minn. 435.

¹⁰ *French P. & O. Co. v. Phelps*, 47 Tex. Civ. App. 385; *Green v. Omnibus Co.*, *supra*, per Erle, C. J.

in respect to the tortious, as the rightful, acts of the latter done in the course of his employment.¹¹ This identity of master and servant involves the necessary legal consequence that the master is responsible in damages for the wrongful act of the servant, done within the scope of his employment, to the extent of full compensation; but there is some division of judicial opinion as to the basis of the master's liability for exemplary damages.¹² The immediate ground of such damages is, of course, the malice or misconduct which warrants their imposition against a natural person; but the diversity is in respect to the question whether the malice and misconduct of the servant is the malice of the principal, as the act which induced or accompanied is his, without particular direction or ratification. In a work of much merit it is laid down that "in any case where exemplary damages may be recoverable against the servant they should be allowed against the master, if it appears that he had reasonable notice of the negligent habits of the servant, or if he left the servant without control or supervision in the work."¹³ This doctrine is obviously sound; but it is based on an actual fault of the master, not solely on that of the servant; the conclusion of liability does not result purely from the identity of master and servant.

§ 409. *Same subject.* In a New York case¹⁴ Church, C. J., said: "For injuries by the negligence of a servant while en-

¹¹ Birmingham R., L. & P. Co. v. Moore, 148 Ala. 115; Savannah E. Co. v. Wheeler, 128 Ga. 550, 10 L.R.A.(N.S.) 1176; Bouillon v. Laclede G. L. Co., 148 Mo. App. 462; New Orleans, etc. R. Co. v. Bailey, 40 Miss. 452, 12 Am. Neg. Cas. 183; Knoxville T. Co. v. Lane, 103 Tenn. 376, 46 L.R.A. 549.

¹² Louisville & N. R. Co. v. Kelly, 100 Ky. 421, 441, 1 Am. Neg. Rep. 249, quoting most of the preceding part of this section.

It is not settled in Louisiana that the doctrine of exemplary damages applies to corporations. *Rutherford v. Shreveport & H. R. Co.*, 41

La. Ann. 793, 15 Am. Neg. Cas. 244. But it seems to have been applied to a municipal corporation. *McGary v. Lafayette*, 4 *La. Ann.* 440.

¹³ *Shearman & Red. on Neg.*, § 749 (4th ed.); *Atler v. Erskine*, 50 Tex. Civ. App. 576, citing the text.

¹⁴ *Cleghorn v. New York, etc. R. Co.*, 56 N. Y. 47, 16 Am. Neg. Cas. 814, 15 Am. Rep. 375, approved in *Sullivan v. Oregon R. & N. Co.*, 12 Ore. 392, 53 Am. Rep. 364; *Lake Shore, etc. R. Co. v. Prentice*, 147 U. S. 101, 115, 37 L. ed. 97, 104, 8 Am. Neg. Cas. 703; *Benner v. Truckee River G. E. Co.*, 193 Fed 740 (Nev.).

gaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman; or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant unless such conduct is of the character before specified." According to this view, as was said by Metcalf, J., "the act of a servant is not the act of a master, even in legal intendment or effect, unless the master personally directs or subsequently adopts it. In other cases he is liable for the acts of his servant, when liable at all, not as if the act were done by himself, but because the law makes him answerable therefor."¹⁵ It has been often said and decided that the master is not liable for the voluntary, wil-

"The rule adopted by the courts of this state is such as not to permit the recovery of exemplary damages against the master for the act or negligence of his servant unless he has authorized his misconduct, or ratified it, or unless the conduct complained of is that of the serv-

ant while he is in the service, after his unfitness is known to the master." *Muckle v. Rochester R. Co.*, 79 Hun 32, 8 Am. Neg. Cas. 553; *Wright v. Glens Falls, etc. R. Co.*, 24 App. Div. (N. Y.) 617.

¹⁵ *Parsons v. Winchell*, 5 Cush. 592.

ful and malicious act of his servant;¹⁶ but when so held, according to the best authorities, the servant has gone outside the master's business to commit the wrong. In an English case the court say: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident the master will not be liable. But if in order to perform his master's orders he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable."¹⁷ And in another: "Suppose a servant driving along a road, in order to avoid a danger, intentionally drove against a carriage of another, would not the master be responsible?"¹⁸ Grover, J., in a New York case,¹⁹ states the principle very clearly. A servant employed to remove and pile lumber had disobeyed his employer's orders in piling it where it was the cause of the injury in question. The judge said: "It was an act done by him in the prosecution of their (the master's) business, and they are not relieved from responsibility therefor by his departure from their instructions in the manner of doing it. The test of the master's responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do. If the owner of a building employs a servant to remove the roof from his house and directs him to throw the materials upon his lot, where no one would be endangered, and the servant, disregarding this direction, should carelessly throw them into the street, causing an injury to a passenger, the master would be responsible therefor although done in violation of his instructions. But should the servant, for some purpose of his own, intentionally throw material upon

¹⁶ 2 Dane's Abr., ch. 59, art. 2, 15 Am. Neg. Cas. 655; Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507; Richmond T. Co. v. Vanderbilt, 1 Hill 480; Vanderbilt v. Richmond T. Co., 2 N. Y. 479; Story on Agency, § 456.

¹⁷ Croft v. Alison, 4 B. & Ald. 590.

¹⁸ Seymour v. Greenwood, 6 H. & N. 359.

¹⁹ Cosgrove v. Ogden, 49 N. Y. 257, 10 Am. Rep. 361. See Kastner v. Long Island R. Co., 76 App. Div. (N. Y.) 323.

a passenger the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant to effect some purpose of his own.²⁰

The same principle is still more comprehensively stated by Hoar, J.: "The master is not responsible as a trespasser unless by direct or implied authority to the servant he consents to the wrongful act. But if a master give an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable. And in an action of tort, in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if a servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner."²¹ Accordingly, in a subsequent case, it was held that a master who orders his servants to go to the house of a person named and remove certain furniture, if a sum due the master thereon is not paid, is liable for a wilful assault committed by them, if done in the execution of the order, and not for some private end or advantage of their own.²² The wantonness or mischief

²⁰ Citing *Weed v. Panama R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474; *Mali v. Lord*, 39 N. Y. 381.

²¹ *Howe v. Newmarch*, 12 Allen 56. See *Lynch v. Metropolitan E. R. Co.*, 90 N. Y. 77, 8 Am. Neg. Cas. 553, 43 Am. Rep. 141; *Staples v.*

Schmid, 18 R. I. 224, 17 Am. Neg. Cas. 266, 19 L.R.A. 824.

²² *Denver, etc. R. v. Harris*, 122 U. S. 597, 30 L. ed. 1146; *Levi v. Brooks*, 121 Mass. 501, 15 Am. Neg. Cas. 712; *Passenger R. Co. v. Young*, 21 Ohio St. 524-5, 8 Am.

done by the servant in the execution of his master's orders will enhance the damages against the latter.²³

Ryan, C J., in an action against a railroad company for a wanton outrage committed by a conductor in attempting to kiss a female passenger, thus illustrated the fallacy of any distinction in the liability of the master between wilful and negligent injuries: "We do not understand it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would be liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that, though the principal would be liable for the negligent failure of the agent to fulfill the principal's contract, the principal is not liable for the malicious breach by the agent of the contract which he was appointed to perform for the principal. As we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*." ²⁴

§ 410. **Same subject.** In those states where exemplary damages are limited to compensation and the punitive element is excluded, when the master's liability for the servant's act is determined the whole question is resolved. If he is liable for the act he is liable for the increased injury which results from the manner in which it is done. But in some states where the element of punishment is admitted it is held that, though the misconduct took place while the servant was on duty for his master and he did the act in the prosecution of his master's business, still there must be a ratification, unless the previous

Neg. Cas. 571; *Barden v. Felch*, 109 Mass. 154; *Toledo, etc. R. Co. v. Harmon*, 47 Ill. 298, 11 Am. Neg. Cas. 429, 95 Am. Dec. 489; *Chicago, etc. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114.

²³ *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383.

²⁴ *Craker v. Chicago, etc. R. Co.*, 36 Wis. 673, 17 Am. Rep. 504.

directions included the commission of the wrong in question or the master had prior notice of the unfitness of the servant.²⁵

²⁵ *Dunshee v. Standard Oil Co.*, 165 Iowa 625; *Southern R. Co. v. Grubbs*, 115 Va. 876; *Haywood v. Hamm*, 77 Conn. 158; *Ingram v. Louisiana, etc. R. Co.*, 128 La. 933; *Neafie v. Hoboken P. & P. Co.*, 72 N. J. L. 340; *Peterson v. Middlesex & S. T. Co.*, 71 N. J. L. 296, 17 Am. Neg. Rep. 673; *Lewine v. Interborough R. T. Co.*, 61 N. Y. Misc. 77; *Samueloff v. New York, etc. R. Co.*, 122 App. Div. (N. Y.) 770; *Walsh v. Hyde & B. A. Co.*, 113 App. Div. (N. Y.) 42; *Reed v. New York & R. G. Co.*, 93 App. Div. (N. Y.) 453; *Stewart v. Cary L. Co.*, 146 N. C. 47; *Moore v. Atchison, etc. R. Co.*, 26 Okla. 682; *Wells v. Boston & M. R.*, 82 Vt. 108; *Topolewski v. Plankinton P. Co.*, 143 Wis. 52; *Lightner M. Co. v. Lane*, 161 Cal. 689; *Warner v. Southern Pac. Co.*, 113 Cal. 105, 54 Am. St. 327, reviewing local cases and limiting *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 8 Am. Neg. Cas. 69, 33 Am. St. 157; *Trabing v. California N. & I. Co.*, 121 Cal. 137; *Fohrmann v. Consolidated T. Co.*, 63 N. J. L. 391; *Haver v. Central R. Co.*, 64 N. J. L. 312, 5 Am. Neg. Rep. 197; *Staples v. Schmid*, 18 R. I. 224, 19 L.R.A. 824; *McGown v. International & G. N. R. Co.*, 85 Tex. 289; *Norfolk & W. R. Co. v. Anderson*, 90 Va. 1, 8 Am. Neg. Cas. 651; *Same v. Neely*, 91 Va. 539, 44 Am. St. 884; *Mace v. Reed*, 89 Wis. 440; *Robinson v. Superior R. T. R. Co.*, 94 Wis. 345, 59 Am. St. 896, 34 L.R.A. 205; *Vassau v. Madison E. R. Co.*, 106 Wis. 301; *Lake Shore, etc. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97; *Cowen v. Winters*, 37 C. C. A. 628, 96 Fed. 929; *Winters v. Cowen*, 90 Fed. 99;

Woodward v. Ragland, 5 D. C. App. Cas. 220; *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. 213; *Rueping v. Chicago & N. R. Co.*, — Wis. —; *Eviston v. Cramer*, 57 Wis. 570; *Haines v. Schultz*, 50 N. J. L. 481; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Murphy v. Central Park R. Co.*, 48 N. Y. Super. Ct. 96; *Sullivan v. Oregon R. & N. Co.*, 12 Ore. 392, 53 Am. Rep. 364; *International, etc. R. Co. v. Garcia*, 70 Tex. 207; *Ricketts v. Chesapeake & O. R. Co.*, 33 W. Va. 433, 25 Am. St. 901, 7 L.R.A. 354; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. 753, 3 L.R.A. 634 (*sub nob*, *Dillingham v. Anthony*); *Redwood v. Metropolitan R. Co.*, 6 D. C. 302 (but see *Flannery v. Baltimore & O. R. Co.*, 4 Mackey (D. C.), 111, a later case), 8 Am. Neg. Cas. 115; *Hagan v. Providence, etc. R. Co.*, 3 R. I. 88; *Turner v. North Beach, etc. R. Co.*, 33 Cal. 594; *Kline v. Central Pac. R. Co.*, 37 Cal. 400, 8 Am. Neg. Cas. 58, 99 Am. Dec. 282; *Ackerson v. Erie R. Co.*, 32 N. J. L. 254; *McKeon v. Citizens' R. Co.*, 42 Mo. 79, 4 Am. Neg. Cas. 471; *Louisville, etc. R. Co. v. Smith*, 2 Duvall 566, 9 Am. Neg. Cas. 380; *Hill v. New Orleans, etc. R. Co.*, 11 La. Ann. 292; *The Amiable Nancy*, 3 Wheat. 546, 4 L. ed. 456; *Moody v. McDonald*, 4 Cal. 297; *Carlson S. Co. v. Schmidt* (Wyo.) 133 Pac. 1053 (it seems); *Munster v. New Orleans R. & N. Co.*, 131 La. 128; *Railroad Co. v. Finney*, 10 Wis. 388; *Craker v. Chicago, etc. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Bass v. Chicago, etc. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Hays v. H. & G. N. R. Co.*, 46 Tex. 280; *G. H. & S. A. R. Co. v.*

The retention of the servant in his employ with knowledge of his wrongful act does not, according to some adjudications, as matter of law, amount to a ratification of such act,²⁶ but it is

Donahoe, 56 id. 162; Houston, etc. R. Co. v. Cowser, 57 id. 293; Willis v. McNeill, id. 465; Ristine v. Blocker, 15 Colo. App. 224 (applying the rule to the act of 1889 authorizing exemplary damages); Kastner v. Long Island R. Co., 76 App. Div. (N. Y.) 323, and local cases cited.

Mr. Justice Gray said for the Supreme Court of the United States in *Lake Shore, etc. R. Co. v. Prentice*, 147 U. S. 101, 114, 37 L. ed. 97, 104. The law applicable to this case has been found nowhere better stated than in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, but excepted to an instruction that punitive damages were not to be allowed as against the principal unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed. This instruction was held to be right for the following reasons: "In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such wilfulness, recklessness or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment and teach

the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the case to implicate the principal and make him *particeps criminis* of his agent's act. No man should be punished for that of which he is not guilty. Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant." *Hagan v. Providence & W. R. Co.*, 3 R. I. 88, 91, 8 Am. Neg. Cas. 621.

In a case ruled in Hawaii, in 1891, the rule was said to be that the master is not liable for exemplary damages unless he participated in the act complained of. *Duncan v. Wilder S. Co.*, 8 Hawaii 411, 415.

The master's liability for exemplary damages may be influenced by the powers of the employee in some cases, as where an attachment is wrongfully sued out. *Emerson v. Skidmore*, 7 Tex. Civ. App. 641.

²⁶ *Toledo, St. L. & W. R. Co. v. Gordon*, 74 C. C. A. 289, 143 Fed. 95; *Southern R. Co. v. Grubbs*, 115 Va. 876; *McGown v. International & G. N. R. Co.*, 85 Tex. 289; *Dil-*

evidence from which the jury may find a ratification.²⁷ If the benefits of the act done by the servant are accepted with knowledge of the facts connected with it the act is ratified.²⁸ A ratification of the act of a servant of a corporation results from the inaction of its officers,²⁹ as where there is a failure to enforce the observance of its rules after knowledge of their violation.³⁰ A corporation advised by one of its superior agents of a tort committed on a stranger by a subordinate ratifies such tort by strenuously endeavoring to prove that the act done was not tortious, and, in defense of an action, making an unwarranted and violent attack on the conduct and character of the plaintiff.³¹ In answer to the contention that punitive damages were not recoverable against a corporation for libel, the court said: But the charges published were gathered and circulated by its agents in the course of their ordinary business, such agents acting within the scope of their authority and the duty intrusted to them.³² Neither express authorization nor approval is neces-

lingham v. Russell, 73 Tex. 47, 15 Am. St. 753, 3 L.R.A. 634.

The master may show that the servant was acquitted of the charge of having committed an assault. Peterson v. T. Co., *supra*.

In Missouri the retention of the servant after his wrongful act is a ratification of it. *Tanger v. Southwest Missouri E. R. Co.*, 85 Mo. App. 28; *Redd v. Missouri Pac. R. Co.*, 161 Mo. App. 522. But ratification is not a condition precedent to such liability in that state. *Haehl v. Wabash R. Co.*, 119 Mo. 325.

In Wisconsin, also, it is conclusive of ratification. *Pfister v. Milwaukee Free Press Co.*, 139 Wis. 627, citing local cases, some of which hold as stated; others that it is but evidence of ratification.

²⁷ *Foley v. Martin*, 142 Cal. 256, 100 Am. St. 123; *Cobb v. Simon*, 119 Wis. 597, 100 Am. St. 909; *Robinson v. Superior R. T. R. Co.*,

94 Wis. 345, 34 L.R.A. 205, 59 Am. St. 896; *Woodward v. Ragland*, 5 D. C. App. Cas. 220; *Bass v. Chicago, etc. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

²⁸ *Stowers F. Co. v. Brake*, 158 Ala. 639; *Carey v. Wolff*, 72 N. J. L. 510; *Avakian v. Noble*, 121 Cal. 216; *Kilpatrick v. Haley*, 13 C. C. A. 480, 66 Fed. 133; *G. H. & S. A. R. Co. v. Donahoe*, 56 Tex. 162; *Jacobs v. Crum*, 62 id. 401.

²⁹ *Pennsylvania I. W. Co. v. Vogt Mach. Co.*, 139 Ky. 497, 139 Am. St. 504, 8 L.R.A. (N.S.) 1023; *Kyles v. Southern R. Co.*, 147 N. C. 394, 16 L.R.A. (N.S.) 405; *San Antonio, etc. R. Co. v. Grier*, 20 Tex. Civ. App. 138.

³⁰ *Arnold v. Rhode Island Co.*, 28 R. I. 163.

³¹ *Pullman P. Car Co. v. Lawrence*, 74 Miss. 782.

³² *Times Pub. Co. v. Carlisle*, 36 C. C. A. 475, 487, 94 Fed. 762.

sary if the act of the servant was a part of, or was done pursuant to, a recognized business system adopted and authorized by the principal,³³ or was the act of an agent or manager to whose charge the general management of the particular business, in the conduct of which the act complained of was done, was entrusted.³⁴

In many states it is held that the master may be liable to punitive damages for the act of his servant when the servant is so liable and the aggravated wrong was done in the master's service, and under such circumstances that the master is liable for full compensation, though the particular act was not directly or impliedly authorized nor ratified. In Ohio it is held that a corporation may be subjected to exemplary and punitive damages for the tortious acts of its agents or servants, done within the scope of their employment, in all cases where natural persons, acting for themselves, if guilty of like acts, would be liable to such damages.³⁵ In a comparatively recent case in Maine this subject was very thoroughly considered where a railroad company was the master and defendant.³⁶ Walton, J., delivering the opinion of a majority of the court, said: "We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as schemes of

³³ *Stevens v. O'Neill*, 51 App. Div. 364, 169 N. Y. 375.

³⁴ *Rose v. Imperial E. Co.*, 127 App. Div. (N. Y.) 885. See sec. 1216.

³⁵ *Atlantic, etc. R. Co. v. Dunn*,

19 Ohio St. 162, 2 Am. Rep. 382; *Fulton v. Spear*, 13 Ohio N. P. (N. S.) 473.

³⁶ *Goddard v. Grand Trunk R.*, 57 Me. 202, 223.

public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation, or the malice of the servant and the malice of the corporation, or the punishment of the servant and the punishment of the corporation, is sheer nonsense, and only tends to confuse the mind and confound the judgment. Neither guilt, malice nor suffering is predicable of this ideal existence called a corporation. And yet, under cover of its name and authority, there is, in fact, as much wickedness, and as much that is deserving of punishment as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped or put in the stocks,—since, in fact, no corrective influence can be brought to bear upon them except that of pecuniary loss,—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants will, for a moment, reflect upon the absurdity of their own thoughts this anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggagemen can be secured who will not handle and smash trunks and band-boxes, as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences called corporations, and that is the pocket of the monied power that is concealed behind them; and, if that is reached, they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolvent servants better men will take their places, and not before.”³⁷

³⁷ *Hanson v. European, etc. R. Co.*, 62 Me. 84, 8 Am. Neg. Cas. 336.

§ 411. **Same subject.** In South Carolina, Tennessee, Indiana, Kansas, Pennsylvania, Arkansas, North Dakota, Alabama, New Hampshire, Mississippi, Kentucky, Maryland, Illinois, Minnesota, West Virginia, North Carolina, Nevada, Georgia and Missouri substantially the same view of the liability of corporations to punitive damages prevails.³⁸ In Ken-

³⁸ *Avondale Mills v. Bryant*, 10 Ala. App. 507; *Carlberg v. Spiegels House Furnishing Co.*, 178 Ill. App. 424; *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 48 L.R.A.(N.S.) 1; *Union R. Co. v. Carter*, 129 Tenn. 459; *Mandeville v. Courtright*, 142 Fed. 97, 6 L.R.A.(N.S.) 1003, 73 C. C. A. 321; *Miller-B. L. Co. v. Stewart*, 166 Ala. 657; *Little Rock R. & E. Co. v. Dobbins*, 78 Ark. 553; *Columbus R. Co. v. Woolfolk*, 128 Ga. 631, 119 Am. St. 404, 10 L.R.A.(N.S.) 1136; *Southern R. Co. v. Chambers*, 126 Ga. 404, 7 L.R.A.(N.S.) 926; *Baltimore, etc. R. Co. v. Davis*, 44 Ind. App. 375; *Duff v. Read*, 74 Kan. 730; *Louisville & N. R. Co. v. Sewell*, 142 Ky. 171; *Same v. Roth*, 130 Ky. 759; *Baltimore & O. R. Co. v. Strube*, 111 Md. 119; *Anderson v. International H. Co.*, 104 Minn. 49, 16 L.R.A.(N.S.) 440; *Illinois Cent. R. Co. v. Reid*, 93 Miss. 458, 17 L.R.A.(N.S.) 344; *Western U. Tel. Co. v. Hiller*, 93 Miss. 658; *McNamara v. St. Louis T. Co.*, 182 Mo. 676, 66 L.R.A. 486; *May v. Western U. Tel. Co.*, 157 N. C. 416, 37 L.R.A.(N.S.) 912; *Cincinnati, etc. R. v. Klute*, 7 Ohio C. C. (N. S.) 409, affirmed by the supreme court without opinion; *Calder v. Southern R. Co.*, 89 S. C. 287; *Gens v. Western U. Tel. Co.*, 86 S. C. 242; *Gadsden v. Catawba P. Co.*, 80 S. C. 239; *Carson v. Southern R.*, 68 S. C. 55; *Hunt v. Di Bacco*, 69 W. Va. 449; *Davis v. Chesapeake & O. R. Co.*, 61 W. Va. 246, 9 L.R.A.

(N.S.) 993; *East Tennessee, etc. R. Co. v. Fleetwood*, 90 Ga. 23, 8 Am. Neg. Cas. 143; *Wright v. Hollywood C. C.*, 112 Ga. 884, 52 L.R.A. 621; *Canfield v. Chicago, etc. R. Co.*, 59 Mo. App. 354; *Haehl v. Wabash R. Co.*, 119 Mo. 325; *Tanger v. Southwest Missouri E. R. Co.*, 85 Mo. App. 28; *Rucker v. Smoke*, 37 S. C. 377, 34 Am. St. 758; *Boyer v. Coren*, 92 Md. 366; *Mobile & O. R. Co. v. Scales*, 100 Ala. 368; *Pullman P. Car Co. v. Lawrence*, 74 Miss. 782; *Knoxville T. Co. v. Lane*, 103 Tenn. 376, 46 L.R.A. 549; *Highland Ave. & B. R. Co. v. Robinson*, 125 Ala. 483, and local cases cited; *Randolph v. Hannibal, etc. R. Co.*, 18 Mo. App. 609; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103, 8 Am. Neg. Cas. 207; *Louisville & N. R. Co. v. Ballard*, 88 Ky. 159, 8 Am. Neg. Cas. 294, 2 L.R.A. 694, 85 Ky. 307, 7 Am. St. 600; *Dawson v. L. & N. R. Co.*, 6 Ky. L. Rep. 668; *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571; *Fell v. Northern Pac. R. Co.*, 44 Fed. 248, 8 Am. Neg. Cas. 706, 7 Am. Neg. Cas. 604; *Philadelphia, etc. R. Co. v. Larkin*, 47 Md. 155, 28 Am. Rep. 442, 8 Am. Neg. Cas. 360; *Quinn v. South Carolina R. Co.*, 29 S. C. 381, 10 Am. Neg. Cas. 237, 1 L.R.A. 682 (modified as to the element of wilfulness in *Pickens v. South Carolina & G. R. Co.*, 54 S. C. 498, 506); *Hart v. Railroad Co.*, 33 S. C. 427, 10 L.R.A. 794 (a proprietary company was liable for ex-

tucky the rule of liability is carried further than in other jurisdictions. It is held that the men in charge of a railroad train

emplary damages because of the act of its lessee); *Louisville & N. R. Co. v. Garrett*, 8 Lea 438, 8 Am. Neg. Cas. 623, 41 Am. Rep. 640; *Haley v. Mobile O. & R. Co.*, 7 Baxter 243, 17 Am. Neg. Cas. 397; *Chicago, etc. R. Co. v. Scurr*, 57 Miss. 456; *Lake Shore, etc. R. v. Rosenzweig*, 113 Pa. 519 (compare *Philad. T. Co. v. Orbann*, 119 Pa. 37), 10 Am. Neg. Cas. 133; *Southern Exp. Co. v. Brown*, 67 Miss. 260, 19 Am. St. 306; *Henning v. Western U. Tel. Co.*, 41 Fed. 864; *Malloy v. Bennett*, 15 id. 371; *Beale v. Railway Co.*, 1 Dill. 568; *Citizens' St. R. v. Steen*, 42 Ark. 321; *Springer T. Co. v. Smith*, 16 Lea 498; *Alabama, etc. R. Co. v. Frazier*, 93 Ala. 45, 8 Am. Neg. Cas. 17; *Hopkins v. Atlantic, etc. R. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Vicksburg, etc. R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552, 12 Am. Neg. Cas. 187; *New Orleans, etc. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *New Orleans, etc. R. Co. v. Bailey*, 40 Miss. 395, 12 Am. Neg. Cas. 183; *Bowler v. Lane*, 3 Met. (Ky.) 311; *Louisville, etc. R. Co. v. Mahony*, 7 Bush 235; *Baltimore, etc. R. Co. v. Blocher*, 27 Md. 227, 8 Am. Neg. Cas. 341; *Jacobs v. Louisville, etc. R. Co.*, 10 Bush 263, 15 Am. Neg. Cas. 168; *Perkins v. Missouri, etc. R. Co.*, 55 Mo. 201; *Travers v. Kansas Pac. R. Co.*, 63 Mo. 421; *Chicago, etc. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 353, 14 Am. Neg. Cas. 248; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 459; *New Orleans, etc. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689. See *Quigley v. Central Pac. R. Co.*, 11 Nev. 364-5, 21 Am. Rep. 757.

In Maryland an exception is made as to malicious prosecutions. *Beiswanger v. American B. & T. Co.*, 98 Md. 287. Assault and battery are not excepted. *Deck v. Baltimore & O. R. Co.*, 100 Md. 168, 108 Am. St. 399.

In *Lake Shore, etc. R. Co. v. Prentice*, 147 U. S. 101, 37 L. ed. 97, 8 Am. Neg. Cas. 703, the Illinois court is classed among those which oppose punitive liability against corporations if the servant's acts were not authorized or ratified, and three decisions are cited as sustaining that doctrine. The Mississippi court has had occasion to determine what the law of Illinois is on this point. It has said: "A critical examination of these cases will demonstrate that the supreme court of the United States not only misconceived the views of the Illinois court in those cases, but overlooked the many other Illinois cases which distinctly held the contrary. The cases cited by the supreme court in support of its holding that authorization or ratification by the principal of the wrongful act of the agent or servant is a prerequisite to recovery of punitive damages are *Grand v. Van Vleck*, 69 Ill. 478; *Becker v. Dupree*, 75 Ill. 167, and *Rosenkrans v. Barker*, 115 Ill. 331, 56 Am. Rep. 169, and in our opinion are not in point and do not support the position of the United States supreme court. * * * They were all cases in which punitive damages were sought to be recovered against a private person on account of the act of an agent charged with a single specific duty in cases where the agent, without any authority, did that which he was not directed

act for the company; its entire power, *pro hac vice*, is vested in them; "as to passengers *in transitu* they should be considered as the corporation itself. It is, therefore, as responsible for their acts in the conduct of the train and the treatment of the passengers as the officers of the train would be for themselves if they were the owners of it. Public interests require this rule. They also demand that the corporation should be, and it is, liable for exemplary damages in case of an injury to a passenger resulting from a violation of duty by one of its employees in the conduct of the train, if it be accompanied by oppression, fraud, malice, insult or other wilful misconduct evincing a reckless disregard of consequences.³⁹ As to female passengers the rule goes still further. Their contract of passage embraces an implied stipulation that the corporation will protect them against general obscenity, immodest conduct or wanton approach."⁴⁰ This rule does not extend to "indecorous conduct" on the part of an employee to a female passenger.⁴¹ On a second appeal the allowance of exemplary damages, on the ground that the employees were insulting "either in words, tone or manner," was approved.⁴² In Mississippi it is the duty of

to do." Reference is made to *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455, 29 Am. Rep. 43, and *Toledo, etc. R. Co. v. Hannon*, 75 Ill. 298, as holding the contrary rule. *Pullman P. Car. Co. v. Lawrence*, 74 Miss. 782.

Under the "Adair Liquor Law" exemplary damages may be recovered from a dealer whose clerk has violated it in contravention of his express instructions. *Kear v. Garrison*, 13 Ohio C. C. 447; *Schneider v. Hosier*, 20 Ohio St. 98.

A statute which provides that when a personal injury is received by a servant or employee in the service or business of the master or employer, the latter is liable to answer in damages to the former as if he were a stranger, and not engaged in such service or employment, includes punitive damages if

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the injury does not produce death. *Southern R. Co. v. Bunt*, 131 Ala. 591.

³⁹ *Memphis & C. P. Co. v. Nagel*, 97 Ky. 9; *Louisville & N. R. Co. v. Kelly*, 100 Ky. 421, 1 Am. Neg. Rep. 249; *Dawson v. L. & N. R. Co.*, 6 Ky. L. Rep. 668; *Hughes v. Louisville & N. R. Co.*, 104 Ky. 768. See *Louisville & N. R. Co. v. Kingman*, 18 Ky. L. Rep. 82. See, as to the rule in case of libel, *Pennsylvania I. W. Co. v. Vogt Mach. Co.*, 139 Ky. 497, 139 Am. St. 504, 8 L.R.A. (N.S.) 1023.

⁴⁰ *Louisville & N. R. Co. v. Ballard* 85 Ky. 307.

⁴¹ *Id.*

⁴² *Louisville & N. R. Co. v. Ballard*, 88 Ky. 159, 2 L.R.A. 694.

In a case in the superior court a railroad conductor refused to carry

the conductor of a passenger train to preserve order thereon and protect the passengers from insult and injury. If he fails to do this the company is liable for an injury to a passenger; but it is not answerable in punitive damages for weak and inefficient conduct on his part, though it is liable therefor if the conductor wilfully fails or refuses to act or manifests conduct which indicates that his sympathy is with the wrong-doers.⁴³ Wallace, J., said on a motion for a new trial in a libel case in which the plaintiff was given a verdict for \$20,000, the actual damages being small: "It cannot be doubted that when the owner of a newspaper delegates to others the power to edit it and publish it and manage its affairs generally, he is responsible for all the acts of omission and commission of his employees in this behalf, and cannot shirk liability for their misconduct because he has abandoned to others that supervision which he might have exercised himself."⁴⁴ Ryan, C. J., speaking for the court in Wisconsin, on the right of railroad companies to adopt and enforce reasonable regulations for the safety and convenience of passengers as well as their own security, vindicates also the soundness of the principle that the company may incur, through its agents, a liability for vindictive damages. Referring to the officers in charge of a passenger train, he says: "These officers may be guilty of acts of arbitrary oppression, beyond endurance, toward

a female passenger to the station to which she had bought a ticket, which had been taken up by another conductor, she being made to pay the additional fare demanded. She was compelled to leave the train and spend the night in a depot, where she was insulted by an employee of the defendant and others. An instruction permitting the award of punitive damages if the jury believed that any of the defendant's agents or employees, on duty as such, were insulting in conduct or manner toward the plaintiff while she was in or about the train or depot, or that the defendant wilfully exposed the plaintiff to insults

or wanton approaches of other persons in its depot, was approved, regardless of the existence of malice on the part of either of the conductors. *Louisville & N. R. Co. v. Grundy*, 12 Ky. L. Rep. 293.

The master is liable in exemplary damages for injuries inflicted by the reckless or wanton negligence of his servant while in the discharge of his duties. *City T. Co. v. Robinson*, 12 Ky. L. Rep. 555 (Ky. Super. Ct.).

⁴³ *New Orleans, etc. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689.

⁴⁴ *Malloy v. Bennett*, 15 Fed. 371.

passengers, which might warrant resistance. But we feel warranted by principle and authority to hold that in the enforcement of order on the train, and in the execution of reasonable regulations for the safety and comfort of the passengers, and for the security of the train, the authority of these officers, exercised upon the responsibility of the corporations, must be obeyed by the passengers, and that forcible resistance cannot be tolerated. They act on the peril of the corporation, and their own. Indeed, as that fictitious entity, the corporation, can act only through natural persons, its officers and servants, and as it of necessity commits its trains absolutely to the charge of officers of its own appointment, and passengers of necessity commit to them their safety and comfort *in transitu*, under conditions of such peril and subordination, we are disposed to hold that the whole power and authority of the corporation, *pro hac vice*, is vested in these officers; and that as to passengers on board they are to be considered as the corporation itself; and that the consequent authority and responsibility are not generally to be straitened or impaired by any arrangement between the corporation and the officers; the corporation being responsible for the acts of the officers in the conduct and government of the train, to the passengers traveling by it, as the officers would be for themselves, if they were themselves the owners of the road and train. We consider this rule essential to public convenience and safety and sanctioned by great weight of authority.”⁴⁵ In Georgia if a street-car conductor uses insult-

⁴⁵ Bass v. Chicago, etc. R. Co., 36 Wis. 463, 8 Am. Neg. Cas. 663, citing Commonwealth v. Power, 7 Metc. (Mass.) 596; Day v. Owen, 5 Mich. 520, 72 Am. Dec. 62; Jencks v. Coleman, 2 Sumn. 221; Pittsburgh, etc. R. Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224; Philadelphia, etc. R. Co. v. Derby, 14 How. 468, 10 Am. Neg. Cas. 602, 14 L. ed. 502; Chamberlain v. Chandler, 3 Mason 242; Nieto v. Clark, 1 Cliff. 145; Stephen v. Smith, 29 Vt. 160; Moore v. Fitchburg R. Co., 4 Gray

465, 8 Am. Neg. Cas. 416, 64 Am. Dec. 83; Vinton v. Middlesex R. Co., 11 Allen 304, 87 Am. Dec. 314; Coleman v. New York, etc. R. Co., 106 Mass. 160, 8 Am. Neg. Cas. 375; Sullivan v. P. & R. R. Co., 30 Pa. 324, 72 Am. Dec. 698, 10 Am. Neg. Cas. 180; Pennsylvania R. Co. v. Vandiver, 42 Pa. 365; Sherley v. Billings, 8 Bush 147, 8 Am. Rep. 451; Higgins v. Watervliet T. & R. Co., 46 N. Y. 23, 8 Am. Neg. Cas. 552; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277; Chicago, etc. R.

ing language and is "very impolite and gruff" to a passenger whom he ejects, a charge upon the question of punitive damages is proper.⁴⁶ In South Carolina the following language is used: When one person invests another with authority to act as his agent for a specified purpose, all the acts done by the agent in pursuance or within the scope of his agency are and should be regarded as really the acts of the principal. If the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him.⁴⁷ If the officers wielding the whole executive power of the corporation participated in and directed all that was planned and done their malicious, wanton or oppressive intent may be treated as the intent of the corporation, for which it must answer in exemplary damages.⁴⁸ In Wyoming the principal's knowledge of a trespass during its continuance by his servant is cause for the recovery of punitive damages.⁴⁹ In Pennsylvania it has been said that too great caution cannot be exercised in permitting the recovery of such damages for unauthorized or unapproved reckless or wilful acts of a servant; they may be recovered if such acts were done by the direction of the defendant's superintendent after notice and knowledge of the damage being done the plaintiff's property.⁵⁰

Co. v. Parks, 18 Ill. 460, 8 Am. Neg. Cas. 148; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; 2 Redf. 220, 230.

⁴⁶ *Atlanta Con. St. R. Co. v. Keeny*, 99 Ga. 266, 33 L.R.A. 824.

⁴⁷ *Rucker v. Smoke*, 37 S. C. 377, 34 Am. St. 758; *Skipper v. Clifton Mfg. Co.*, 58 S. C. 143; *Fields v. Lancaster C. Mills*, 77 S. C. 546, 122 Am. St. 593, 11 L.R.A.(N.S.) 822; *Reeves v. Southern R.*, 68 S. C. 89.

⁴⁸ *Bingham v. Lipman*, 40 Ore. 363, 371; *Lowe v. Yolo County C. W. Co.*, 157 Cal. 503; *Bishop v. Readsboro Mfg. Co.*, 85 Vt. 141, 36 L.R.A.(N.S.) 1171; *Jackson v.*

American Tel. & T. Co., 139 N. C. 347, 70 L.R.A. 738; *Brown v. Electric L. Co.*, 138 N. C. 533, 107 Am. St. 554, 60 L.R.A. 631.

An act done or authorized or commanded by an officer so high in authority as to be fairly considered executive in character must be answered for by the corporation he represents on a theory akin to that of general agency. *Wendelken v. New York, etc. R. Co.* (N. J. L.) 86 Atl. 377.

⁴⁹ *Henderson v. Coleman*, 19 Wyo. 183.

⁵⁰ *Funk v. Kerbaugh*, 222 Pa. 18, 22 L.R.A.(N.S.) 296.

§ 412. **Liability of officers, municipalities, estates, voluntary societies and sureties.** Exemplary damages may be recovered against public officers if the facts warrant,⁵¹ as where a malicious trespass has been committed under color of process,⁵² a *mandamus* disobeyed,⁵³ a levy made upon property for taxes after a tender thereof,⁵⁴ or for willingly and knowingly allowing themselves to become the tools of another, whose object was apparently malicious, and carrying out his wishes in a high-handed and oppressive manner.⁵⁵ In an early Pennsylvania case they were awarded against a sheriff for the acts of his deputy, though the latter were not recognized or adopted.⁵⁶ This is regarded as of doubtful propriety, and is not recognized everywhere.⁵⁷ They have been denied against officers who unreasonably, but not corruptly, refused to permit an elector to vote,⁵⁸ but have been allowed against officers who intentionally, maliciously and repeatedly interfered with the exercise of the plaintiff's personal rights and privileges under the federal constitution, the wrong and injury done not being compensable by a money standard.⁵⁹ In New Brunswick punitive damages have been sustained against the counselors of a municipality for maliciously dismissing a person from his office.⁶⁰ Municipal corporations cannot be subjected to vindictive damages,⁶¹ unless

⁵¹ *Crawford v. Eidman*, 129 Fed. 992; *Railey v. Hopkins* (Tex. Civ. App.) 131 S. W. 624; *Parker v. Shackleford*, 61 Mo. 68; *Friedly v. Giddings*, 119 Fed. 438; *Ewton v. McCracken*, 9 Ala. App. 619, sustaining a judgment for punitive damages against a levying officer for intentional injury to plaintiff's goods seized under process against another.

⁵² *Nightingale v. Scannell*, 18 Cal. 315; *Louder v. Hinson*, 4 Jones 369; *Anonymous, Minor*, 52, 12 Am. Dec. 31; *Rodgers v. Ferguson*, 36 Tex. 544.

⁵³ *Wilson v. Vaughn*, 23 Fed. 229.

⁵⁴ *Willis v. Miller*, 29 Fed. 238; *Faroux v. Cornwell*, 40 Tex. Civ. App. 529.

Selling the exempt property of a debtor with knowledge of the fact and in violation of a statute warrants the implication of malice. *Johnson v. Collier*, 161 Ala. 204.

⁵⁵ *Giddings v. Freedley*, 128 Fed. 355, 63 C. C. A. 85, 65 L.R.A. 327.

⁵⁶ *Hazard v. Israel*, 1 Bin. 240, 2 Am. Dec. 438.

⁵⁷ *Foley v. Martin*, 142 Cal. 256, 100 Am. St. 123.

⁵⁸ *Pierce v. Getchell*, 76 Me. 216.

⁵⁹ *Scott v. Donald*, 165 U. S. 58, 89, 41 L. ed. 632, 639.

⁶⁰ *Gallagher v. Westmoreland*, 31 N. B. 194.

⁶¹ *Mayor v. Lewis*, 92 Ala. 352, 357 (it seems); *Bennett v. Marion*, 102 Iowa 425, 63 Am. St. 454, quoting the text; *Hunt v. Boonville*, 65

they, in some legal way, either authorize or subsequently approve the wrongful act or neglect. The trustees of a municipality can only act by a majority vote. They are the business managers of the corporation. But after once elected, the voters and taxpayers on whom such damages must fall if awarded, cannot, during their term of office, discharge them, and usually cannot control their action within the scope of their office. Hence there is no liability for exemplary damages for mere neglect,⁶² nor for trespass under ordinary circumstances.⁶³ Such damages are not recoverable from the estate, or against the personal representatives of a deceased wrong-doer,⁶⁴ when action is brought after the death of the person wronged, in the absence of a statute. Sureties on the indemnifying bond of an attaching officer are not liable for punitive damages.⁶⁵ But under some statutes sureties on the bonds of liquor sellers are liable therefor,⁶⁶ regardless of the intent of their principal to violate the law.⁶⁷ A voluntary organization which secures the discharge of a workman by threats and intimidation is liable for exemplary damages.⁶⁸

Mo. 620, 27 Am. Rep. 299 (it seems); *Wilson v. Wheeling*, 19 W. Va. 323, 350, 42 Am. Rep. 780; *Chicago v. Langlass*, 52 Ill. 259, 4 Am. Rep. 603; *Chicago v. Kelly*, 69 Ill. 475; *Larson v. Grand Forks*, 3 Dak. 307; *Costich v. Rochester*, 68 App. Div. (N. Y.) 623. See *St. John's G. Co. v. San Juan*, 1 Porto Rico Fed. 160.

⁶² *Willett v. St. Albans*, 69 Vt. 330. Liability for such damages has been adjudged in *McGary v. Lafayette*, 4 La. Ann. 440.

⁶³ *Ostrom v. San Antonio*, 33 Tex. Civ. App. 683.

⁶⁴ *Meighan v. Pennsylvania T.*

Co., 165 Ala. 591; *Morris v. Duncan*, 126 Ga. 467, 115 Am. St. 105; *Johnson v. Levy*, 122 La. 118, 118 La. 447, 9 L.R.A. (N.S.) 1020, 43 So. 46, 118 Am. St. 378; *Wallace v. McPherson*, 139 N. C. 297; *Sheik v. Hobson*, 64 Iowa 146; *Wright v. Donnell*, 34 Tex. 291; *Ripley v. Miller*, 11 Ired. 247.

⁶⁵ *Constantine v. Rowland*, 147 Iowa 142; §§ 723, 390, note.

⁶⁶ *Sisson v. Lampert*, 159 Mich. 509.

⁶⁷ *Scahill v. Aetna Ind. Co.*, 157 Mich. 310.

⁶⁸ *Wyeman v. Deady*, 79 Conn. 414, 118 Am. St. 152.

CHAPTER X.

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SECTION 1.

PLEADING.

§ 413. Plaintiff must state a case which entitles him to damages. It is, of course, of paramount importance that a plaintiff suing for damages should state such a case as entitles

him thereto.¹ It is enough, on demurrer, that he states a case which gives him at least a right to nominal damages.² A party cannot by a claim of damages give himself a right to recover more than the facts stated by him will warrant.³ Thus, a counter-claim in an action on a breach of contract, where the recovery was measured by the loss of profits, an allegation as to the contract price, the breach of the contract and the damages sustained is not a good allegation that the profits would equal the alleged damages or that there would have been any profits, because the expense of performance might have exceeded the sum laid as damages.⁴ In an action to recover for the conversion of stock there cannot be a recovery of the dividends accrued thereon unless a demand of their payment is alleged and their conversion is set up as a separate cause of action.⁵ But when in an action sounding in damages the plaintiff claims more than on the face of his declaration appears to be due it will not vitiate

¹ *Louisville & N. R. Co. v. Cody*, 119 Ga. 371; *Sullivan Mach. Co. v. Breeden*, 40 Ind. App. 631; *Niebuhr v. Sonn*, 29 App. Div. (N. Y.) 360; *Goldman v. Gainey*, 67 App. Div. (N. Y.) 330; *Carron v. Clark*, 14 Mont. 301.

Even upon a hearing in damages after a default a judgment for substantial damages cannot be based upon the failure of duty upon the part of the defendant not averred in the complaint. *Seltzer v. Davenport F. A. Co.*, 74 Conn. 46. See § 429.

Compensatory damages may not be recovered under a complaint alleging only facts showing the right to recover punitive damages. *Aaron v. Southern R.*, 68 S. C. 98.

It must be alleged that damages have been sustained. *Harndon v. Stultz*, 124 Iowa 734.

² *Moody v. Pierano*, 4 Cal. App. 411; *Grau v. Grau*, 37 Ind. App. 635; *Gause v. Commonwealth T. Co.*, 111 App. Div. (N. Y.) 530; *Coppola*

v. Kraushaar, 102 App. Div. (N. Y.) 306; *Philip v. Durkee*, 108 Cal. 300; *Parker v. Griswold*, 19 Conn. 288; *Cowley v. Davidson*, 10 Minn. 392; *Wilson v. Clarke*, 20 Minn. 367; *Hood v. Palm*, 8 Pa. 237. See *Gould v. Allen*, 1 Wend. 182; *Rider v. Pond*, 28 Barb. 447; *Thompson v. Gould*, 16 Abb. Pr. (N. S.) 424, 19 N. Y. 262.

Under a declaration charging positive malfeasance there cannot be a recovery of damages upon proof of non-feasance only. *Macumber v. White River L. & B. Co.*, 52 Mich. 195.

³ *Woodbridge I. Co. v. Semon I. C. Co.*, 81 Conn. 479; *Wainwright v. Weske*, 82 Cal. 193; *Murphy v. Evans*, 11 Ind. 517; *Buford v. Graden*, 5 Ala. App. 421.

⁴ *Singer Mfg. Co. v. Potts*, 59 Minn. 240; *Kentucky T. Ass'n v. Ashby*, 9 Ky. L. Rep. 109; *Hagins v. Spencer*, 147 Ky. 184.

⁵ *Ralston v. Bank*, 112 Cal. 208

a verdict; for the amount of the damages, being ascertained by the jury, it is presumed that they were assessed according to the proof.⁶ In an orderly statement of a case brought for such redress there should be a formal allegation of damage, though if the facts alleged are such that the law draws the implication of damage the absence of a formal allegation of injury does not render the complaint insufficient.⁷

§ 414. *The ad damnum.* The *ad damnum* is the logical and legal sequence of the case stated; but as damages can only be claimed as the legal result of the facts alleged when proved and the *ad damnum* is only the legal conclusion therefrom, it is not of substance, and if omitted or left blank the judgment will nevertheless be sustained.⁸ Where the declaration contains several counts, concluding with the common counts, and no damages are laid in a particular count the court will intend the general averment of damages at the close of the common counts

⁶ *Kerry v. Pacific M. Co.*, 121 Cal. 564, 66 Am. St. 65; *Van Rensselaer v. Platner*, 2 Johns. Cas. 17.

⁷ *Moore v. Linneman*, 143 Ky. 231; *Green Bay & M. C. Co. v. Kaukauna W. P. Co.*, 112 Wis. 323, 62 L.R.A. 579; *Luessen v. Oshkosh E. L. & P. Co.*, 109 Wis. 94. See *Pacific B. Co. v. Oregon Hassam P. Co.*, 67 Ore. 576.

A complaint which avers a legal wrong and a resulting pecuniary loss is good though it does not demand the precise damage to which the plaintiff is entitled or mistakes the correct rule of damages. *Colrick v. Swinburne*, 105 N. Y. 503; *Finkelstein v. Selwitz*, 79 N. Y. Misc. 28.

⁸ *Mattingly v. Darwin*, 23 Ill. 618; *Galea, etc. R. Co. v. Appleby*, 28 Ill. 283; *Hargrave v. Penrod*, 1 Ill. 401, 12 Am. Dec. 201; *Bank v. Guttschlick*, 14 Pet. 19, 10 L. ed. 335; *Proctor v. Crozier*, 6 B. Mon. 268; *Craghill v. Page*, 2 Hen. &

Munf. 446; *Stephens v. White*, 2 Wash. (Va.) 260. Held to be necessary and matter of substance in *Brownson v. Wallace*, 4 Blatchf. 465.

In *Bumpass v. Webb*, 3 Ala. 109, it was held that though the declaration omit to lay damages, yet, if they are laid in the writ, the declaration is unobjectionable. In such a case, the declaration being amendable in the trial court on error, it will be considered as amended. Where the cause of action is a legal liability, certain and defined, as a promissory note, the damages being the statutory rate of interest, they need not be laid either in the writ or declaration. *Diggs v. Norris*, 3 Hen. & Munf. 268; *Palmer v. Euback*, id. 502; *Kennedy v. Woods*, 3 Bibb 322. See *Snow v. Grace*, 25 Ark. 570; *Henrie v. Sweasey*, 5 Blackf. 273; *Gilligan v. New York, etc. R. Co.*, 1 E. D. Smith, 453, 8 Am. Neg. Cas. 555.

to apply to it.⁹ The general damage laid at the conclusion of a declaration in the ordinary form is distributable over the several counts in it.¹⁰ But if there is a general averment of damages to the extent of a sum stated and the complaint is verified the general *ad damnum* clause will not control such averment.¹¹ The *ad damnum* is a sufficient allegation of general damage in actions on contract if the existence of a liability is shown by previous averments.¹²

§ 415. Demand of damages in code complaint. Under the code the claim of damages is essential when judgment is taken by default; such a judgment is erroneous if no amount of, nor a prayer for, damages be contained in the complaint, notwithstanding the latter states facts sufficient to sustain a judgment for damages.¹³ The code requires that the complaint shall contain a demand for the relief which the plaintiff claims; but compliance is principally important in cases where there is failure to answer, for the court is authorized to grant any relief consistent with the case made by the complaint and embraced within the issue.¹⁴ The controlling part of the complaint, as to the amount of damages, is the prayer for judgment.¹⁵ If the complaint in an action on a contract states facts which in law constitutes plaintiff's damages and their measure, it is not insufficient because it does not specifically allege damages.¹⁶

⁹ *Adams v. McMillan*, 7 Port. 73.

¹⁰ *Gell v. Burgess*, 7 C. B. 16; *Hoffman v. Dickinson*, 31 W. Va. 142, 17 Am. Neg. Cas. 859.

¹¹ *Kerry v. Pacific M. Co.*, 121 Cal. 564, 66 Am. St. 65.

¹² *Sherlag v. Kelley*, 200 Mass. 232, 128 Am. St. 414, 19 L.R.A. (N.S.) 633.

¹³ *Pittsburgh C. M. Co. v. Greenwood*, 39 Cal. 71; *Raun v. Reynolds*, 11 Cal. 14; *Gage v. Rogers*, 20 Cal. 91; *Lamping v. Hyatt*, 27 Cal. 102; *Gautier v. English*, 29 Cal. 165; *Parrott v. Den*, 34 Cal. 79; *Bond v. Pacheco*, 30 Cal. 530; *Simonson v. Blake*, 12 Abb. Pr. 331; *Walton v. Walton*, 32 Barb. 203; *Andrews*

v. Monilaws, 8 Hun 65; *Prince v. Lamb*, 128 Cal. 120, 125.

¹⁴ *Smith v. Havens*, 6 Colo. 297; *Nevada County & S. C. Co. v. Kidd*, 37 Cal. 282; *Acheson v. Western U. Tel. Co.*, 96 Cal. 641.

¹⁵ *Ketchum v. Van Dusen*, 11 App. Div. (N. Y.) 332; *Schultz v. Third Ave. R. Co.*, 46 N. Y. Super. Ct. 211; *Riser v. Walton*, 78 Cal. 490; *Weaver v. Mississippi & R. R. B. Co.*, 28 Minn. 542.

¹⁶ *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218; *Bank v. Port Townsend*, 16 Wash. 450, quoting the text; *Ford v. Fargason*, 120 Ga. 708.

And so in an action *ex delicto*.¹⁷ It is not material that the plaintiff does not demand the precise damages to which he is entitled, or errs as to the true rule of damages he alleges; the recovery will be adjusted upon the proper basis.¹⁸ Present and prospective damages resulting from the total breach of an executory contract for the sale of chattels may be recovered under a general allegation of damage. But if there is no such allegation, it being alleged that there was a failure to deliver a particular chattel, or any other specific breach of the contract, damages being asked therefor, the recovery cannot cover any other breach.¹⁹

§ 416. Effect of not answering allegation of damage. The statement of the amount of damages is in some jurisdictions deemed an issuable fact;²⁰ in others it is not.²¹ In the common-law action of trespass, where the defendant fails to support by proof a special plea in bar, a trespass or cause of action of the general nature set forth in the declaration is admitted; but the trespasses precisely as laid in all their particulars and variety are not admitted. The failure of the defendant to prove his plea

¹⁷ Fitzpatrick v. Paulding, 131 Ga. 693. See § 413.

¹⁸ Colrick v. Swinburne, 105 N. Y. 503; Mitchell v. Thorne, 134 N. Y. 536, 30 Am. St. 699.

¹⁹ Rathbone v. Wheelihan, 82 Minn. 30, citing *Bowe v. Minnesota M. Co.*, 44 Minn. 460; *Missouri, etc. R. Co. v. Byas*, 9 Tex. Civ. App. 572; *Stewart v. Baltimore*, 33 W. Va. 88.

²⁰ *Tucker v. Parks*, 7 Colo. 62; *Cole v. Hoeburg*, 36 Kan. 263, explaining *Union Pac. R. Co. v. Pillsbury*, 29 Kan. 652; *Patterson v. Ely*, 19 Cal. 28; *Dimick v. Campbell*, 31 Cal. 238; *Carlyon v. Lannon*, 4 Nev. 156; *White v. Northwest S. Co.*, 5 Ore. 99; *Huston v. Twin, etc. Road Co.*, 45 Cal. 550.

²¹ *Byrne v. Independent School Dist.*, 139 Iowa 618; *Bigham v. Wabash-P. T. R. Co.*, 223 Pa. 106;

Newman v. Otto, 4 Sandf. 668; *Jenkins v. Steanka*, 19 Wis. 126, 88 Am. Dec. 675; *Bartelt v. Braunsdorf*, 57 Wis. 1; *Thompson v. Lumley*, 7 Daly 74; *McLees v. Felt*, 11 Ind. 218; *Raymond v. Traffarn*, 12 Abb. Pr. 52; *Connoss v. Meir*, 2 E. D. Smith 314; *McKensie v. Farrell*, 4 Bosw. 192; *Woodruff v. Cork*, 25 Barb. 505; *Vanderslice v. Newton*, 4 N. Y. 130; *Howell v. Bennett*, 74 Hun 555.

These cases turn upon the meaning given to the words "material allegation" in the codes. In states where these words are not defined by the code the courts usually give them their common-law meaning. But where they are defined to mean an allegation essential to the claim or defense, as they are in some codes, their common-law meaning is extended.

entitles the plaintiff to nominal damages, but nothing beyond, until he shows by proof a claim to more.²²

§ 417. *Ad damnum* limits recovery; erroneous claim of damages. The general rule is that the *ad damnum* limits the plaintiff's recovery. He cannot take judgment for a greater sum. If he does it is error²³ unless the excess be merely for in-

²² Rich v. Rich, 16 Wend. 663.

Under a replication *de injuria* to a plea of *son assault demesne* the defendant cannot give evidence in mitigation of damages to contradict the averment of aggravated injuries laid in the *narr*; he is confined to proving an excuse for the battery. He was not entitled for this reason to show in mitigation that he had been indicted, convicted and punished for the same battery. The general rule in regard to such a replication is, that, as its puts in issue only the matter alleged in the plea, nothing can be given in evidence under it which is beyond and out of the plea. Frederick v. Gilbert, 8 Pa. 454; 2 Greenlf. Ev., § 96.

An assessment of damages by jury is necessary at common law though those alleged in the declaration be not denied. Thompson v. Thompson, 7 B. Mon. 421; Wells v. Commonwealth, 8 id. 459.

²³ Weller v. Missouri Lumber & Mining Co., 176 Mo. App. 243; Brought v. Cherokee Nation, 129 Fed. 192, 63 C. C. A. 350; Birmingham R. L. & P. Co. v. Lee, 153 Ala. 386; Rexford v. Bleckley, 131 Ga. 678; Kytile v. Kytile, 128 Ga. 387; Kenyon v. Brightwell, 120 Ga. 606; Deputy v. Dollarhide, 42 Ind. App. 554; Berkey v. Lefbure, 125 Iowa 76; Blue Grass T. Co. v. Ingles, 140 Ky. 488; South Covington & C. R. Co. v. Raymer, 132 Ky. 187, 136 Am. St. 177; Radtke v. St. Louis B. & B. Co., 229 Mo. 1; Smoot

v. Kansas City, 194 Mo. 513; Moore v. St. Louis, etc. R. Co., 117 Mo. App. 384; South Omaha v. Ruthjen, 71 Neb. 545; Cumming v. Lawrence, 87 S. C. 457; Ray v. Southern R., 77 S. C. 103; San Antonio, etc. R. Co. v. Addison, 96 Tex. 61; First Nat. Bank v. Cleland, 36 Tex. Civ. App. 478; Denver, etc. R. Co. v. Howe, 49 Colo. 256 (cross-petition in condemnation proceedings); In re Oldfield's Est., 158 Iowa 98; Frankhouser v. Cannon, 50 Kan. 621; Brook v. Bayless, 6 Okla. 568; Gulf, etc. R. Co. v. Simonton, 2 Tex. Civ. App. 558; Tyner v. Hays, 37 Ark. 599; Burke v. Koch, 75 Cal. 356; Clark v. San Francisco, etc. R. Co., 142 Cal. 614; Carre v. Massil, 113 La. 608; Enoch v. Mining & P. Co., 23 W. Va. 314; Vanbuskirk v. Quincy, etc. R. Co., 131 Mo. App. 357; Howard v. Gunnison, 12 Ohio Dec. 684; Beranek v. Beranek, 113 Wis. 272; Cooper v. Livingston, 19 Fla. 684; Stafford v. Oskaloosa, 57 Iowa 748; Flournoy v. Childress, Minor 93; Derrick v. Jones, 1 Stew. 18; McWhorter v. Sayre, 2 id. 225; Hall v. Hall, 42 Ind. 585; White v. Cannada, 25 Ark. 41; Annis v. Upton, 66 Barb. 370; Robinett v. Morris, Hardin 93; Davenport v. Bradley, 4 Conn. 309; Henderson v. Staintor, Hardin 118; Moore v. Texas, 1 Tex. 563; McLellan v. Crofton, 6 Me. 307; Palmer v. Reynolds, 3 Cal. 396; Dox. v. Dey, 3 Wend. 356; Snow v. Grace, 25 Ark. 570; Cheveley v. Morris, 2 W. Bl. 1300;

terest which accrued pending the suit and the objection is first

McIntire v. Clark, 7 Wend. 330; Lake v. Merrill, 10 N. J. L. 288; Herbert v. Hardenberg, id. 222; Hawk v. Anderson, 9 id. 319; Cortelyou v. Cortelyou, 2 id. 318; Daniel v. Park, id. 1004; Rowan v. Lee, 3 J. J. Marsh. 97; Edwards v. Weister, 2 A. K. Marsh. 382; Harris v. Jaffray, 3 Harr. & J. 543; Grist v. Hodges, 3 Dev. 203; Dinsmore v. Austill, Minor, 89; Coursey v. Covington, 5 Harr. & J. 45; Wilde v. Crow, 10 Up. Can. C. P. 406.

In *Calumet I. & S. Co. v. Martin*, 115 Ill. 358, 374, 14 Am. Neg. Cas. 258, the court instructed the jury not to assess plaintiff's damages above the amount claimed. In answer to an objection thereto it was said: "It does not appear from the amount of the verdict or otherwise that this instruction affected the action of the jury. While it is certainly censurable it will not justify a reversal of the judgment." This was an action of negligence. In an action of *assumpsit* the rule is the same in Illinois as elsewhere. *Kelley v. Third Nat. Bank*, 64 Ill. 541.

In Texas if actual and exemplary damages are claimed and the facts show the latter are not recoverable, the judgment will not be reversed because it awards as actual damages an amount in excess of the sum prayed for as such. *International & G. N. R. Co. v. Gordon*, 72 Tex. 44. The allowance of a larger sum than was demanded as exemplary damages is error. *Gregory v. Coleman*, 3 Tex. Civ. App. 166.

In an action of trespass to try title to land the plaintiff is allowed to recover damages beyond the sum laid in the writ and declaration. *McWhorter v. Standifer*, 2 Port

519; *Graves v. Dodson*, 8 Yerg. 161; *Malone v. Donnally*, Minor 12; *Boddie v. Ely*, 3 Stew. 182.

In debt the amount stated in the caption is the debt demanded. *Hampton v. Barr*, 3 Dana 578. The *ad damnum* merely covers the interest (*Hoff v. Hutchinson*, 14 How. 486); and where the damages recovered are more than the amount laid in the declaration it is not error. *Stuart v. Davidson*, Peck 203; *Van Rensselaer v. Platner*, 2 Johns. Cas. 18; *Carver v. Adams*, 40 Vt. 552; *Thompson v. French*, 10 Yerg. 452. See *Friedley v. Schultz*, 9 S. & R. 156, 11 Am. Dec. 691. In debt on a bond damages need not be laid in the declaration or found by the jury. *Taylor v. McLean*, 3 Call 481; *Payne v. Ellzey*, 2 Wash. (Va.) 185; *Allen v. Smith*, 12 N. J. L. 159.

Where the court has jurisdiction of the parties the *ad damnum* may be amended by increasing or decreasing it to bring the case within its jurisdiction as to amount. *Merrill v. Curtis*, 57 Me. 152; *Converse v. Damariscotta Bank*, 15 Me. 431; *Hart v. Waitt*, 3 Allen 532; *McLellan v. Crofton*, 6 Me. 307, 19 Am. Dec. 210. But see *Hoit v. Molony*, 2 N. H. 322; *Flanders v. Atkinson*, 18 id. 167; *Taylor v. Jones*, 42 id. 25; *McQuade v. O'Neil*, 15 Gray 52, 77 Am. Dec. 350.

Under a statute providing that the evidence of indebtedness filed as an exhibit shall be a part of the record the exhibit controls the *ad damnum*. *Montgomery v. Hanover Nat. Bank*, 79 Miss. 443, and cases cited.

Under the English practice if the damages assessed exceed those claimed, the petitioner, if he desires

made on appeal²⁴ or unless the proper sum is stated in the *præcipe* and the declaration, and the objection is so made.²⁵ Costs may be given in addition to the damages claimed.²⁶ The declaration in an action to recover a statutory penalty is good though the damages demanded are nominal.²⁷ The plaintiff may be allowed, in the discretion of the court, to amend the *ad damnum* by increasing it before or at the trial and even after verdict; or he may be permitted to cure the error of a larger verdict by a *remittitur*.²⁸ The declaration in an action to re-

to amend his petition, must take out a summons which he must serve upon a co-respondent not represented at the trial. *Beckett v. Beckett*; [1901] Prob. 85.

"The rule requiring the instructions to restrict the assessment of a special damage to the alleged sum applies only to cases where the evidence would support a greater recovery, and not to cases where the evidence most favorable to the plaintiff discloses that such damage was less in amount than that alleged." *Campbell v. City of Chilli-cothe*, 175 Mo. App. 436.

²⁴ *Metropolitan Acc. Ass'n v. Froiland*, 161 Ill. 30, 52 Am. St. 359; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751. See *Linder v. Renfroe*, 1 Ga. App. 58; *San Antonio, etc. R. Co. v. Timon* (Tex. Civ. App.) 110 S. W. 82; *Unfried v. Libert*, 23 Idaho 603.

Where action is brought for the value of property destroyed a verdict for the value as alleged or agreed upon by the parties and interest is improper where no interest is asked for. *St. Louis Southwestern Ry. Co. of Texas v. Starks* (Tex. Civ. App.), 109 S. W. 1003.

Where interest is not recoverable *eo nomine* an allegation of damages in a court of limited jurisdiction includes interest, so that where the total amount demanded does not

exceed the jurisdiction of the court the complaint is not open to attack by plea to the jurisdiction. *Ft. Worth & R. G. R. Co. v. Brown*, 45 Tex. Civ. App. 376.

²⁵ *Wells v. Matthews*, 70 Ill. App. 504.

²⁶ *French v. Goodnow*, 175 Mass. 451.

²⁷ *Indiana Millers' Mut. F. Ins. Co. v. People*, 65 Ill. App. 355, 150 Ill. 474.

The right to recover double damages pursuant to a statute is not affected because the *ad damnum* limits the amount to the injury in fact sustained. The additional sum is in the nature of a penalty, and may be added to the actual damages in the same manner as costs. *Rosevelt v. Hanold*, 65 Mich. 414.

²⁸ *Coons v. McKees Rocks Borough*, 243 Pa. 340; *Kirkbride v. Bartz*, 82 Conn. 615; *Rexford v. Bleckley*, 131 Ga. 678; *De Lashmuff v. Chicago, etc. R. Co.*, 148 Iowa 556; *Groat v. Detroit United R.*, 153 Mich. 165 (blank filled before jury selected); *Middendorf v. Schreiber*, 150 Mo. App. 530; *Davis v. Hall*, 70 Neb. 678; *Schreiber v. Depew*, 137 App. Div. (N. Y.) 433; *Sohnman v. Metropolitan St. R. Co.*, 56 N. Y. Misc. 342; *Dunham v. Hastings P. Co.*, 95 App. Div. (N. Y.) 360; *Wilson v. Seattle, etc. R. Co.*, 55 Wash. 656; *Lobb v. Same*,

cover unliquidated damages, the only indication of the sum claimed being in the *ad damnum*, should not be amended after verdict by increasing that sum without sending the cause back for a new trial.²⁹ The objection that the recovery is in excess of the sum claimed cannot be first raised in the appellate court.³⁰ That court will presume that the proper amendment was

48 Wash. 238; *Williams v. Arnold*, 139 Wis. 177; *San Francisco & S. H. B. Soc. v. Leonard*, 17 Cal. App. 254; *Excelsior E. Co. v. Sweet*, 59 N. J. L. 441; *Zimmer v. Third Ave. R. Co.*, 36 App. Div. (N. Y.) 265; *Luddington v. Goodnow*, 168 Mass. 223; *Cullar v. Missouri, etc. R. Co.*, 84 Mo. App. 347; *Cooper v. Livingston*, 19 Fla. 684; *McClennahan v. Smith*, 76 Mo. 428; *Johnson v. Brown*, 57 Barb. 118; *Taylor v. Jones*, 42 N. H. 25; *Piereson v. Finney*, 37 Ill. 29; *Schneider v. Seely*, 40 Ill. 257; *Falcon E. Co. v. Wright*, 171 Ill. App. 521; *Labahn B. Co. v. Hecht*, 169 Ill. App. 447; *Kretzinger v. Lewis*, 174 Ill. App. 45; *Pickering v. Pulsifer*, 9 Ill. 79; *Dox v. Dey*, 3 Wend. 356; *Cahill v. Pintony*, 4 Munf. 371; *Lewis v. Cooke*, 1 Harr. & McH. 159; *Green v. Wright*, 8 M. & W. 360; *Lautz v. Frey*, 19 Pa. 366; *Pickwood v. Wright*, 1 H. Bl. 643; *Hardy v. Cathcart*, 1 Marsh. 180; *Usher v. Dansey*, 4 M. & S. 94; *Deane v. O'Brien*, 13 Abb. Pr. 11; *Grass Valley Quartz Mining Co. v. Stackhouse*, 6 Cal. 413; *Baltzell v. Hickman*, 4 Litt. 265; *Wilde v. Crow*, 10 Up. Can. C. P. 406; *Fowlkes v. Webber*, 8 Humph. 530; *Corning v. Corning*, 6 N. Y. 97; *Reed v. Crane*, 89 Mo. App. 670; *Dallas v. Jones*, 93 Tex. 38.

The excess may be cured by amendment on error when the record shows something to amend by (*Miller v. Weeks*, 22 Pa. 89); or the

court is authorized to try the case as though originally brought there (*Dressler v. Davis*, 12 Wis. 58; *Palmer v. Wylie*, 19 Johns. 276; *Jackson v. Covert*, 5 Wend. 139; *Moore v. Tracy*, 7 Wend. 229); or by allowing the party to remit the excess where the appellate court has power to render such judgment as the court below might have given. *Crabbs v. Nashville Bank*, 6 Yerg. 332.

An offer to remit does not avail. *Tyner v. Hays*, 37 Ark. 599. The failure to limit the jury to the sum claimed is fatal. *Blyston-Spencer v. United R. Co.*, 152 Mo. App. 118, and cases cited.

In New York the courts will not allow an amendment after verdict without granting a new trial. *Pharris v. Gere*, 31 Hun 443; *Corning v. Corning*, 6 N. Y. 97.

A petition in an action for assault and battery may be amended so as to ask for exemplary damages on the facts pleaded. *Kreuger v. Sylvester*, 100 Iowa 647.

A stipulated amendment is binding. *Duckworth v. Ferland* (R. I.) 83 Atl. 261.

²⁹ *Excelsior E. Co. v. Sweet*, *supra*, reversing 57 N. J. L. 224; *Clark v. San Francisco, etc. R. Co.*, 142 Cal. 614.

³⁰ *Boening v. North American Union*, 155 Ill. App. 528; *McLain v. Nurnberg*, 16 N. D. 144; *Utter v. Jaffray*, 114 Ill. 470; *Cunningham*

made,³¹ unless the rights of parties in default will be affected.³² An erroneous claim of damages in a declaration does not make it demurrable; objection should be made to such claim on the trial.³³ The recovery of special damages must be limited to the amount claimed as such.³⁴ In the absence of an objection to evidence of special damages on the ground that they are not pleaded the pleading may be amended after verdict to cover those proved.³⁵

It will be convenient to notice here some claims which arise otherwise than in actions, at least in the first instance. One who presents a claim against an estate to the commissioners appointed to examine claims, the amount of the recovery being based on the *quantum meruit*, is not precluded from recovering more on appeal to the court if entitled to it. The estimate as set forth in the claim is evidence against the claimant, being an implied admission that no more is due; but it is not everywhere conclusive.³⁶ In some states the rule limiting the recovery to the sum claimed does not apply to the presentment of claims to city councils after rejection thereby.³⁷ Under the Ohio statute a claim so filed cannot be amended after expiration

v. Alexander, 58 Ill. App. 296; Clason v. Baldwin, 152 N. Y. 204.

³¹ Helms v. Appleton, 43 Ind. App. 482; Southern R. Co. v. Bulleit, 40 Ind. App. 457; Charles v. Witt, 88 Kan. 484; Brunswick G. Co. v. Spencer, 97 Ga. 764; Clason v. Baldwin, *supra*.

In the absence of a bill of exceptions it will be assumed that the complaint was amended to cover such special damages as were proved. Archer v. Milwaukee A. E. & S. Co., 144 Wis. 476. Or the court will either direct the prayer to be amended to conform to the evidence or enter judgment for the amount of damages shown by it. Unfried v. Libert, 23 Idaho 603, § 4229 Rev. Codes.

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³² Deputy v. Dollarhide, 42 Ind. App. 554.

³³ Western U. Tel. Co. v. Hopkins, 49 Ind. 223; Dowd v. Seawell, 3 Dev. 185; Leland v. Tousey, 6 Hill 328; Kent v. Halliday, 23 R. I. 182, quoting the text; Fitzpatrick v. Age-Herald Pub. Co., 184 Ala. 510, 51 L.R.A.(N.S.) 401.

³⁴ Walters v. United R. Co., 165 Mo. App. 628.

³⁵ Halloran v. New York, etc. R. Co., 211 Mass. 132.

³⁶ Maughan v. Estate of Burns, 64 Vt. 316; Turner v. Wabash R. Co., 114 Mo. App. 539. *Contra*, Schemp v. Beardsley, 83 Conn. 34.

³⁷ Wyandotte v. White, 13 Kan. 191; Salina v. Kerr, 7 Kan. App. 223.

of the time fixed for filing it by increasing the sum claimed,³⁸ and in Iowa the sum claimed in the notice limits the recovery though the complaint demands a larger sum.³⁹ Under a statute declaring that no action upon any claim or cause of action for which a money judgment only is demandable, shall be maintained against any town unless a statement or bill of such claim shall have been filed, etc., the filing is essential to the maintenance of the action, and the damages recoverable are limited to the sum claimed.⁴⁰ The rule is otherwise under a statute expressing that no action shall be maintained unless the claim on which the action is brought has been presented to the comptroller and he has neglected for thirty days after such presentment to pay the same. The claim being for unliquidated damages, the estimate of the amount thereof is not an essential part of it; hence it may be amended to demand judgment for a larger sum than was named in it.⁴¹ A claim for personal injuries against a city cannot be enlarged by a complaint subsequently filed if the injury alleged in the latter was known when the claim was filed.⁴²

§ 418. What provable under general allegation of damage.

Under a general allegation of damage the plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of for the law implies that they will proceed from it. These are called general, as contradistinguished from special, damages which are the natural but not the necessary consequence.⁴³ The damages which usually re-

³⁸ Geib v. Cleveland, 2 Ohio Dec. 360.

³⁹ Van Camp v. Keokuk, 130 Iowa 716.

⁴⁰ Conrad v. Ellington, 104 Wis. 367. See Berger v. Abel, 141 Wis. 321.

Under a charter providing that no claim against the city can be sued on until a statement of it has been filed, a claim setting one sum as damages is not admissible to support a complaint demanding a less sum. Bland v. Mobile, 142 Ala. 142.

⁴¹ Reed v. Mayor, 97 N. Y. 620;

Johnson v. Bay City, 164 Mich. 251, 4 N. C. C. A. 167.

⁴² Horton v. Seattle, 53 Wash 316.

⁴³ Wilkes v. Stacy, 113 Ark. 556; Foster v. United Rys. Co. of St. Louis, 183 Mo. App. 602; Giddings v. Freedley, 128 Fed. 355, 65 L.R.A. 327, 63 C. C. A. 85; Terrace W. Co. v. San Antonio L. & P. Co., 1 Cal. App. 511; Moses v. Autuono, 56 Fla. 499, citing the text; Jacksonville E. Co. v. Batchis, 54 Fla. 192; Kircher v. Larchwood, 120 Iowa 578; Louisville G. Co. v. Kentucky

sult are sometimes considered to be the natural result of the

- H. Co., 32 Ky. 435; *Renders v. Grand Trunk R. Co.*, 144 Mich. 387; *Hesse v. Imperial E. Co.*, 160 Mo. App. 431; *Stewart v. Watson*, 133 Mo. App. 44, citing the text; *Fledermann v. St. Louis T. Co.*, 134 Mo. App. 199; *Vanbuskirk v. Quincy, etc. R. Co.*, 131 Mo. App. 357; *Trousil v. Bayer*, 85 Neb. 431; *Hoskins v. Scott*, 52 Ore. 271; *Bus-sard v. Hibler*, 42 Ore. 500; *Sizer v. Dopson*, 89 S. C. 535; *Fritz v. Watertown*, 21 S. D. 280; *Malnati v. Thomas*, 26 App. D. C. 277; *Springer v. Schultz*, 205 Ill. 144, 753; *Barnett v. Schlapka*, 110 Ill. App. 672; *Stroms Bruks Aktie Bolag v. Hutchinson* (1905) App. Cas. 515; *Warfield v. Hepburn*, 62 Fla. 418; *Morris v. Allen*, 17 Cal. App. 684; *Palmer v. Waterloo*, 138 Iowa 296; *Kingsley v. Butterfield*, 35 Neb. 228; *James Co. v. Bank*, 105 Tenn. 1, 51 L.R.A. 255; *Abilene v. Wright*, 4 Kan. App. 708; *Nicholson v. Rogers*, 129 Mo. 136, citing the text; *Orman v. Mannix*, 17 Colo. 564, 13 Am. Neg. Cas. 570, 31 Am. St. 340, 17 L.R.A. 602; *Loesch v. Koehler*, 144 Ind. 278, 285, 35 L.R.A. 62, quoting the text; *English v. Danville*, 69 Ill. App. 288; *Rosenberger v. Marsh*, 108 Iowa 47; *Strudgeon v. Sand Beach*, 107 Mich. 496, citing the text; *Root v. Butte, etc. R. Co.*, 20 Mont. 354, quoting the text; *Dose v. Tooze*, 37 Ore. 13, citing the text; *Fishburne v. Engle-dove*, 91 Va. 548; *Cain L. Co. v. Standard D. K. Co.*, 108 Ala. 346; *Denver v. Human*, 9 Colo. App. 144; *Mood v. Western U. Tel. Co.*, 40 S. C. 524; *Dowdall v. King*, 97 Ala. 635; *Bruce v. Beall*, 99 Tenn. 303; *Spernsen v. Northern Pac. R. Co.*, 45 Fed. 407, citing the text; *Moline W. P. Co. v. Waters*, 10 Ill. App. 159; *Rotchschild v. Williamson*, 83 Ind. 387; *Atchison, etc. R. Co. v. Rice*, 36 Kan. 593; *Simmons v. Haas*, 56 Md. 153; *Hancock v. Hub-bell*, 71 Cal. 537; *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529; *Tucker v. Parks*, 7 Colo. 62; *Conner v. Pioneer Fire-proof C. Co.*, 29 Fed. 629; *Bradbury v. Benton*, 69 Me. 194; *Tinsley v. Rowe*, 17 Ill. App. 326; *Hutts v. Shoaf*, 88 Ind. 395; *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107; *Roberts v. Graham*, 6 Wall. 578, 10 Am. Neg. Cas. 570, 18 L. ed. 791; *Warner v. Bacon*, 8 Gray 397, 69 Am. Dec. 253; *Potter v. Froment*, 47 Cal. 165; *Nunan v. San Francisco*, 38 Cal. 689; *Rowand v. Bellinger*, 3 Strobb. 373; *Andrews v. Stone*, 10 Minn. 72; *Squire v. Gould*, 14 Wend. 159; *Spencer v. St. Paul, etc. R. Co.*, 21 Minn. 362; *Wampach v. Same, id.* 364; *Alston v. Huggins*, 2 Brev. 309; *Fagen v. Davidson*, 2 Duer. 153; *Bedell v. Powell*, 13 Barb. 183; *Adams v. Barry*, 10 Gray 361; *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *Ryerson v. Marscellis*, 16 N. J. L. 450; *Tren-ton Mut. L. & F. Ins. Co. v. Per-rine*, 23 id. 402, 57 Am. Dec. 400; *Strang v. Whitehead*, 12 Wend. 64; *Vanderslice v. Newton*, 4 N. Y. 130; *Burrell v. New York & S. S. S. Co.*, 14 Mich. 34; *Bogert v. Burkhalter*, 2 Barb. 525; *Tomlinson v. Derby*, 43 Conn. 562; *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201; *Baldwin v. Western R. Co.*, 4 Gray 333; *Solms v. Lias*, 16 Abb. Pr. 311; *Plimpton v. Gardiner*, 64 Me. 360; *Lewis v. Paull*, 42 Ala. 136; *Shaw v. Hoff-man*, 21 Mich. 151; *Birchard v. Booth*, 4 Wis. 67; *Patten v. Libbey*,

wrongdoer's act.⁴⁴ The questions involved in actions for personal injuries where loss of earnings is involved are treated elsewhere.⁴⁵ Matters in mitigation of damages may be given in evidence under the general issue.⁴⁶

§ 419. **Special damages must be alleged.** Special damages are required to be stated in the declaration for notice to the defendant and to prevent surprise at the trial.⁴⁷ This rule

32 Me. 378; *Agnew v. Johnson*, 22 Pa. 471, 62 Am. Dec. 303; *Hart v. Evans*, 8 Pa. 13; *Boyden v. Burke*, 14 How. 575, 14 L. ed. 548; *Olmstead v. Burke*, 25 Ill. 86; *Hallock v. Belcher*, 42 Barb. 199; *Harrison v. Coleman*, 171 Mo. App. 633; *Hunter v. Stewart*, 47 Me. 419, 9 Am. Neg. Cas. 401; *Prentiss v. Barnes*, 6 Allen 410; *Stevens v. Lyford*, 7 N. H. 360; *Hutchinson v. Granger*, 13 Vt. 386; *Laraway v. Perkins*, 10 N. Y. 371; *O'Leary v. Rowan*, 31 Mo. 117; *Park v. McDaniels*, 37 Vt. 594; *Lusk v. Briscoe*, 65 Mo. 555; *Adams v. Gardner*, 78 Ill. 568; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *Gray v. Ballard*, 22 Minn. 278; *De Forest v. Leete*, 16 Johns. 122; *Butler v. Kent*, 19 id. 228, 10 Am. Dec. 219; *Dumont v. Smith*, 4 Denio 319; *Johnson v. Von Kettler*, 84 Ill. 315; *North Point C. I. Co. v. Utah & S. L. C. Co.*, 23 Utah 199, 206, citing the text; *Carroll v. Caine*, 27 Wash. 402, 406, citing the text; *Pioneer Press Co. v. Hutchinson*, 63 Minn. 481, citing the text; *Hesse v. Imperial Electric L. & P. Co.*, 160 Mo. App. 431; *Warner I. Co. v. Ingersoll*, 157 Fed. 311; *Packard v. Slack*, 32 Vt. 9, 76 Am. Dec. 148 (placing diseased sheep sold with warranty with others not diseased).

Where the issue is as to the extent of the suffering caused by the injury, rather than the diseased bodily condition, the consequences

that usually, but not necessarily or meritably follow may be shown, though they arose from events subsequent to the injury. *Cooley v. Kansas E. R. Co.*, 170 Mo. App. 42.

The sum paid for transmitting a message is not special damages. *Western U. Tel. Co. v. McMorris*, 158 Ala. 563, 132 Am. St. 46.

⁴⁴*Moore v. St. Louis T. Co.*, 226 Mo. 689; *Schmidt v. Same*, 163 Mo. App. 412.

⁴⁵§§ 421, 1247.

⁴⁶*Yazoo & M. V. R. Co. v. Sultan*, — Miss. —, 63 So. 672.

⁴⁷*Id.*; *Vest v. Speakman*, 153 Ala. 393; *Moses v. Autuono*, 56 Fla. 499, citing the text; *Jacksonville E. Co. v. Batchis*, 54 Fla. 192; *Watters v. Retail Clerks' Union*, 120 Ga. 424; *Cohen v. Fisher*, 135 App. Div. (N. Y.) 238; *Texas & P. R. Co. v. Ellerd*, 38 Tex. Civ. App. 596; *Missouri, etc. R. Co. v. Linton* (Tex. Civ. App.), 109 S. W. 942; *Harper Mach. Co. v. Ryan-U. Co.*, 85 Conn. 359; *Lanston M. M. Co. v. Mergenthaler L. Co.*, 154 Fed. 42, 83 C. C. A. 154; *Louisville & N. R. Co. v. Roney* (Ky.), 108 S. W. 343 (miscarriage must be alleged); *Lexington R. Co. v. Britton*, 130 Ky. 676 (loss of time and medical treatment); *Armagost v. Rising*, 54 Neb. 763; *McKinney v. Carson*, 35 Utah 180; *Coast Central Milling Co. v. Russell Lumber Co.*, 88 Conn. 109; *Hall v. Manufacturers' Coal & Coke Co.*,

applies to a cross-bill in equity where such damages are claimed as a set-off.⁴⁸ Under a general averment of damage, interest may be recovered on an alleged breach of a contract to pay money; for it is the precise legal measure of damages on that breach. When damages are sought to be recovered for the breach of a special contract the action must be upon that contract;⁴⁹ and when it is so under a general allegation of damage the plaintiff may prove and recover those damages which necessarily result, and are therefore implied by law from the breach assigned.⁵⁰ If a contractor in a building contract is prevented by the other party from fulfilling it under such a general allegation he will be entitled to recover the profits he would have made had he been suffered to complete the work;⁵¹ for the breach of a contract of sale the profits with reference to the market value at the time the defendant was bound to deliver or accept the goods according to the contract may be recovered. If special circumstances existed entitling the purchaser to greater damages because the default defeated a particular purpose known to the contracting parties, they must be stated, and

260 Mo. 351; *Whitlock v. Mungiven*, 36 R. I. 386; *Louisville & N. R. Co. v. Sanders*, 7 Ala. App. 543, 4 N. C. C. A. 667.

The amount claimed as special damages must be stated. *Montgomery v. Glasscock* (Ky.), 121 S. W. 668.

"It is not necessary that the petition allege the measure of damages, as that is a matter to be regulated by the court in the instructions." *Weller v. Missouri Lumber & Mining Co.*, 176 Mo. App. 243.

In order to recover for permanent injuries they should be alleged as such. *Salmon v. Chicago & A. R. Co.*, 181 Mo. App. 414.

If the items of special damages alleged aggregate the sum demanded there cannot be a recovery of general damages. *Wright v. Smith*, 128 Ga. 432.

If proof of special damages is not

objected to when offered the right to have it ruled out is waived. *Lashus v. Chamberlain*, 6 Utah 385, *Roberts v. Graham*, 6 Wall. 578, 18 L. ed. 791, 10 Am. Neg. Cas. 570.

But this does not apply to actions in justices' courts. *Lec v. Western U. Tel. Co.*, 51 Mo. App. 375.

⁴⁸ *Hooper v. Armstrong*, 69 Ala. 343.

⁴⁹ *Trunkey v. Hedstrom*, 131 Ill. 204; *Royalton v. Royalton & W. T. Co.*, 14 Vt. 311.

⁵⁰ *Lashus v. Chamberlain*, *supra*; *Lillard v. Kentucky D. & W. Co.*, 134 Fed. 168, 67 C. C. A. 74.

⁵¹ *Burrell v. New York & S. S. S. Co.*, 14 Mich. 34; *Tahoe I. Co. v. Union I. Co.*, 109 Cal. 242; *Ennis v. Buckeye Pub. Co.*, 44 Minn. 105; *Masterton v. Mayor*, 7 Hill 61, 42 Am. Dec. 38.

also the facts which, under the circumstances, rendered the injury greater.⁵² If a publication is not libelous *per se* an averment of special damage to the effect that the plaintiff has been greatly injured in his business, been unable to obtain employment and been deprived of the right to follow his vocation is not a sufficient statement of special damages.⁵³ The special loss or injury resulting from libel or slander, if the words are not actionable *per se*, must be particularly set forth; an allegation of damage and injury in name and fame is not good.⁵⁴ The loss of employment in consequence of a libel *per se* must be alleged,⁵⁵ and so of the mental condition produced by a mistake in a telegram.⁵⁶ If only special damages are pleaded there cannot be a recovery of either nominal or general damages.⁵⁷ The rule concerning special damages has less scope in condemnation pro-

⁵² *Eaves v. Harris*, 95 Miss. 607; *Stecker v. Weaver C. & C. Co.*, 116 App. Div. (N. Y.) 772; *Fletcher v. Tayleur*, 17 C. B. 21; *Smeed v. Foord*, 1 E. & E. 602; *Messmore v. New York, etc. Co.*, 40 N. Y. 422; *Griffin v. Colver*, 16 N. Y. 489; *Cole v. Swanston*, 1 Cal. 50; *Liljengren F. & L. Co. v. Mead*, 42 Minn. 420; *Miller v. Burch*, 19 Ky. L. Rep. 629; *Sloss Marblehead L. Co. v. Smith*, 11 Ohio C. C. 213; *Citizens' St. R. Co. v. Burke*, 98 Tenn. 650, 2 Am. Neg. Rep. 459; *Watkins v. Junker*, 4 Tex. Civ. App. 629; *Independent B. Ass'n v. Burt*, 109 Minn. 323; *Howard S. Co. v. Wells*, 176 Fed. 512, 100 C. C. A. 70; *Brady v. Cassidy*, 9 N. Y. Misc. 107; *Myer v. Davies*, 17 Ill. App. 228.

"The complaint is sufficient if it alleges knowledge of facts and circumstances by the defendant from which a person of ordinary intelligence and prudence should have known such damages would result" from the breach of a contract. *Simkins v. Western U. Tel. Co.*, 97 S. C. 413.

⁵³ *Railroad v. Delaney*, 102 Tenn. 289, 45 L.R.A. 600; *Reporters' Ass'n v. Sun P. & P. Ass'n*, 186 N. Y. 437.

⁵⁴ *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308; *Kentucky Journal Pub. Co. v. Brock*, 140 Ky. 373; *Swan v. Tappan*, 5 Cush. 104; *Brown v. Independent Pub. Co.*, 48 Mont. 374; *Fagan v. New York Evening Journal Pub. Co.*, 129 App. Div. (N. Y.) 28; *McNamara v. Goldan*, 194 N. Y. 315; *Langdon v. Shearer*, 43 App. Div. (N. Y.) 607; *Twigger v. Ossing Ptg. & Pub. Co.*, 161 App. Div. (N. Y.) 718; *McKenney v. Carpenter*, 42 Okla. 410. § 1219.

⁵⁵ *Kentucky Journal Pub. Co. v. Brock*, *supra*. But see *Beek v. Nelson*, 126 Minn. 10, holding that spoken words, directly disparaging a person in his calling or employment, being slanderous, are actionable *per se* and special damage need not be alleged.

⁵⁶ *Lay v. Postal Tel. C. Co.*, 171 Ala. 172.

⁵⁷ *Christophulos C. Co. v. Phillips*, 4 Ga. App. 819; *Red Cypress L. Co. v. Beall*, 5 Ga. App. 202.

ceedings than in ordinary actions; the defendant may recover for every element of value the property possesses, whether they be general or special.⁵⁸

§ 420. **Same subject; illustrations.** Where the action is for the conversion or destruction of property, or any tortious act or omission involving its loss the law infers an injury measured by its value, and the injured party may recover by that standard under the general averment of damage.⁵⁹ But if he is entitled to recover other damages they are special and exceptional, arising from peculiar circumstances which must be alleged and proved.⁶⁰ Evidence of the value of horses for the purpose for which they were used may be received under an allegation of general damages in an action to recover for their wrongful injury or killing.⁶¹ Loss of subscriptions will not be legally inferred from the destruction of a subscription list;⁶² of an account from the destruction of an account book.⁶³ The expense of keeping horses or boarding them elsewhere is not a necessary result of eviction from a barn;⁶⁴ nor is it a necessary result of detaining an animal that it will be reduced in flesh by being kept on short pasturage;⁶⁵ or that from detaining a mare a breeding season will be lost.⁶⁶ A wrong by which the owner is deprived of possession of his property does not necessarily oblige him to incur expense to regain possession;⁶⁷ or if

⁵⁸ *Yellowstone Park R. Co. v. Bridger C. Co.*, 34 Mont. 545.

⁵⁹ *Blair Co. v. Rose*, 26 Ind. App. 487 quoting the text; *Spigelmoyer v. Walter*, 3 W. & S. 540; *Vanbuskirk v. Quincy, etc. R. Co.*, 131 Mo. App. 357.

The damages resulting from the depreciation in value of a suit of clothing by the loss of or damage to one article of it is not special when the defendant had possession of the whole suit. *Cone v. Southern R.*, 85 S. C. 524.

⁶⁰ *Ling v. Malcom*, 77 Conn. 517; *Eisele v. Oddie*, 128 Fed. 941.

⁶¹ *Loesch v. Koehler*, 144 Ind. 278, 35 L.R.A. 682; *Pannell v. Al-*

len, 160 Mo. App. 714. *Contra*, *Dakin v. Elmore*, 127 App. Div. (N. Y.) 457.

⁶² *Nunan v. San Francisco*, 38 Cal. 689.

⁶³ *Id.*

⁶⁴ *Shaw v. Hoffman*, 21 Mich. 151.

⁶⁵ *Henderson v. Coleman*, 19 Wyo. 183.

⁶⁶ *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107.

⁶⁷ *Lampkin v. Garwood*, 122 Ga. 407; *Central R. Co. v. Chicago P. Co.*, 122 Ga. 11, 106 Am. St. 87; *People v. Crowe*, 145 Ill. App. 450; *Pacific Exp. Co. v. Jones*, 52 Tex. Civ. App. 367; *Texas & P. R. Co. v. Arnett*, 40 Tex. Civ. App. 76;

his horse is injured, expense for its care and cure.⁶⁸ Under an allegation that a horse was greatly injured and damaged evidence is admissible to show that the injury was permanent, and also the value of the services of the horse while disabled.⁶⁹ To recover for loss of rents or injury to business there must be a statement of facts from which such a loss must arise and the allegation of a loss of that kind.⁷⁰ Injury to a sucking colt is not necessarily the result of harm done to its dam.⁷¹ A physical injury to an animal does not necessarily injure its disposition.⁷² In an action to recover for the destruction of a fence and injury done to trees by the direct acts of the defendant there cannot be a recovery for labor made necessary to prevent the destruction of crops unless the declaration alleges the facts which made such labor necessary.⁷³ The special value of trees as enhancing the value of land for building purposes must be alleged in an action against a person who has cut them down.⁷⁴ The loss of profits or injury to business as the result of the wrongful levy of an attachment upon goods is a special damage.⁷⁵ Under a complaint alleging the plaintiff's wrongful and unlawful ejectment from premises occupied by him he may recover compensation for injury to his goods and property, and for mental anguish and injury to his feelings

Henderson v. Coleman, 19 Wyo. 183; *Gray v. Bullard*, 22 Minn. 278; *Ross v. Malone*, 97 Ala. 529; *Boggan v. Bennett*, 102 Ala. 400; *Patee v. McCabe-B. W. Co.*, 97 Mo. App. 356; *Dothard v. Sheid*, 69 Ala. 135; *Washington v. Timberlake*, 74 id. 259.

⁶⁸ *Igo v. Cleveland, etc. R. Co.*, 156 Ill. App. 190; *McKinney v. Carson*, 35 Utah 180; *Harper v. Missouri, etc. R. Co.*, 70 Mo. App. 604; *Patten v. Libbey*, 32 Me. 378.

⁶⁹ *La Duke v. Exeter*, 97 Mich. 450, 37 Am. St. 357. Compare *Montgomery v. Glasscock* (Ky.), 121 S. W. 668.

⁷⁰ *Sloan v. Hart*, 150 N. C. 269, 21 L.R.A.(N.S.) 239; *Sizer & Co. v. Dopson*, 89 S. C. 535; *Russell v.*

Olson, 22 N. D. 410; *Wampach v. St. Paul, etc. R. Co.*, 21 Minn. 364; *Agnew v. Johnson*, 22 Pa. 471, 62 Am. Dec. 303; *Spencer v. St. Paul R. Co.*, 21 Minn. 363; *Plimpton v. Gardiner*, 64 Me. 360; *Taylor v. Dustin*, 43 N. H. 493; *Potter v. Froment*, 47 Cal. 165; *Dickinson v. Boyle*, 17 Pick. 78, 28 Am. Dec. 281; *Parker v. Lowell*, 11 Gray 353.

⁷¹ *Gamble v. Mullin*, 74 Iowa 99; *Teagarden v. Hetfield*, 11 Ind. 522.

⁷² *Pannell v. Allen*, *supra*.

⁷³ *Krueger v. Le Blanc*, 62 Mich. 70; *Carron v. Clark*, 14 Mont. 301.

⁷⁴ *Eldridge v. Gorman*, 77 Conn. 699.

⁷⁵ *O'Brien v. Quinn*, 35 Mont. 441; *Bradley v. Borin*, 53 Kan. 628.

and sense of shame in being turned into the street, these being general damages;⁷⁶ but not for discomforts to himself and family because of the condition of the building he thereafter moved into, nor for injuries to his goods by reason of their exposure to the weather. These are special damages.⁷⁷ Proof that the plaintiff was deprived of the use of pasture as the result of the tearing down and removal of his fence is inadmissible under a general allegation of damages.⁷⁸

But where a tort or breach of contract is so alleged that loss is the direct and necessary consequence damages therefor may be recovered under a general allegation.⁷⁹ An allegation in a complaint in an action for a breach of duty growing out of the implied contract of a bank to honor the plaintiff's checks that the plaintiff is a trader and engaged in business permits the recovery of substantial damages, as by the general impairment of the plaintiff's credit, though there is no averment of that fact. But it is otherwise as to the loss of patronage or confidence of particular persons.⁸⁰ Disgrace and a feeling of mortification are the natural result of a slander and damages therefor are recoverable under a general allegation of injury to reputation;⁸¹ but the latter injury is not the necessary re-

⁷⁶ *Rauma v. Bailey*, 80 Minn. 366; *Moyer v. Gordon*, 113 Ind. 282; *Perkins v. Ogilvie*, 148 Ky. 309.

⁷⁷ *Rauma v. Bailey*, *supra*; *Fillebrown v. Hoar*, 124 Mass. 580.

⁷⁸ *Macy v. Carter*, 67 Mo. App. 323; *Adams v. Gardner*, 78 Ill. 568 (loss of use of damaged property must be specially alleged). But see *Woodruff v. Cook*, 25 Barb. 505.

⁷⁹ *Germain F. Co. v. Armsby*, 153 Cal. 585; *Driggs v. Dwight*, 17 Wend. 71, 31 Am. Dec. 283, following *Ward v. Smith*, 11 Price 19 (both cases favor the recovery of the expense of breaking up an establishment and of removing to where premises are situated in reliance on an agreement to lease them); *Smith v. Sherman*, 4 Cush.

408; *Smith & Egge Mfg. Co. v. Webster*, 87 Conn. 74; *Jutte v. Hughes*, 67 N. Y. 267; *Reckert v. Snyder*, 9 Wend. 416; *Francis v. Schoellkopf*, 53 N. Y. 152; *Richardson v. Chasen*, 10 Q. B. 756; *Hart v. Evans*, 8 Pa. 13; *McKeon v. See*, 4 Robert. 449; *St. John v. Mayor*, etc., 6 Duer 315; *Ruff v. Rinaldo*, 55 N. Y. 664; *Laraway v. Perkins*, 10 N. Y. 371; *Dewint v. Wiltse*, 9 Wend. 325; *Ten Cate v. Fansler*, 10 Okla. 7; *Blair Co. v. Rose*, 26 Ind. App. 487. See § 985 as to seduction in breach of marriage promise cases.

⁸⁰ *James Co. v. Bank*, 105 Tenn. 1, 51 L.R.A. 255.

⁸¹ *Nicholson v. Rogers*, 129 Mo. 136.

sult of an assault though it be accompanied by secret solicitation for unlawful intercourse.⁸²

Under a complaint claiming damages for the destruction of a country dwelling and outhouse there may be a recovery for the loss of trees surrounding the dwelling.⁸³ In a suit to recover for the breach of a contract not to engage in the hotel business evidence of the loss of patrons may be given without specifying the individuals, as may decrease of profits.⁸⁴ But the general rule is in actions for slander of title and the like that if the special damage is a loss of customers or of a sale of property the persons who ceased to be customers or who refused to purchase must be named,⁸⁵ and that loss of custom or of credit from particular persons must be pleaded,⁸⁶ as must a subsequent discharge from employment.⁸⁷ The plaintiff declared in case that the defendant had placed a quantity of building material in a highway opposite to and adjoining his premises so as to interrupt the free passage to his store and damaged his goods. It was held that proof that customers were prevented from frequenting the store, and that a tenant who occupied it quit it in consequence of the annoyance, and that the store afterwards remained unoccupied was admissible because not alleged as special damages.⁸⁸ No more than nominal damages can be recovered in an action upon the warranty against incumbrance on the general assignment of a breach. The fact that the plaintiff had discharged an incumbrance cannot be proved unless specially alleged, for it is not a damage necessarily arising from the breach assigned.⁸⁹ The law does not imply that the vendee of chattels will incur expense or suffer other loss because

⁸² Sletten v. Madison, 122 Wis. 251.

⁸³ Wrought-Iron R. Co. v. Graham, 25 C. C. A. 570, 579, 80 Fed. 474.

⁸⁴ Lashus v. Chamberlain, 6 Utah 385.

⁸⁵ Denney v. Northwestern C. Ass'n, 55 Wash. 331, 25 L.R.A. (N.S.) 1021; Stevenson v. Love, 106 Fed. 466; Linden v. Graham, 1

Duer 670; Wilson v. Dubois, 35 Minn. 471, 59 Am. Rep. 335. But see Ratcliffe v. Evans, [1882] 2 Q. B. 524.

⁸⁶ Fleming v. Bank, [1900] App. Cas. 577.

⁸⁷ Metcalf v. Collinson, 95 Minn. 238.

⁸⁸ Squier v. Gould, 14 Wend. 159.

⁸⁹ De Forest v. Leete, 16 Johns. 122.

of the breach of warranty in their sale;⁹⁰ nor that the loss of time and expenditure of money will follow the breach of a vendor's contract;⁹¹ nor that the vendee's business will be damaged by the loss of trade because of a defect in an article, the vendor not being informed that he had contracted to incur such liability.⁹² An unmarried woman cannot recover damages on account of her prospects of marriage being lessened by the personal injury for which she sues, unless such special damage be alleged.⁹³ Where the disfigurement was of a girl of five years and no allegation was made as to the loss of marriage prospects the court said, referring to the case last cited, the plaintiff was presumably a married woman, and not a child of five years, as to which it could hardly be said that she could truthfully set up any special averment as to loss of marriage, and therefore the case would fall within the general rule that damages not following directly as a consequence of the particular circumstances must be specially pleaded. The loss of a particular prospect of marriage must be specially pleaded, no doubt, but why should the loss of the general prospect belonging to a child whose injury so disfigures her as to make marriage almost impossible. Such a loss is a natural consequence of the injury.⁹⁴ In an action for a nuisance, the plaintiff's premises being affected by the flow of filth from the defendant's adjacent privy, the plaintiff was not permitted to show that the nuisance tainted his well, from which he was in the habit of drawing to make beer, and in consequence the beer was unmerchantable, because not alleged as special damages.⁹⁵

When damages are the gist of the action they must be specially alleged,⁹⁶ as expenses incurred and labor performed in reliance on the performance of a contract.⁹⁷ In case of public

⁹⁰ *Harron v. Wilson*, 4 Cal. App. 488; *Snowden v. Waterman*, 105 Ga. 384.

⁹¹ *Sudden v. Morse*, 48 Wash. 101.

⁹² *Sutherland v. Round*, 6 C. C. A. 428, 57 Fed. 467.

⁹³ *Hunter v. Stewart*, 47 Me. 419, 9 Am. Neg. Cas. 401.

⁹⁴ *Smith v. Pittsburgh & W. R. Co.*, 90 Fed. 783.

⁹⁵ *Solms v. Lias*, 16 Abb. Pr. 311.

⁹⁶ *Swan v. Tappan*, 5 Cush. 104; *McDaniel v. Hutcherson*, 136 Ky. 412; *Bogert v. Burkhalter*, 2 Barb 525.

⁹⁷ *Sommerville v. Idaho I. Co.*, 21 Idaho 546.

nuisance the plaintiff must aver special damages to him, inasmuch as the law does not presume or imply damage to any particular individual from the public offense.⁹⁸ But for a private nuisance, such as turning the course of an ancient stream so that it no longer flowed through the plaintiff's field, it is an intendment of law that he is injured by the loss of the water. Then to determine this damage, proof to show that he was thereby compelled to haul water from a distance to supply the uses of the stream was held to be only giving the jury certain *data* from which to estimate the real damage; it was not a claim for a distinct injury not necessarily resulting from the nuisance.⁹⁹ The depreciation in value of private property in consequence of a nuisance adjacent to it is a natural consequence; but the failure of the owner to find a purchaser for the property at a stated price is not such a consequence.¹ The noise occasioned by the operation of a railroad in a street and the impracticability of turning teams therein are not the necessary consequence of the situation, and damages therefor cannot be recovered unless the facts are alleged.² Expense in making proofs of loss against an insurer does not necessarily result from the refusal of an insurance broker to give the names of insurers to the insured.³ The damages resulting from the illness of a person not named in the complaint (others being named therein) in consequence of a nuisance are not recoverable.⁴

§ 421. **Same subject.** The law infers bodily pain and suffering from serious personal injury,⁵ and loss of time from the

⁹⁸ *Hart v. Evans*, 8 Pa. 13; *Weller v. Missouri Lumber & Mining Co.*, 176 Mo. App. 243, holding sufficient an allegation of special damage suffered by a sawmill proprietor from the maintenance of a boom in a river which interfered with the floating of logs to his mill. See also § 1058.

⁹⁹ *Id.*

¹ *Comminge v. Stevenson*, 76 Tex. 642.

² *Root v. Butte, etc. R. Co.*, 20 Mont. 354.

³ *Cheshire B. Co. v. Wilson*, 86 Conn. 551.

⁴ *Gulf, etc. R. Co. v. Craft* (Tex. Civ. App.), 102 S. W. 170.

⁵ *Indianapolis Traction & Terminal Co. v. Gillaspay*, 56 Ind. App. 332; *Waterman Lumber Co. v. Shaw*, — Tex. Civ. App. —, 165 S. W. 127; *Niles v. Central Vermont R. Co.*, 87 Vt. 356; *Kennedy v. St. Louis T. Co.*, 103 Mo. App. 1; *Pratt v. Davis*, 224 Ill. 300, 7 L.R.A. (N.S.) 609, citing the text; *Klein v. Burleson*, 138 App. Div. (N. Y.)

disabling effect thereof,⁶ if the disability is total.⁷ A claim for damages for permanent injury is not a demand for special damages, but for the damages which necessarily flow from injuries received.⁸ In some jurisdictions loss of earnings in a special employment or profession or from any peculiar condition of the party injured must be alleged.⁹ In others, when the complaint

405; *Fink v. Busch*, 83 Neb. 599; *Brown v. Hannibal, etc. R. Co.*, 99 Mo. 310; *Breen v. Iowa Cent. R. Co.*, 159 Iowa 537.

⁶ *Abilene v. Wright*, 4 Kan. App. 708; *Pratt v. Davis*, 118 Ill. App. 161, citing the text; *Waters-P. O. Co. v. Snell*, 47 Tex. Civ. App. 413. *Contra*, *Central Kentucky T. Co. v. Chapman*, 130 Ky. 342; *Lexington R. Co. v. Britton*, 130 Ky. 676; *Main Jellico Mountain Coal Co. v. Young*, 160 Ky. 397; *City of Boulder v. Stewardson*, 26 Colo. App. 290. See §§ 1241, 1242.

⁷ *El Paso S. R. Co. v. Barrett*, 46 Tex. Civ. App. 14.

⁸ *Birmingham R. L. & P. Co. v. Goldstein*, 181 Ala. 517; *Chandler v. Illinois Cent. R. Co.*, 171 Ill. App. 240; *Allen v. Bland*, — Tex. Civ. App. —, 168 S. W. 35; *Bibb County v. Ham*, 110 Ga. 340, 7 Am. Neg. Rep. 518, quoting the first sentence of this section; *Bradbury v. Benton*, 69 Me. 194; *Southern C. O. Co. v. Skipper*, 125 Ga. 368; *Witt v. Latimer*, 139 Iowa 273 (disfigurement); *Fuqua v. St. Louis, etc. R. Co.*, 82 Kan. 315; *MacGregor v. Rhode Island Co.*, 27 R. I. 85; *San Antonio, etc. R. Co. v. Beauchamp*, 54 Tex. Civ. App. 123; *Cumberland Tel. & T. Co. v. Overfield*, 127 Ky. 548. See *Wallace v. New York City R. Co.* (N. Y. Misc.), 92 Supp. 766. *Contra*, unless the result necessarily produces a permanent injury. *Kaiser v. Detroit United R.*, 167 Mich. 288. It

ought to be pleaded. *Central Kentucky T. Co. v. Chapman*, 130 Ky. 342; *Acton v. Smith*, 150 Ky. 703.

"To allege that the plaintiff's ability to earn money has been impaired, coupled with the statement that the cause that produced that result is permanent, is the assertion of the fact that the impairment likewise is permanent, and therefore raises the issue of a permanent determination in earning capacity, and satisfies the rule that loss of earnings, being in the nature of special damages, must be specially pleaded." *Goodloe v. Metropolitan St. R. Co.*, 120 Mo. App. 194. See also *Pendegrass v. St. Louis & S. F. R. Co.*, 179 Mo. App. 517.

An allegation of past disablement and that such condition will continue for a long time is not sufficient to admit evidence of permanent injuries. *Greene v. Johnson*, 126 App. Div. (N. Y.) 33.

It is sufficient if plaintiff alleges his belief as to the permanency of his injuries. *Evans v. Elwood*, 123 Iowa 92.

The permanency of the injuries and the loss of earning capacity must be alleged in action for assault and battery. *Hamilton County A. Soc. v. Helmann*, 14 Ohio C. C. (N. S.) 522.

⁹ *Campbell v. City of Chillicothe*, 175 Mo. App. 436; *Smith v. Whitteley*, 79 Conn. 189; *Jacksonville E. Co. v. Batchis*, 54 Fla. 192; *Illinois Cent. R. Co. v. Rothschild*, 134

states facts showing that the injury has been such as to render it impossible for the injured party to pursue his ordinary business and damages are claimed for the loss of time therein, the plaintiff is permitted to show upon the trial what his business is and what damages he has suffered by reason of inability to pursue the same. This is held on the reasonable presumption that ordinarily the business of the plaintiff will be known to the defendant and the latter will not be surprised at the introduction of evidence on that point; and under the codes if the defendant is ignorant concerning it he may move to have the complaint made more definite and certain.¹⁰ If the plaintiff's

Ill. App. 504; *Union T. Co. v. Sullivan*, 38 Ind. App. 513; *Southern R. Co. v. Bowlin*, 143 Ky. 268; *Baries v. Louisville E. L. Co.*, 118 Ky. 830 (an allegation of inability to work does not show a loss of time); *Rush v. Metropolitan St. R. Co.*, 157 Mo. App. 504; *Hart v. Same*, 121 App. Div. (N. Y.) 732; *Farlington v. Cheponis*, 82 Conn. 258; *Pittsburgh, etc. R. Co. v. Lynch*, 43 Ind. App. 177; *Louisville & N. R. Co. v. Moore*, 150 Ky. 692; *Yorty v. Case T. M. Co.*, 91 Neb. 449; *Coontz v. Missouri Pac. R. Co.*, 115 Mo. 669, 16 Am. Neg. Cas. 497; *Slaughter v. Metropolitan St. R. Co.*, 116 Mo. 269; *Morris v. Winchester R. A. Co.*, 73 Conn. 680; *Finken v. Elm City B. Co.*, 73 Conn. 423; *Conner v. Pioneer F. P. C. Co.*, 29 Fed. 629; *Pueblo v. Griffin*, 10 Colo. 366; *Joslin v. Grand Rapids I. Co.*, 50 Mich. 516, 16 Am. Neg. Cas. 84, 45 Am. Rep. 54 (the court intimate that if the practice would permit the defendant to demand that plaintiff make his allegations more specific it would hold otherwise); *Heiser v. Loomis*, 47 Mich. 16; *Tomlinson v. Derby*, 43 Conn. 562; *Taylor v. Monroe*, id. 36; *Baldwin v. Western R. Co.*, 4 Gray 333. See § 1247.

Where the allegation was that owing to the plaintiff's inability to attend to his business he was obliged to hire his business and work done, to his damage in a sum specified, evidence of the loss of profits as a partner in the business was inadmissible. *Lombardi v. California St. R. Co.*, 124 Cal. 311.

A "tool maker" is a "machinist." *Fillingham v. Michigan United R.*, 154 Mich. 233.

A plaintiff is bound by the specifications alleged as to the elements of his damages. *Ft. Worth, etc. R. Co. v. Morrison* (Tex. Civ. App.), 129 S. W. 1157.

The rule as to pleading the damages arising from loss of time has special force when the plaintiff is a married woman. *Mellwitz v. Manhattan R. Co.*, 17 N. Y. Supp. 112; *Bloom v. Same*, id. 812; *Uransky v. Dry Dock, etc. R. Co.*, 118 N. Y. 304.

¹⁰ *Johnson v. Danville, U. & C. Ry. Co.*, 185 Ill. App. 83; *Atwood v. Utah Light & Railway Co.*, 44 Utah 366; *Cordner v. Hall*, 84 Conn. 117; *Barnes v. Danville St. R. & L. Co.*, 143 Ill. App. 259; *Scholl v. Grayson*, 147 Mo. App. 652; *Carlile v. Bentley*, 81 Neb. 715; *Jacobs v. Williams*, 67 W. Va. 377; *Homan*

profession is stated and it is alleged that he has been unable to attend to it, he may show the amount of his monthly earnings.¹¹ Under the allegation that the plaintiff was a preacher and that the injuries sustained rendered him unable to carry on his occupation on account of a partial loss of voice, a recovery may be had for lessened earning power.¹² Under a general allegation of damage the loss of profits from any special engagement cannot be shown¹³ nor the loss of profit from a farm.¹⁴ A husband who alleges only that he lost the services of his wife as housekeeper may not show that she aided in the performance of work in which he was engaged.¹⁵ If a complaint alleges damages because of hindrance to the plaintiff's business and expenses of cure, it cannot be shown what he might have made by going into a particular business.¹⁶ Under an allegation in an action by an infant to recover for personal injuries that the plaintiff has lost the use of his right arm, has become and will continue to be a confirmed invalid, there may be a recovery for the impairment of ability to pursue the ordinary vocations of life.¹⁷ In an action to recover for injuries sustained by an assault the plaintiff may, without an allegation of the fact, show that he became subject to fits as the result of it.¹⁸ Physical pain as the result of a battery must be alleged, as must loss of time and liability for medical expenses.¹⁹ Where

v. Franklin County, 90 Iowa 185; Chicago & E. R. Co. v. Meech, 163 Ill. 305, 314; North Chicago St. R. Co. v. Brown, 178 Ill. 187; Chicago City R. Co. v. Anderson, 182 Ill. 298; Frobisher v. Fifth Ave. T. Co., 81 Hun 544, 5 Am. Neg. Cas. 599, 1 Am. Neg. Rep. 148; Luck v. Ripon, 52 Wis. 196; Bierbach v. Goodyear R. Co., 54 Wis. 208, 41 Am. Rep. 19; El Paso S. R. Co. v. Barrett, 46 Tex. Civ. App. 141; Bloomington v. Chamberlain, 104 Ill. 268; Wade v. Leroy, 20 How. 34, 15 L. ed. 813. See § 1247.

¹¹ Collins v. Dodge, 37 Minn. 503.

¹² Warsaw v. Fisher, 24 Ind. App. 46; Wilbur v. Southwest Missouri E. R. Co., 110 Mo. App. 689.

¹³ Chicago & E. R. Co. v. Meech, 163 Ill. 305; Oldfather v. Zent, 14 Ind. App. 89; Chicago v. O'Brennan, 65 Ill. 160; Chicago West Division R. Co. v. Klauber, 9 Ill. App. 613, 9 Am. Neg. Cas. 263; Shaw v. Southern Pac. R. Co., 157 Cal. 240.

¹⁴ Homan v. Franklin County, 90 Iowa 185.

¹⁵ Keenan v. Metropolitan St. R. Co., 118 App. Div. (N. Y.) 56.

¹⁶ Beardstown v. Smith, 150 Ill. 169.

¹⁷ Strudgeon v. Sand Beach, 107 Mich. 496.

¹⁸ Tyson v. Booth, 100 Mass. 258; Sloan v. Edwards, 61 Md. 89.

¹⁹ Irby v. Wilde, 150 Ala. 402.

the damages claimed were specified and the allegation was that plaintiff was "hurt," "bruised" and "wounded," evidence of fractures of the shoulder, arm and hand and a temporary strain of the hip resulting in permanent injury and some disability was inadmissible.²⁰ It may be doubted whether this case declares the law as it is in Michigan. The rule there and in some other states is that the plaintiff is not bound to aver all the physical injuries which he sustained, or which may have resulted from or have been aggravated by the tort, even though they do not necessarily result from the original injury. If such injuries can be traced to the act complained of and are such as would naturally follow from the injury they need not be specially averred.²¹ Hence under an allegation that the plaintiff was seriously hurt, and his back and spine were so hurt, crippled, bruised, sprained and injured testimony may be received to show that chronic inflammation and tenderness of the spine might result.²² The usual allegations concerning

²⁰ *Shadock v. Alpine P. Co.*, 79 Mich. 7. Compare *Storrs v. Grand Rapids*, 110 Mich. 483. To much the same effect are *Arnold v. Maryville*, 110 Mo. App. 254; *Pugmire v. Oregon S. L. R. Co.*, 33 Utah 27, 13 L.R.A.(N.S.) 565, 126 Am. St. 805. See *Rapid Transit R. Co. v. Williams* (Tex. Civ. App.), 136 S. W. 267.

A statutory notice claiming compensation for the fracture of both wrists does not open the door for proof of injury to a shoulder. *Joy v. York*, 99 Me. 237.

²¹ *St. Louis S. W. Ry. Co. of Texas v. Brown*, — Tex. Civ. App. —, 163 S. W. 383; *Katahdin P. & P. Co. v. Peltomaa*, 156 Fed. 342; *Wilbur v. Southwest Missouri E. R. Co.*, 110 Mo. App. 689; *Van Cleve v. St. Louis, etc. R. Co.*, 124 Mo. App. 224; *South Omaha v. Sutcliffe*, 72 Neb. 746; *Falldin v. Seattle*, 57 Wash. 307; *Birmingham R., L. & P. Co. v. Girod*, 164 Ala.

10, 137 Am. St. 17 (loss of voice may be shown under an allegation that permanent external and internal injuries were received); *Connersville v. Snider*, 31 Ind. App. 218; *Kircher v. Larchwood*, 120 Iowa 578; *Reardon v. St. Louis, etc. R. Co.*, 215 Mo. 105.

²² *Montgomery v. Lansing City R. Co.*, 103 Mich. 46, 12 Am. Neg. Cas. 118, 29 L.R.A. 287, and local cases cited; *Missouri, etc. R. Co. v. Coker* (Tex. Civ. App.), 163 S. W. 218; *Leslie v. Jackson & S. T. Co.*, 134 Mich. 518; *Southern T. & T. Co. v. Evans*, 54 Tex. Civ. App. 63; *Rapid T. R. Co. v. Allen*, 54 Tex. Civ. App. 245. Compare *Ketchum v. Fillingham*, 162 Mich. 704 and see *Currelli v. Jackson*, 77 Conn. 115, 17 Am. Neg. Rep. 22; *Maynard v. Oregon R. Co.*, 43 Ore. 63; *Comstock v. Georgetown*, 137 Mich. 541; *Fuchs v. St. Louis T. Co.*, 111 Mo. App. 574.

It is said in *Norfolk & W. R. Co.*

maiming, injuring and suffering and of the fracture of a leg are ample to cover evidence that after the leg was set it became necessary to rebreak and reset the bones.²³ If all the allegations as to the injuries sustained and the consequences thereof are in the past tense there cannot be a recovery for future suffering,²⁴ unless it is alleged that the plaintiff has not recovered.²⁵

Except in cases of very serious personal injury it is not inferred as a matter of law that the plaintiff has incurred expense for nursing, medical or surgical aid,²⁶ or on account of

v. Spears, 110 Va. 110: When the defendant was informed that damages were sought for sickness and disorder and their attendant expenses, as well as damages for wounds and bruises, it was bound to expect evidence of any sickness or disorder the origin or aggravation of which could be traced to the act or wrong complained of, and the rules of pleading did not require any more specific description of the sickness or disorder from which the plaintiff was suffering than was given in the declaration.

The recovery must be limited to the specific injuries alleged. *Blyston-Spencer v. United R. Co.*, 152 Mo. App. 118.

A parent suing for personal injuries to a child cannot recover expenses caused thereby for its future care, maintenance and education unless he states the amount which will be necessary therefor. *Houston, etc. R. Co. v. Adams*, 44 Tex. Civ. App. 288.

In Texas the nature and character of the injuries to the affected parts must be alleged if they can be stated; otherwise the fact that they cannot be stated must be alleged. *Dallas Con. E. St. R. Co. v. Ison*, 37 Tex. Civ. App. 219, 17 Am. Neg. Rep. 268; *Suderman v. Woodruff*, 47 Tex. Civ. App. 229. Compare *Suth. Dam. Vol. II.*—9.

Missouri, etc. R. Co. v. Edling, 18 Tex. Civ. App. 171.

²³ *Cudahy P. Co. v. Broadbent*, 70 Kan. 535.

²⁴ *Whitlock v. Mungiven*, 36 R. I. 386, quoting the text; *Palmer v. Waterloo*, 138 Iowa 296; *Shultz v. Griffith*, 103 Iowa 150, 40 L.R.A. 117; *Kalembach v. Michigan Cent. R. Co.*, 87 Mich. 509. Compare *La Duke v. Exeter*, 97 Mich. 450, 37 Am. St. 457.

²⁵ *Meier v. Shrunk*, 79 Iowa 22, 1 Am. Neg. Cas. 13.

²⁶ *City of Boulder v. Stewardson*, 26 Colo. App. 290; *Central Georgia Power Co. v. Fincher*, 141 Ga. 191; *Revel v. Pruitt*, 42 Okla. 696; *Whitlock v. Mungiven*, 36 R. I. 386; *Elam v. Majestic C. & C. Co.*, 155 Ill. App. 375; *Baltimore & O. S. R. Co. v. Schell*, 122 Ill. App. 346 (no suggestion that the extent of the injury is material); *Blue Grass T. Co. v. Ingles*, 140 Ky. 488; *Lexington R. Co. v. Johnson*, 139 Ky. 324; *Same v. Britton*, 130 Ky. 676; *Cincinnati, etc. R. Co. v. Giboney*, 124 Ky. 806; *Radtke v. St. Louis B. & B. Co.*, 229 Mo. 1; *Field v. Metropolitan St. R. Co.*, 169 Mo. App. 624, 4 N. C. C. A. 543; *Northern Texas T. Co. v. Jamison*, 38 Tex. Civ. App. 55; *Stowe v. LaConner T. & T. C.*, 39 Wash. 28; *South Covington, etc. R. Co. v. Ware*, 84 Kv.

his inability to conduct his business.²⁷ But if the character of the injuries sustained is alleged and it is serious, it is to be expected that expenses will be incurred and these may be recovered under the general allegation of damages.²⁸ An allegation that the plaintiff was, and will still be, put to much expense in the treatment of his injuries is sufficient to admit proof of medical expenses.²⁹

It is implied that mental suffering follows serious personal hurts³⁰ or insult, and that such is the case on the part of a

267; *Folsom v. Underhill*, 36 Vt. 580; *Louisville & N. R. Co. v. McEwan*, 17 Ky. L. Rep. 406; *Pittsburgh, etc. R. Co. v. Lynch*, 43 Ind. App. 177.

An allegation that the plaintiff incurred considerable expense, to wit: in the sum of \$——, in securing medical attention, nursing and medicine, does not authorize the recovery of doctor's bills, cost of medicine, etc. *Jesse v. Shuck*, 11 Ky. L. Rep. 463.

In the absence of an averment that the injuries received are permanent, expenses incurred for medical attention cannot be recovered. *Salmon v. Chicago & A. R. Co.*, 181 Mo. App. 414..

²⁷ *Chesapeake & O. R. Co. v. Crank*, 128 Ky. 329, 16 L.R.A. (N.S.) 197; *Southern R. Co. v. Hawkins*, 121 Ky. 415; *McDonald v. St. Louis, etc. R. Co.*, 165 Mo. App. 75 (no distinction made as to the nature of the injuries); *Edge v. Third Ave. R. Co.*, 57 App. Div. 29; *Gumb v. Twenty-third St. R. Co.*, 114 N. Y. 411. See *Schmidt v. St. Louis T. Co.*, 163 Mo. App. 412.

The expense of employing others to do what the plaintiff could have done but for his injury must be alleged. *Elijah v. Dowling*, 49 Ind. App. 515.

In *Gumb v. R. Co.*, *supra*, it was alleged that the plaintiff was per-

sonally injured and that his property was damaged, and he was put to expense in repairing it and in endeavoring to be healed of his hurts, and was prevented from going on with his business. Evidence that he employed men to work in his place was inadmissible.

²⁸ *Evansville, etc. R. Co. v. Holcomb*, 9 Ind. App. 198, 14 Am. Neg. Cas. 517.

The rule may be less liberal where the notice required by statute must specify the injuries sustained. *Diamond R. Co. v. Harryman*, 41 Colo. 415, 15 L.R.A. (N.S.) 775.

²⁹ *Pittsburgh, etc. R. Co. v. Lynch*, 43 Ind. App. 177; *McCready v. Staten Island E. R. Co.*, 51 App. Div. (N. Y.) 338. See *Louisville & S. I. Traction Co. v. Lloyd*, — Ind. App. —, 105 N. E. 519, holding that, in the absence of surprise, the complaint will be deemed amended so as to correct a technical error in regard to an allegation as to expense of nursing.

In order to recover for medical expenses incurred subsequently to the filing of the original petition the proper practice is to file a supplemental petition covering such item. *Plowman Const. Co. v. Garrison's Adm'r*, 157 Ky. 462.

³⁰ *Chicago City R. Co. v. Taylor*, 170 Ill. 49; *T. & P. R. Co. v. Curry*, 64 Tex. 85; *Brown v. Hannibal, etc.*

parent whose daughter has been seduced, or of a spouse in an action for the alienation of the affections of a husband or wife.³¹ Mental suffering independent of physical pain must be alleged.³² Such suffering may be shown under an allegation that shock and fright were sustained.³³ In an action for malicious prosecution whatever shows the extent and character of the mental suffering endured by the plaintiff may be proven without special allegations³⁴—as that he had a family dependent upon him for support, one of whom was sick and needed the care of the plaintiff.³⁵ The complaint in an action for false imprisonment

R. Co., 99 Mo. 310; Chicago, etc. R. Co. v. Warner, 108 Ill. 538, 14 Am. Neg. Cas. 348, 401; Central R. & B. Co. v. Lanier, 83 Ga. 587; Chicago v. McLean, 133 Ill. 148, 8 L.R.A. 765; Wright v. Compton, 53 Int. 337; Gronan v. Kukuck, 59 Iowa 18 (assault and battery); Caldwell v. Central Park, etc. R. Co., 27 N. Y. Supp. 397; Wrightsville & T. R. Co. v. Tompkins, 9 Ga. App. 154; Ousley v. Hampe, 128 Iowa 675; Stewart v. Watson, 133 Mo. App. 44; Fink v. Busch, 83 Neb. 599; Gagnier v. Fargo, 12 N. D. 219, citing the text; Pecos & U. T. Ry. Co. v. Huskey, — Tex. Civ. App. —, 166 S. W. 493; Colorado Springs & I. R. Co. v. Marr, 26 Colo. App. 48.

Mental suffering is presumed from personal injury in case of the insane as well as the sane in the absence of such evidence of abnormal mental condition as will preclude such presumption. Tweed v. Western U. Tel. Co., — Tex. —, 166 S. W. 696.

Contra, Garvey v. Metropolitan, etc. E. R. Co., 155 Ill. App. 601; Sloss-S. & I. Co. v. Dickinson, 167 Ala. 211 (mental pain must be alleged in an action for assault and battery); Knoche v. Knoche, 160 Mo. App. 257 (humiliation must be

pleaded in an action for assault and battery.)

An allegation that pain and anguish were suffered includes physical and mental suffering. Tomasi v. Donk C. & C. Co., 257 Ill. 70.

In some cases an averment of mental suffering is necessary. Garvey v. Metropolitan, etc. E. R. Co., 155 Ill. App. 601. That requirement is met by an allegation that the plaintiff has suffered and will suffer much pain on account of said injuries and the loss of his eye. Tomasi v. Donk C. & C. Co., 169 id. 47.

³¹ Phillips v. Hoyle, 4 Gray 568, 64 Am. Dec. 95; Nevins v. Nevins, 68 Kan. 410; Rice v. Rice, 104 Mich. 371; Klein v. Klein (Ky.), 101 S. W. 382.

³² Western U. Tel. Co. v. Bowen, 97 Tex. 621; Adcock v. Oregon R. Co., 45 Ore. 173.

³³ Austin E. R. Co. v. Faust (Tex. Civ. App.), 133 S. W. 449.

³⁴ Grorud v. Lossel, 48 Mont. 274, citing the text; Shatto v. Crocker, 87 Cal. 629.

³⁵ Davis v. Seeley, 91 Iowa 583, 51 Am. St. 536. *Contra*, Reisan v. Mott, 42 Minn. 49. An intimation to the same effect is made in Missouri, etc. R. Co. v. Cherry, 44 Tex. Civ. App. 232.

and malicious prosecution alleged that the plaintiff was greatly injured in his health, credit and reputation, and was exposed to and suffered great pain of body and mind, and was prevented from transacting and performing his necessary affairs and business. This was not sufficient to admit evidence of the destruction of the plaintiff's law business.³⁶ Damage caused by the loss of reputation, credit or business cannot be recovered in an action for wrongful and vexatious attachment unless it is specially claimed.³⁷ In an action for false imprisonment the law does not imply injury from deficient food during confinement, or from the bad condition of the jail;³⁸ nor that expenses are incurred for the services of an attorney to get discharged.³⁹ In the absence of wilfulness in failing to stop a train on signal to take a passenger on there cannot be a recovery for the resulting sickness and disappointment unless such results are alleged.⁴⁰ Under a general averment of the plaintiff's mental suffering, anxiety and suspense as the result of personal injuries proof may be made that she was obliged to use crutches, and that she suffered shame and mortification on that account; but evidence is inadmissible to show mental suffering occasioned by the postponement of her marriage on account of her injuries.⁴¹

An allegation of nervous prostration and numbness in certain parts of the body as the result of injuries makes admissible evidence of sympathetic affection of other parts.⁴² Though no special allegation of injury to vision is alleged as the result of

³⁶ *Evins v. Metropolitan St. R. Co.*, 47 App. Div. (N. Y.) 511; *Stanfield v. Phillips*, 78 Pa. 73.

Diminished ability to work and inability to sleep must be alleged in an action for malicious prosecution. *Moneyweight S. Co. v. McCormick*, 109 Md. 170.

³⁷ *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59.

³⁸ *Atchison, etc. R. Co. v. Rice*, 36 Kan. 593; *Johnson v. Von Kettler*, 84 Ill. 315.

³⁹ *Strang v. Whitehead*, 12 Wend. 64; *Thompson v. Lumley*, 7 Daly

74; *Tutwiler C. C. & I. Co. v. Tuvin*, 158 Ala. 657.

⁴⁰ *Illinois Cent. R. Co. v. Siddons*, 53 Ill. App. 607.

⁴¹ *Beath v. Rapid R. Co.*, 119 Mich. 512.

⁴² *Jenkins v. Northern Pac. R. Co.*, 44 Mont. 295 (compare *Gordon v. Same*, 39 Mont. 571, impairment of one eye not provable under an allegation of the loss of the other); *Missouri, etc. R. Co. v. McCutcheon*, 33 Tex. Civ. App. 557; *Illinois Cent. R. Co. v. Griffin*, 25 C. C. A. 413, 80 Fed. 278; *Will v. Mendon*, 108 Mich. 251.

a physical injury some cases hold that it is such a natural consequence thereof that proof of it may be made, as may proof that such injury resulted in a shock to the nervous system which injured the optic nerve, diminished the power of making calculations and subsequently produced emaciation.⁴³ It is not the natural or probable result of mere bodily injuries that loss of memory and impaired mental vigor shall follow.⁴⁴ Under an allegation that the plaintiff's spine was severely and permanently injured and that he was otherwise severely bruised, hurt and wounded, and became disabled, etc., evidence may be received to show a withering of the flesh about one of the thighs and hip as the result of a partial paralysis.⁴⁵ An allegation of injury to a hip, hip joint, pelvis and thigh is broad enough to admit evidence of a resulting disease of the sciatic nerve.⁴⁶ The declaration in an action for injuries caused by a dog stated that the plaintiff's nervous system was permanently injured by the shock and fright, that she had suffered, continued to suffer and would continue to suffer pain; that the injury was permanent, her nervous system being permanently injured, her mental faculties ruined, and her blood poisoned. Proof

⁴³ *Baltimore City P. R. Co. v. Baer*, 90 Md. 97; *West Chicago St. R. Co. v. Levy*, 182 Ill. 525. Compare *Geoghegan v. Third Ave. R. Co.*, 51 App. Div. (N. Y.) 369. *Contra*, *Louisville R. Co. v. Gaugh*, 133 Ky. 467. See *Spear v. Westbrook*, 104 Me. 496, 20 L.R.A.(N.S.) 804; *Pugmire v. Oregon S. L. R. Co.*, 33 Utah 27, 126 Am. St. 805; 13 L.R.A.(N.S.) 565; *Margrane v. St. Louis & S. R. Co.*, 183 Mo. 119.

The effects of a nervous shock must be alleged unless it was inevitable—as that it produced locomotor ataxia. *Wilkins v. Nassau N. D. Exp. Co.*, 98 App. Div. (N. Y.) 130.

An allegation of injury to the head, spine and nerves does not include injuries to the eyes. *Wells*,

Fargo Exp. Co. v. Boyle, 39 Tex. Civ. App. 365.

Effects which are not the necessary and immediate result of the injury must be pleaded—as where injury to one eye was alleged it could not be shown that both were affected. *Dittman v. Edison E. Co.*, 87 App. Div. (N. Y.) 68. See *Lockwood v. Troy City R. Co.*, 92 App. Div. (N. Y.) 112, 15 Am. Neg. Rep. 636.

⁴⁴ *Atchison, etc. R. Co. v. Willey*, 57 Kan. 764; *Missouri, etc. R. Co. v. Doyal* (Tex. Civ. App.), 142 S. W. 610.

⁴⁵ *Canfield v. Jackson*, 112 Mich. 120; *Denver, etc. R. Co. v. Mitchell*, 42 Colo. 43; *Grady v. St. Louis T. Co.*, 102 Mo. App. 212.

⁴⁶ *Beath v. Rapid R. Co.*, 119 Mich. 512.

of resulting epilepsy was admissible.⁴⁷ Allegations that the plaintiff had suffered great bodily injury, that he became and still continued sick, sore and disabled, and that he was prevented for a long time from attending to his business authorize proof of any bodily injury resulting from the accident, in the absence of a motion for a more specific statement.⁴⁸ Under an allegation of permanent impairment of health and strength proof of any physical disability resulting from the injury is proper.⁴⁹ But if the allegations as to the result of the injury are specific the rule is less expansive.⁵⁰ Where it was stated that the plaintiff received severe and painful contusions to her head, body and arms, and that her scalp was lacerated, whereby she sustained severe nervous shock and concussion of the brain and injured eyesight, was for a time rendered unconscious and permanently injured, evidence that her heart was affected, that the dorsal muscle on the right side was paralyzed, that she suffered from vertigo, and had a curvature of the spine, was inadmissible.⁵¹ On the other hand, it was laid down that if the

⁴⁷ *Fye v. Chapin*, 121 Mich. 675

⁴⁸ *Ehrgott v. Mayor*, 96 N. Y. 264, 277, 48 Am. Rep. 622; *Grasselli C. Co. v. Davis*, 166 Ala. 471; *Price v. Metropolitan St. R. Co.*, 220 Mo. 435, 132 Am. St. 588; *Roenebeck v. Brooklyn Heights R. Co.*, 123 App. Div. (N. Y.) 606; *Rudomin v. Interurban St. R. Co.*, 111 App. Div. (N. Y.) 548; *Fleming v. Tuttle*, 98 App. Div. (N. Y.) 222; *Graham v. Bauland*, 97 App. Div. (N. Y.) 141; *Houston E. Co. v. McDade*, 34 Tex. Civ. App. 497; *Dralle v. Reedsburg*, 140 Wis. 319; *Gilleland v. Greason*, 156 App. Div. (N. Y.) 46; *Yaeger v. Chicago City R. Co.*, 166 Ill. App. 506. See *Lake Erie & W. R. Co. v. Oland*, 49 Ind. App. 494.

⁴⁹ *Woody v. Louisville R. Co.*, 153 Ky. 14.

⁵⁰ *Piltz v. Yonkers R. Co.*, 83 App. Div. (N. Y.) 29; *Denver City T. Co. v. Cowan*, 51 Colo.

64; *Applegate v. Quincy, etc. R. Co.*, 252 Mo. 173, 4 N. C. C. A. 190; *Pain v. Metropolitan St. R. Co.*, 170 Mo. App. 574; *Paisley v. Western New York & P. T. Co.*, 80 N. Y. Misc. 258; *Keefe v. Lee*, 197 N. Y. 68, 27 L.R.A.(N.S.) 837.

⁵¹ *Kleiner v. Third Ave. R. Co.*, 162 N. Y. 193, 7 Am. Neg. Rep. 315; *Hergert v. Union R. Co.*, 25 App. Div. (N. Y.) 218. See *Dallas O. & R. Co. v. Carter* (Tex. Civ. App.), 134 S. W. 418.

There are two lines of decisions, dependent upon the state of the pleadings, as to what specific injuries can be proven. One is where the injuries to certain portions or organs of the body are alleged in general terms, such as that they were crushed, strained, bruised, etc., and a special exception is urged that the defendant is not put upon notice by such allegations of the particular character, nature or

defendant is informed that the plaintiff was permanently injured, crushed, bruised and wounded in his back and loins and in various other parts of his body, both externally and internally some of his ribs broken, and because of such injuries he became sick, sore, lame and disordered and suffered great mental and physical pain and distress he is bound to expect evidence of any sickness or any injury to the plaintiff, either mental or physical, the origin or aggravation of which can be traced to the act complained of.⁵² An allegation that the injury was to the head, side and ribs to such an extent as rendered the plaintiff unfit to perform his duties, and that such condition will be permanent is broad enough to admit evidence of a permanent disorder of the heart.⁵³ Under an allegation that the plaintiff received a wound at the upper right angle of the forehead, a fracture of the skull, concussion of the brain and a fracture of the nasal bone, all of which gave him severe bodily pain and shock to his physical and mental system, it cannot be shown that he was afflicted with hystero epilepsy in the absence of proof that that disease is the necessary and immediate result of such injuries.⁵⁴ An allegation that the plaintiff was beaten

extent of the alleged injuries. In such cases proof should not be admitted, over objection, as to such specific injuries as must have been known to the plaintiff, or which he could easily have ascertained and specifically alleged. The other is where the plaintiff undertakes to allege, with particularity, what portions of the body were injured. In such case evidence as to injury to a portion of the body not necessarily included in a description of the injured parts is not admissible, though no exception is made, under the rule that the inclusion of one is the exclusion of all others. *Houston, etc. R. Co. v. Gerald* (Tex. Civ. App.), 128 S. W. 166.

⁵² *Williams v. Oregon S. L. R. Co.*, 18 Utah 210, 72 Am. St. 777; *Croco v. Same*, 18 Utah 311, 44

L.R.A. 285; *Nichols v. Same*, 28 Utah 319; *New York T. Co. v. Gar-side*, 157 Fed. 521, 85 C. C. A. 285; *Walsh v. Richmond L. R. Co.*, 124 App. Div. (N. Y.) 533 ("where a complaint specifically enumerates certain injuries only, it excludes all other injuries, but when, instead of so limiting, it alleges injuries in general terms it includes all injuries"). See *Birmingham R. L. & P. Co. v. Brown*, 150 Ala. 327; *Hollingsworth v. Ft. Dodge*, 125 Iowa 627; *Horton v. Seattle*, 53 Wash. 316; *McCarthy v. Clarke*, 115 Md. 454.

⁵³ *Myers v. Erie R. Co.*, 44 App. Div. (N. Y.) 11.

⁵⁴ *Ackman v. Third Ave. R. Co.*, 52 App. Div. (N. Y.) 483; *Long v. Fulton C. Co.*, 133 App. Div. (N. Y.) 842; *Johnson v. Troy*, 124 App.

and wounded on the head, whereby he was wounded and is, and for a long time will be, sick, and has suffered and will suffer great bodily pain and discomfort, sustains the admission of evidence of physical and mental suffering naturally and proximately resulting from the wrong done.⁵⁵ General averments of permanent bodily injury are sufficient to admit proof of uterine difficulty,⁵⁶ and of injury to the nerves if that is the reasonable and natural result of the injuries to the body.⁵⁷ The absence of such averments cannot be objected to on the ground of surprise if the plaintiff was examined before the trial by physicians of the defendant's selection.⁵⁸ In some states the aggravation of an existing condition must be alleged;⁵⁹ but not in Indiana.⁶⁰ An allegation of specific injuries and of "other internal injuries" not ascertained will not permit evidence of injury to independent or separate members or organs outside the trunk of the body.⁶¹ Under averments of injury to every part of the person, including the head, there cannot be a recovery for injury to the hearing.⁶² But under a general allegation of "great and lasting injuries to all parts of the plaintiff's body" injuries to his leg and ankle may be shown.⁶³ Under an allegation that injuries sustained caused the plaintiff "to suffer in-

Div. (N. Y.) 29; *Brown v. Manhattan R. Co.*, 105 App. Div. (N. Y.) 395. See *Thompson v. St. Louis & S. R. Co.*, 111 Mo. App. 465; *Kappus v. Metropolitan St. R. Co.*, 82 App. Div. (N. Y.) 13. Compare *Levison v. Bernheimer*, 31 N. Y. Misc. 26.

⁵⁵ *Harshman v. Rose*, 50 Neb. 113.

⁵⁶ *Samuels v. California St. Cable R. Co.*, 124 Cal. 294; *Treadwell v. Whittier*, 80 Cal. 574, 19 Am. Neg. Rep. 180, 13 Am. St. 174, 5 L.R.A. 498; *Denver, etc. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146; *Mueller v. Detroit United R.*, 162 Mich. 313; *Groat v. Same*, 153 Mich. 165; *Lofink v. Interborough R. T. Co.*, 106 App. Div. (N. Y.) 202. See *Atlanta & R. P. Co. v. Maddox*, 117 Ga. 181.

⁵⁷ *Foster v. Crooker*, 142 App. Div. (N. Y.) 268.

⁵⁸ *Kline v. Santa Barbara C. R. Co.*, 150 Cal. 741.

⁵⁹ *Lindsay v. Wabash R. Co.*, 141 Mich. 204, 19 Am. Neg. Rep. 24; *Comstock v. Georgetown*, 137 Mich. 541; *Maynard v. Oregon R. Co.*, 46 Ore. 15, 68 L.R.A. 477; *Whitlock v. Mungiven*, 36 R. I. 386.

⁶⁰ *Indiana Union T. Co. v. Jacobs*, 167 Ind. 85.

⁶¹ *Cincinnati, etc. R. Co. v. Bennette*, 134 Ky. 19.

⁶² *Louisville R. Co. v. Gaugh*, 133 Ky. 467.

⁶³ *Louisville R. Co. v. Veith*, 157 Ky. 424, citing *Chesapeake & O. Ry. Co. v. Roberts*, 32 Ky. L. Rep. 651; *Quirk v. Seigel-Cooper Co.*, 43 App. Div. (N. Y.) 464; *Louisville & N.*

flammation of the bladder" evidence of urinary disorders is properly admitted.⁶⁴ That gangrene resulted from injuries sustained and that a number of operations were necessary should be specially alleged.⁶⁵ Under an allegation of permanent injuries to the head, nervous system and mind testimony of a physician that the plaintiff would suffer in the future from dementia, some brain trouble, a possible paralysis, or a brain pressure resulting in epilepsy is admissible.⁶⁶ Under a complaint alleging, as a result of personal injuries, the formation of a tumor on the foot and the consequent amputation of the foot, as a result thereof, it may be shown, in the absence of a demand that the complaint be made more definite and certain, that the tumor was of a cancerous nature and that the results thereof will prove fatal.⁶⁷

§ 422. Not necessary to allege matter of aggravation.

Where there are aggravations accompanying a tort it does not appear to be necessary in common-law pleading to specially aver them in order to let in proof of them in an action for the tort; and such seems to be the rule in some code states, though the decisions are not a unit.⁶⁸ Where exemplary dam-

R. Co. v. Richmond, 23 Ky. L. Rep. 2394.

⁶⁴ Reynolds v. Metropolitan St. R. Co., 180 Mo. App. 138.

⁶⁵ Gulf, C. & S. F. Ry. Co. v. Sullivan, — Tex. Civ. App. —, 168 S. W. 473.

⁶⁶ Peterie v. Metropolitan St. R. Co., 177 Mo. App. 359.

⁶⁷ Atlantic Coast Line R. Co. v. Thompson, 128 C. C. A. 267, 211 Fed. 889.

⁶⁸ Johnson v. Collier, 161 Ala. 204; Sparks v. McCreary, 156 Ala. 382, 22 L.R.A.(N.S.) 1224; Southern R. Co. v. Phillips, 119 Ga. 146; Martin v. Corscadden, 34 Mont. 308; Korber v. Dime Sav. Bank, 134 App. Div. (N. Y.) 149; Davis v. Seeley, 91 Iowa 583, 51 Am. St. 536, citing the text (action for malicious prosecution); Pierce v. Carpenter, 65

Mo. App. 191; Wilkinson v. Drew, 75 Me. 360; Dailey v. Houston, 58 Mo. 361; Southern Exp. Co. v. Brown, 67 Miss. 260, 19 Am. St. 306; Peers v. Nevada P. L. & W. Co., 119 Fed. 400, 404, citing the text; Schofield v. Ferrers, 46 Pa. 438.

Exemplary damages are not special damages which need be claimed *eo nomine* in the complaint. Wilkinson v. Searcy, 76 Ala. 176; Alabama, etc. R. Co. v. Arnold, 84 id. 159, 5 Am. St. 354; Savannah, etc. R. Co. v. Holland, 82 Ga. 257, 14 Am. St. 158; Gustafson v. Wind, 62 Iowa 281; Richmond Passenger, etc. R. Co. v. Robinson, 100 Va. 374; Greeney v. Pennsylvania W. Co., 29 Pa. Super. 136; Black v. Hankins, 6 Ala. App. 512. But the facts which warrant the assessment of

ages are provided for by statute, the claim being unliquidated, and the only limit to the recovery of such damages being that

the former must be alleged in some states. *Sullivan v. Oregon R. & N. Co.*, 12 Ore. 392, 53 Am. Rep. 364; *Welsh v. Stewart*, 31 Mo. App. 376; *Reed v. Coughran*, 21 S. D. 257; *Selland v. Nelson*, 22 N. D. 14; *Jaegar v. Metcalf*, 11 Ariz. 283; *Greeney v. Pennsylvania W. Co.*, *supra*; *Macon R. & L. Co. v. Mason*, 123 Ga. 773, 18 Am. Neg. Rep. 355; *Geddings v. Atlantic C. L. R. Co.*, 91 S. C. 477.

Punitive damages are not recoverable under a complaint alleging only mere negligence. *Bowles v. Lowery*, 5 Ala. App. 555.

Exemplary damages may be recovered under a claim for damages generally. *Harmening v. Howland*, 25 N. D. 38.

It is enough to allege that the wrong complained of was done maliciously or oppressively. *Stark v. Epler*, 59 Ore. 262.

The rule applies to an action for the breach of a contract to marry. *Jacoby v. Stark*, 205 Ill. 34.

Facts in aggravation may be set out. *Gadsden v. Catawba W. P. Co.*, 71 S. C. 340.

It is sufficient to allege the reckless failure to perform a duty. *Cole v. Blue Ridge R.*, 75 S. C. 156.

Both compensatory and punitive damages may be recovered under an allegation of wilfulness and recklessness. *Tuscaloosa Belt R. Co. v. Maxwell*, 171 Ala. 318.

An amendment may be allowed to set up the facts upon which exemplary damages may be claimed. *Morrow v. Gaffney Mfg. Co.*, 70 S. C. 242, 17 Am. Neg. Rep. 271; *Southern R. Co. v. Jordan*, 129 Ga. 665.

An allegation of forcible detainer

is sufficient to uphold an award of punitive damages. *San Francisco & S. H. B. Soc. v. Leonard*, 17 Cal. App. 254.

"If the wrongful act is of such a character that the law will give to the injured party both compensatory and exemplary damages the petition should so describe it that it may appear to be a case in which such damages may be recovered." *Potter v. Stamford*, 2 Kan. App. 788; *Jacobs v. Louisville & N. R. Co.*, 10 Bush 263, 15 Am. Neg. Cas. 168; *Savannah, etc. R. Co. v. Holland*, 82 Ga. 257; *Spellman v. Richmond, etc. R. Co.*, 35 S. C. 475; *Hirabelli v. Daniels*, 40 Utah 513. But the rule has been changed by statute so that it is not now necessary to allege punitive and actual damages in separate counts. *Glover v. Charleston & S. R. Co.*, 57 S. C. 228; *Appleby v. South Carolina & G. R. Co.*, 60 S. C. 48, 9 Am. Neg. Rep. 582.

If the alleged wrongful act does not in itself imply malice the plaintiff must, if he intends to claim exemplary damages, allege the facts entitling him thereto—must state as an ultimate fact the intent or purpose of the defendant in doing the act. *Vine v. Casmey*, 86 Minn. 74; *Jones v. Marshall*, 56 Iowa 739.

The facts upon which the claim for exemplary damages is predicated must be set out, but it is not essential that it be claimed, in so many words, that some or all of the damages are punitive. *Railroad v. Ray*, 101 Tenn. 1.

In Texas the claims for actual and exemplary damages must be separately stated. *Belo v. Wren*, 63 Tex. 727; *Walker v. Farmers' &*

they must be reasonable, they may be recovered under a complaint in the common-law form.⁶⁹ In a replevin suit the trial court instructed the jury that in estimating damages they were not confined to the value of the property; but if they thought the taking was accompanied by circumstances of outrage and oppression they could go beyond its value. The property was valued at \$150, and a verdict for \$250 was sustained, notwithstanding objection that the declaration contained no clause of special damage or that the taking was accompanied with such aggravation. Strong, J., said: "The rules of pleading do not require that the circumstances which attended the taking should be specially averred in order to entitle the plaintiff to recover damages commensurate with them. If consequential damages are claimed, not necessarily or naturally resulting from the tortious act, they must be specially alleged. But if outrage and oppression attended the taking they belong to the wrongful act itself, and are not merely special injury."⁷⁰

It is held that this doctrine, that the circumstances attending a trespass to realty may be given in evidence for the purpose of enhancing damages, though not alleged in the declaration, does not apply where those circumstances of themselves constitute an independent cause of action, as where in trespass

M.'s Bank (Tex. Civ. App.), 146 S. W. 312.

An allegation that the act complained of was done unlawfully, wantonly and maliciously, and with the fraudulent intent to deprive the plaintiff of the value of the property, is sufficient, without a statement of the circumstances showing it to have been so done. *San Antonio, etc. R. Co. v. Kniffen*, 4 Tex. Civ. App. 484.

In North Carolina the sum claimed as punitive damages should be stated. *Daniel v. Perkins L. Co.* (N. C.), 72 S. E. 438.

Wilfulness need not be alleged if it is the substantive cause of action. *Rude v. Fakes*, 143 Ill. App. 456.

A claim for exemplary damages because of the misconduct of a servant must allege that it was participated in, authorized or ratified by the master. *Norfolk & P. T. Co. v. Miller*, 174 Fed. 607, 98 C. C. A. 453.

In Missouri, because of a statute, exemplary damages must be claimed in the petition. *Anderson v. Shockley*, 159 Mo. App. 334. And they and the compensatory damages must be separately stated. *Kerone v. Block*, 144 Mo. App. 575.

⁶⁹ *Williams v. Williams*, 20 Colo. 51; *Shoemaker v. Sonju*, 15 N. D. 518.

⁷⁰ *Schofield v. Ferrers*, 46 Pa. 438.

de bonis there is an assault upon the person.⁷¹ In an action of trespass to real estate, where the breaking and entering the close was by breaking down and removing fences, it was held correct to instruct the jury that the breaking and entry were the substantive ground of the action; and so far as this was effected by the act or means of breaking down a fence belonging to the close the damage occasioned thereby might properly be taken into consideration as part of the damage to be recovered. It was part of the natural and necessary consequences of the act charged.⁷² In a like action in New Jersey it appeared that the defendant illegally entered upon the plaintiff's premises, and put upon his door an insulting, libelous hand-bill. The question arose whether the contents of this hand-bill could be proved. Southard, J., said: "Is this hand-bill to be regarded as part of his cause of complaint, or is it not? * * * I understand it to be admitted that it was proper to charge and prove the putting up of the hand-bill because it was of the same character with and a part of the trespass; but not proper to charge and prove the contents of the hand-bill because they do not partake of the character of the trespass, and a remedy for them must be sought by an action on the case for the libel or slander. But I do not perceive how the two are to be separated. The plaintiff complains of a trespass. The jury are to determine the extent of it and the injury resulting from it. To do this they must not only know what was done, but, as far as possible, the motives with which it was done. How will they learn them? By being informed that the defendant passed over the gravel walk? No, for this was not all he did; and this he might have done with the best intentions,

⁷¹ *Plumb v. Ives*, 39 Conn. 120; *Simpson v. Markwood*, 6 Baxter 340; *Lamb v. Harbaugh*, 105 Cal. 680. See *Thayer v. Sherlock*, 4 Mich. 173.

⁷² *Clark v. Boardman*, 42 Vt. 667. The allegation of special damages as a matter of aggravation is not an inference of law resulting from facts antecedently stated. *McConnel v. Kibbe*, 33 Ill. 175, 85 Am.

Dec. 265, citing *Kidgell v. Moore*, 14 Jurist 790.

In fixing a *quantum meruit* for wages on a whaling voyage it is competent for the court to take into view the unusual protraction of the voyage and the condition of the vessel and the crew, though not specially alleged or relied on in the libel. *Allen v. Hitch*, 2 Curtis 147.

and have committed no punishable trespass. That he put his foot upon the sill and left a paper there? No, for these acts might have been, and no harm done to the plaintiff. But this might also have been and the plaintiff deeply wounded by them. How is the jury, then, to say whether he was or was not injured? How are they to determine whether the defendant came as a friend or foe? to leave a paper containing information salutary to his safety, or poisonous to his reputation and peace? to commit a trespass, or to do a kindness? It can only be done by looking into the contents of the hand-bill; and shall the jury be compelled to decide, and yet precluded from this only means of judging? Suppose the contents of the bill had been of a kind and friendly nature, and designed expressly for benefit to the plaintiff, would not the defendant have been permitted to show it? And would not the jury in such case have refused the plaintiff anything? Yet the rule must operate both ways. A man enters my house and strikes my child, but when he does it adds the most malignant and unfounded slanders of him. May I not charge or prove these to show the temper with which he did it, and the extent of the wrong? I may, and the jury will estimate his acts accordingly. I understand the true rule on this point to be this: in trespass you may charge and prove the whole circumstances accompanying the act, and which were part of the *res gestæ*, in order to show the temper and purposes with which the trespass was committed and the extent of the injury. A contrary rule would certainly produce the effect argued by the plaintiff's counsel. It would take away all distinction from acts of trespass."⁷³ But if the acts relied upon to show aggravation were wholly independent of the act counted upon as the cause of action they should be pleaded.⁷⁴ The facts justifying exemplary damages in an action for personal injury may set up in an amendment to the complaint.⁷⁵

§ 423. **Matters of aggravation not traversable.** If accompanying circumstances or torts are alleged by way of aggrava-

⁷³ Ogden v. Gibbons, 5 N. J. L. Co., 122 Ga. 646, 69 L.R.A. 119. 518.

⁷⁵ Southern R. Co. v. Jordan, 129

⁷⁴ Central R. Co. v. Augusta B. Ga. 665.

tion they are not traversable, and may be stated in a very general manner. They are not separate and substantive subjects of damage, but serve to characterize the principal act which is the cause of action. That act must be proved or the action will fail, though the matter alleged by way of aggravation be proved, and would, if properly stated as part of the *gravamen* of the action, have alone sustained it.⁷⁶ Such accompanying facts, when of such a nature as to be ground for a separate action, may be alleged with certainty in connection with the act which otherwise would be the principal one, and thus a wrong which is divisible is, as an entirety, made the subject of the action.⁷⁷ Where trespass to real estate is the gist of the action and there is an illegal entry whatever is done after the breaking and entry is but aggravation,⁷⁸ and may be proved to enhance damages, whether it might be the subject of a distinct and different action or not. Thus, if after a tortious entry the trespasser assaulted the plaintiff,⁷⁹ debauched his servants, uttered a slander, or was guilty of a libel, or committed a trespass to or conversion of personal property,⁸⁰ the whole wrong may be embraced in the same complaint and made parts of one cause of action, of which the illegal entry is the vital and paramount fact—essentially the ground of the action, even though not the gravest element in the estimate of dam-

⁷⁶ *Bracegirdle v. Orford*, 2 M. & S. 77; *Russell v. Carne*, 1 Salk. 119; *Newman v. Smith*, 2 id. 642; *Chamberlain v. Greenfield*, 3 Wils. 292; *Smalley v. Kerfoot*, 2 Strange 1094; *Ford v. Kelsey*, 4 Rich. 365; *Rucker v. McNeeley*, 4 Blackf. 179; *Howard v. Black*, 42 Vt. 258; *Eames v. Prentice*, 8 Cush. 337; *Bishop v. Baker*, 19 Pick. 517; *Sampson v. Henry*, 13 Pick. 36; *Brown v. Manter*, 22 N. H. 468; *Howe v. Willson*, 1 Denio 181; *Wright v. Chandler*, 4 Bibb 422; *Carlewis v. Laurie*, 12 Q. B. 640; *Pritchard v. Long*, 9 M. & W. 666; *Thayer v. Sherlock*, 4 Mich. 173.

⁷⁷ *Id.*; *Brewer v. Temple*, 15

How. Pr. 286; *Robinson v. Flint*, 16 id. 240.

⁷⁸ *Brown v. Manter*, *supra*; *Van Leuven v. Lyke*, 1 N. Y. 515, 1 Am. Neg. Cas. 428, 49 Am. Dec. 346; *Taylor v. Cole*, 3 T. R. 292; *Smalley v. Kerfoot*, *supra*; *Angus v. Rudin*, 5 N. J. L. 815, 8 Am. Dec. 626, 1 Am. Neg. Cas. 427; *Dolph v. Ferris*, 7 W. & S. 367; *Beckwith v. Shordike*, 4 Burr. 2092.

⁷⁹ *Plump v. Ives*, 39 Conn. 120; *Druse v. Wheeler*, 22 Mich. 439.

⁸⁰ *Bracegirdle v. Orford*, 2 M. & S. 77; *Adams v. Rivers*, 11 Barb. 390; *Snively v. Fahnestock*, 18 Md. 391; *Burson v. Cox*, 6 Baxter 360; *Ogden v. Gibbons*, 5 N. J. L. 518;

ages.⁸¹ Under the code matters of aggravation, as well as of mitigation, should be pleaded.⁸²

§ 424. **Not necessary to itemize damages.** It is unnecessary in most actions where the demand is unliquidated and sounds wholly in damages, and where there is but a single cause of action to state specifically and in separate amounts the different elements or items which go to make up the sum total of damages. It is enough to claim so much in gross as damages for the wrong done.⁸³ As a general rule, it is not necessary for a defendant in an action to recover possession of personal property

Allison v. Chandler, 11 Mich. 542; *McAfee v. Crofford*, 13 How. 447, 14 L. ed. 217; *United States v. Magoon*, 3 McLean 171; *Smith v. Smith*, 50 N. H. 212.

⁸¹ *McAfee v. Crofford*, 13 How. 447, 14 L. ed. 217; *Howe v. Willson*, 1 Denio 181; *Taylor v. Wells*, 2 Saund. 74, note; *Monts v. Witmer*, 3 Gill & J. 118; *Welch v. Piercy*, 7 Ired. 365; *Johnson v. Gorham*, 38 Conn. 513; *Barnes v. Burt*, id. 541; *Tuskegee L. & S. Co. v. Birmingham Realty Co.*, 161 Ala. 542, 23 L.R.A.(N.S.) 992, citing the text.

⁸² *Leavitt v. Cutler*, 37 Wis. 46; *Klopper v. Bromme*, 26 Wis. 372; *McKyring v. Bull*, 16 N. Y. 297, 307; *Huger v. Tibbits*, 2 Abb. Pr. (N. S.) 97; *Fink v. Justh*, 14 id. 107. But see *Allis v. Nanson*, 41 Ind. 154, and § 422.

Matter in mitigation need not be pleaded. *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548.

⁸³ *Nokken v. Avery Mfg. Co.* 11 N. D. 399, citing the text; *Hoffman v. Dickinson*, 31 W. Va. 142, 17 Am. Neg. Cas. 859; *Binicker v. Hannibal & St. J. R. Co.*, 83 Mo. 660; *Smith v. Perry*, 13 Ky. L. Rep. 683 (Ky. Super. Ct.); *Louisville, etc. R. Co. v. Neafus*, id. 951, 93 Ky. 53; *Alabama & V. R. Co. v. Hanes*, 69 Miss. 160; *Ten Cate v.*

Fansler, 10 Okla. 7, citing the text; *Shepard v. Pratt*, 16 Kan. 209; *Dooley v. Missouri Pac. R. Co.*, 36 Mo. App. 381; *Central Georgia Power Co. v. Stubbs*, 141 Ga. 172; *Anniston E. & G. Co. v. Rosen*, 159 Ala. 195, 133 Am. St. 32; *Birmingham R. L. & P. Co. v. Chastain*, 158 Ala. 421; *Castino v. Ritzman*, 156 Cal. 587; *Freeman v. Macon G. L. & W. Co.*, 126 Ga. 843, 7 L.R.A. (N.S.) 917; *Wissler v. Atlantic*, 123 Iowa 11; *Blue Grass T. Co. v. Ingles*, 140 Ky. 488; *Habig v. Parker*, 76 Neb. 102, citing the text and holding that claiming a named sum for any other item or items of damage limits the recovery; *Huber Brewery v. Sieke*, 146 App. Div. (N. Y.) 467; *Shoemaker v. Sonkju*, 15 N. D. 518, citing the text; *Turney v. Southern Pac. Co.*, 44 Ore. 280, citing the text; *Missouri, etc. R. Co. v. Rich*, 51 Tex. Civ. App. 312. Compare *Howe v. Frith*, 43 Colo. 75, 17 L.R.A.(N.S.) 672.

The complaint in an action by a husband to recover damages for loss of society and services of his wife as a result of personal injuries to her, need not define or itemize such injuries. *Birmingham Railway, Light & Power Co. v. Roach*, — Ala. —, 66 So. 82.

to claim special damages in his answer to entitle him to recover them for the taking and detention of his property from him by the plaintiff,⁸⁴ or in an action to recover the value of such property to specially enumerate the qualities which gave it the value claimed for it.⁸⁵ It is necessary that disbursements made and the value of time lost should be itemized if the complaint is attacked by a special demurrer.⁸⁶ The effect of itemizing damages is to limit the recovery to the amounts of money or quantity of time stated.⁸⁷ Testimony may be received as to the loss and value of goods not mentioned in a bill of particulars; receiving it is equivalent to an amendment of the bill.⁸⁸ An itemization of money paid a physician for medical attendance is unnecessary.⁸⁹

§ 425. Statutory damages must be specially claimed and alleged. Whenever penal damages are given by statute to the party injured, where he had a remedy at common law, if he claims the statutory damages he should do so by a reference to the statute;⁹⁰ it is not enough to state facts showing a right of action at common law, referring to the statute only in the prayer.⁹¹ The facts must be averred which bring the case within the statute;⁹² but if the case stated constitutes a cause of

⁸⁴ Woodruff v. Cook, 25 Barb. 505.

⁸⁵ Chicago, etc. R. Co. v. Harmon, 12 Ill. App. 54; Lanning v. Chicago, etc. R. Co., 68 Iowa 502.

⁸⁶ Turley v. Atlanta, etc. R. Co., 127 Ga. 594, 8 L.R.A.(N.S.) 695; The Oriental v. Barclay, 16 Tex. Civ. App. 193; Houston, etc. R. Co. v. Adams, 44 Tex. Civ. App. 288 (future expenses).

⁸⁷ Texas & P. R. Co. v. Barnwell (Tex. Civ. App.), 133 S. W. 527.

⁸⁸ Hayes v. Brandt, 80 Ark. 592.

⁸⁹ Central Georgia Power Co. v. Fincher, 141 Ga. 191, reviewing Georgia authorities as to the degree of itemization required in various cases.

⁹⁰ Stevens v. Kelley, 66 Conn. 570; McCook v. Bryan, 4 Okla. 488, 12 Am. Neg. Cas. 513; Williams v.

Thomas, 25 Ont. 536; Bell v. Norris, 79 Ky. 48, 42 Am. Rep. 204; Palmer v. York Bank, 18 Me. 166, 36 Am. Dec. 710; Bayard v. Smith, 17 Wend. 88; Keiny v. Ingraham, 66 Barb. 250; Royse v. May, 93 Pa. 454; Chapman v. Emerick, 5 Cal. 239; Illinois, etc. R. & C. Co. v. People, 19 Ill. App. 141; Dunbar v. Jones (Conn.), 87 Atl. 787; Salmon v. Blasier Mfg. Co., 123 App. Div. (N. Y.) 171; Springer v. Jenkins, 47 Ore. 502; Henning v. Keiper, 37 Pa. Super. 488. Compare Smith v. Hallahan, 75 N. H. 534, and see Galbraith v. Carmode, 43 Wash. 456.

⁹¹ Pitt v. Daniel, 82 Mo. App. 168.

⁹² Plymell v. Meadows, 170 Mo.

action of that form at common law, and is established, though all the elements alleged to constitute the case for which the statute gives penal damages are not proved, single damages, or those allowed by the common law, may be recovered.⁹³ The claim for damages in the declaration in such cases may be the same whether those recoverable are penal or single.⁹⁴ If the penalty provided by statute is a separate and distinct cause of action from the damages recoverable under the common law, though the statute allows both causes to be joined in the same action, if one is omitted it cannot be added by way of amendment pending the action.⁹⁵ A remedial statute providing for the recovery of double damages need not be recited in the complaint nor need it be alleged that the action was brought under the statute; both allegations may, however, properly be made.⁹⁶ In an action for the breach of a statutory duty reference to the statute imposing the duty is not necessary.⁹⁷ Where judicial notice is taken of a statute allowing double damages it need not be pleaded.⁹⁸

§ 426. **Pleading in actions to recover for death.** The law imposes upon a father who has the ability to do so the duty of supporting his minor children. Hence a complaint which shows that the deceased was a laboring man and left no widow, but only a child of tender years, sufficiently alleges that the child suffered pecuniary damages by the death of his father; it appearing that the latter was earning money at the time of his death, it will be presumed he was able to discharge his duty

App. 37; *Thompson v. San Francisco G. & E. Co.*, 20 Cal. App. 142.

⁹³ *Clark v. San Francisco, etc. R. Co.*, 142 Cal. 614; *Rowell v. Crothers*, 75 Conn. 124, 12 Am. Neg. Rep. 8; *Menasha W. W. Co. v. Spokane Int. R. Co.*, 19 Idaho 586; *Clark v. American Exp. Co.*, 130 Iowa 254; *O'Bannon v. St. Louis & S. R. Co.*, 106 Mo. App. 316; *Caldwell L. & L. Co. v. Hayes*, 157 N. C. 333; *Warner v. Baltimore & O. R. Co.*, 11 Ohio N. P. (N. S.) 487; *Stevens v. Kelley*, *supra*; *Starkweather v. Quigley*, 7 Hun 26; *Dubois v. Bea-Suth. Dam. Vol. II.—10.*

ver, 25 N. Y. 123; *Sprague v. Irwin*, 27 How. Pr. 51; *Barnes v. Quigley*, 59 N. Y. 265; *Clark v. Field*, 42 Mich. 342; *Swift v. Applebone*, 23 Mich. 252, 1 Am. Neg. Cas. 149.

⁹⁴ *Clark v. Field*, *supra*.

⁹⁵ *Baldwin v. Western U. Tel. Co.*, 93 Ga. 692, 44 Am. St. 194.

⁹⁶ *Dubreuil v. Waterman*, 84 Conn. 47.

⁹⁷ *Leathers v. Blackwell D. T. Co.*, 144 N. C. 330, 9 L.R.A. (N.S.) 349.

⁹⁸ *Bekker v. White River Valley R. Co.*, 28 S. D. 84.

to his child.⁹⁹ But a complaint by a son of the deceased as his administrator must state facts which show a pecuniary loss resulting from the death to the widow or other relatives.¹ In some jurisdictions nominal damages may be recovered in the absence of such an averment.² In Minnesota it is said that the statute which gives the right of action assumes that the widow and next of kin of the deceased had a pecuniary interest in his life, and where the complaint names the next of kin, states their relation to the deceased and alleges damage to them it is good though it does not recite the circumstances which may be considered in arriving at the amount of damages.³ There are numerous adjudications to this effect.⁴ A distinction

⁹⁹ *Kelley v. Chicago, etc. R. Co.*, 50 Wis. 381, 17 Am. Neg. Cas. 905. See *Kearney E. Co. v. Laughlin*, 45 Neb. 390, 16 Am. Neg. Cas. 596; *Omaha, etc. R. Co. v. Crow*, 54 Neb. 747, 69 Am. St. 741.

The pleading should disclose the names of all the beneficiaries, but if the names of the surviving minor children of the decedent who were dependent upon him for support are averred, the omission to allege whether or not he left a widow will not make it demurrable. *Chicago, etc. R. Co. v. Oyster*, 58 Neb. 1.

¹ *State v. Walford*, 11 Ind. App. 392; *Chicago, etc. R. Co. v. Young*, 58 Neb. 678; *Same v. Van Buskirk*, 58 Neb. 252; *Topping v. St. Lawrence*, 86 Wis. 526; *Regan v. Chicago, etc. R. Co.*, 51 Wis. 599; *Saford v. Drew*, 3 Duer 627.

The necessary implication from allegations that the deceased was unmarried, was seventeen years of age, was intelligent, in good health, capable of earning considerable sums of money, and left a father surviving is that the father has been deprived of the reasonable value the services of such a son for four years. But under these allega-

tions there could not be a recovery because of the peculiar ability of the son. *Luessen v. Oshkosh E. L. & P. Co.*, 109 Wis. 94.

Under the Federal Employer's Liability Act of 1908 damages to the widow and children of an employee killed may be presumed; but pecuniary injury to the parents of an adult son must be alleged. *Garrett v. Louisville & N. R. Co.*, 197 Fed. 715 (C. C. A.). But as to this see ch. 40 *post*.

² *Johnston v. Cleveland & T. R. Co.*, 7 Ohio St. 337, 70 Am. Dec. 75; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Chapman v. Rothwell*, Ellis, Bl. & E. 168; *Oldfield v. New York & H. R. R.*, 14 N. Y. 310; *Quinn v. Moore*, 15 id. 432.

³ *Barnum v. Chicago, etc. R. Co.*, 30 Minn. 461; *Johnson v. St. Paul & D. R. Co.*, 31 Minn. 283. See *Tucker v. Draper*, 62 Neb. 66, 54 L.R.A. 321; *Peers v. Nevada P., L. & W. Co.*, 119 Fed. 400.

The facts from which the damages are to be measured must be alleged. *Johnson v. Dixie M. & D. Co.*, 171 Mo. App. 134.

⁴ *Haug v. Great Northern R. Co.*, 8 N. D. 23, 31, 73 Am. St. 727, 42 L.R.A. 664, 5 Am. Neg. Rep. 467.

is noted in some cases to the effect that when the party in whose interest the suit is brought had the legal right to demand the services of the deceased, or to demand support and maintenance at the hands of the deceased, then substantial damages will be presumed; while if recovery is sought by a collateral relative or one having no such legal claim, and who was not in fact dependent upon the deceased, the presumption of substantial damages may not be indulged.⁵ Other courts, however, hold or incline to the view that a general allegation of damage is not sufficient in any case.⁶ An allegation in an action by the administrator showing that the decedent left heirs and next of kin who are entitled to damages and who have been damaged is sufficient to admit testimony to show who are the beneficiaries.⁷ The existence of a person entitled to sue must be alleged.⁸ The complaint of a husband seeking to recover for the death of his wife should show that there are no children.⁹ An allegation that a son was six years of age at the time of his

The cases are cited in the opinion of Bartholomew, C. J., who refers to the following, among others: *Chicago v. Scholten*, 75 Ill. 468; *Ihl v. Forty-second St.*, etc. R. Co., 47 N. Y. 317; *Atchison*, etc. R. Co. v. *Weber*, 33 Kan. 543, 8 Am. Neg. Cas. 274, 15 Am. Neg. Cas. 14, 52 Am. Rep. 543; *Johnston v. Cleveland & Toledo R. Co.*, *supra*; *Aprops v. Costello*, 8 Wash. 149; *Serensen v. Northern Pac. R. Co.*, 45 Fed. 407; *Korrady v. Lake Shore*, etc. R. Co., 131 Ind. 261; *District of Columbia v. Wilcox*, 4 App. Cas. (D. C.) 90; *Railroad Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591; *San Antonio*, etc. R. Co. v. *Long*, 87 Tex. 148, 47 Am. St. 87, 24 L.R.A. 637; *International*, etc. R. Co. v. *Knight*, 91 Tex. 660, 4 Am. Neg. Rep. 79.

⁵ *Loellke v. Grant*, 120 Ill. App. 74; *Cleveland*, etc. R. Co. v. *Starks*, 174 Ind. 345; *Haug v. R. Co.*, *supra*; *Chicago v. Scholten*, 75 Ill. 468; *Quincy C. Co. v. Hood*, 77 Ill.

68, 14 Am. Neg. Cas. 311; *Winnt v. International*, etc. R. Co., 74 Tex. 32, 5 L.R.A. 172.

⁶ *Safford v. Drew*, 3 Duer 627; *Regan v. Chicago*, etc. R. Co., 51 Wis. 599; *Hurst v. Detroit City R.*, 84 Mich. 539; *Charlevoix v. Gogebic*, etc. R. Co., 91 Mich. 59; *Ruiz v. Santa Barbara G. & E. Co.*, 164 Cal. 188. See the Nebraska cases cited in first note to this section.

⁷ *Commercial Club v. Hilliker*, 20 Ind. App. 239, 5 Am. Neg. Rep. 152.

If the deceased left no wife or minor children the names of the beneficiaries must be pleaded. *Johnson v. Dixie M. & D. Co.*, 171 Mo. App. 134.

⁸ *Anderson v. Fielding*, 92 Minn. 42, 16 Am. Neg. Rep. 92, 104 Am. St. 665; *Vander Wegen v. Great Northern R. Co.*, 114 Minn. 118.

⁹ *Bartlett v. Chicago*, etc. R. Co., 21 Okla. 415.

death shows that he was unmarried.¹⁰ All the damages recoverable by a minor for the wrongful killing of a parent are general and need not be specified.¹¹ A parent cannot recover for the loss of a child's services during its minority unless they are specially declared for.¹² In Missouri punitive damages cannot be recovered for a wrongful killing unless they are pleaded.¹³ It is otherwise under the statute of Nevada.¹⁴ The existence of demands for the support of the deceased or for his funeral expenses must be alleged.¹⁵

SECTION 2.

ASSESSMENT OF DAMAGES.

§ 427. **Writ of inquiry.** By the common-law practice the assessment of damages is by a writ of inquiry. An interlocutory judgment is first entered up that the plaintiff ought to recover his damages; but, because the court knows not what damages he hath sustained, therefore the sheriff is commanded that by the oaths of twelve honest and lawful men he inquire into said damages and return such inquisition into court.¹⁶ The writ is issued accordingly, directed to the sheriff, who, in the execution of it, sits as judge and tries by a jury what damages the plaintiff hath really sustained, under very nearly the same rules of law as upon a trial by jury at *nisi prius*. When their verdict is rendered the sheriff returns the inquisition, and final judgment is thereupon entered that the plaintiff recover the damages so assessed. Some of the authorities would seem to sustain the view that as the writ of inquiry is merely an

¹⁰ Baird v. Citizens' R. Co., 146 Mo. 265.

¹¹ Ellingson v. Chicago & A. R. Co., 60 Mo. App. 679.

¹² Pennsylvania Co. v. Lilly, 73 Ind. 252; Gilligan v. New York & H. R. R. Co., 1 E. D. Smith 453, 8 Am. Neg. Cas. 555.

¹³ Gilfillan v. McCrillis, 84 Mo. App. 507; Kuehne P. Co. v. Allen, 148 Fed. 666, 78 C. C. A. 418.

¹⁴ Peers v. Nevada P. L. & W. Co., 119 Fed. 400.

¹⁵ Schwarz v. Judd, 28 Minn. 371; Sykora v. Case T. M. Co., 59 Minn. 130; Barnum v. Chicago, etc. R. Co., 30 Minn. 661; Swift v. Johnson, 138 Fed. 867, 71 C. C. A. 619, 1 L.R.A. (N.S.) 1161.

¹⁶ Jacobs' Law Dict., Judgment, 1; Phoenix Ins. Co. v. Hedrick, 73 Ill. App. 601.

inquest of office to inform the conscience of the court they may, if they please, themselves assess the damages without the intervention of the writ.¹⁷ This view is supported by the authorities generally so far as it relates to actions brought for a sum certain or which may be made certain by computation.¹⁸ The appellate court on reversing a judgment dismissing a complaint, the defendant having stipulated for judgment absolute on appeal, may, where some difficult point of law is likely to arise or the facts are important, direct that the damages be assessed by a jury under the direction of the trial court.¹⁹ It is at the option of the plaintiff to have a writ of inquiry in all cases, but not of the defendant. The latter, having suffered default, has no election in the case.²⁰ Where a declaration contains counts for liquidated and unliquidated damages the defendant may, upon affidavit when necessary, plead to the action at any time before final judgment entered upon a duly executed writ of inquiry notwithstanding the entry by the clerk of an office judgment on return of duly executed process.²¹

§ 428. When assessed without a jury. It is the constant practice of the court, with the consent of the plaintiff, to assess the damages either by itself or by referring the cause to a master, prothonotary or the clerk for that purpose when they may be assessed by computation,—where there are records or other indisputable documents which determine the amount,—

¹⁷ *Bruce v. Rawlins*, 3 Wills. 61; *Dyson v. Rhode Island Co.*, 25 R. I. 600, 65 L.R.A. 236.

¹⁸ *Price v. Dearborn*, 34 N. H. 481; *Renner v. Marshall*, 1 Wheat. 215, 4 L. ed. 74; *Tannehill v. Thomas*, 1 Blackf. 144; *VánVleet v. Adair*, id. 346; *Begg v. Whittier* 48 Me. 314; *Crommett v. Pearson*, 18 Me. 344; *Blackmore v. Flemyng*, 7 T. R. 446; *Fleming v. Nall*, 1 Tex. 246; *Dicken v. Smith*, 1 Litt. 209; *McLain v. Rutherford*, Hempst. 47; *Cartwright v. Roff*, 1 Tex. 78; *McCoy v. Elder*, 2 Blackf. 183; *Reed v. Bank*, 1 T. B. Mon. 92, 15 Am. Dec. 86; *Campion v. Crawshay*, 6

Taunt. 356; *Maunsell v. Massacreene*, 5 T. R. 87; *Arden v. Cornell*, 5 B. & Ald. 885; *Mayhew v. Thatcher*, 6 Wheat. 129, 5 L. ed. 223; *Rashleigh v. Salmon*, 1 H. Bl. 252; *Andrews v. Blake*, id. 529; *Graham v. Bickham*, 4 Dall. 148.

¹⁹ *Bornstein v. Faden*, 84 Misc. (N. Y.) 256.

²⁰ *Holdip v. Otway*, 2 Saund. 107; *Price v. Dearborn*, 34 N. H. 481; *Blackmore v. Flemyng*, 7 T. R. 446; *Deane v. Willamette Bridge Co.*, 22 Ore. 167, 174, 15 L.R.A. 614, citing the text.

²¹ *Rosencrance v. Kelly*, 74 W. Va. 100.

as a judgment,²² a note or bill of exchange;²³ and where the damages on protested bills of exchange are fixed by the *lex fori* these may be assessed by the court.²⁴ The court may not assess where the obligation is payable in a foreign currency;²⁵ nor where the interest is to be ascertained by the law of another state or country.²⁶ The allegation in a petition in ejectment as to the damages sustained by the plaintiff by the unlawful detention of possession cannot be taken as true upon default; evidence must be received as to the damages before judgment can be rendered.²⁷ And so in an action of trespass if it is not alleged that there was an express promise to pay the damages or a statement of facts from which that may be implied.²⁸ Such mode of assessing damages is not forbidden by a constitutional provision preserving the right of trial by jury, because it was in use when the constitution was adopted.²⁹ If the party liable for damages admits the amount thereof a court of equity will award them without the intervention of a jury.³⁰ It is immaterial, so far as the right of the court to assess the damages without a jury is concerned, at what stage of the pro-

²² *Harrington v. Witherow*, 2 Blackf. 37.

²³ *Andrews v. Blake*, 1 H. Bl. 529; *Rashleigh v. Salmon*, id. 252; *Longman v. Fenn*, id. 541; *Gould v. Hammersley*, 4 Taunt. 148; *Phipps v. Addison*, 7 Blackf. 375; *Randolph v. Parish*, 9 Port. 76; *Cullum v. Casey*, id. 131, 33 Am. Dec. 304; *Campion v. Crawshaw*, 6 Taunt. 356; *McGowin v. Dickson*, 182 Ala. 161; *Second Nat. Bank v. Claney*, 178 Ill. App. 427.

²⁴ *Grigsby v. Ford*, 3 How. (Miss.) 184.

A note on which damages are assessed must be produced or its absence accounted for. *Brandt v. Foster*, 5 Iowa 287.

The unsworn statement of an at-

torney or the belief or supposition of a judge are not a sufficient basis for assessing damages. *Wells v. Tedrick*, 69 Ill. App. 203.

²⁵ *Lynch v. Barr*, Sneed 170; *Maunsell v. Massareene*, 5 T. R. 87.

²⁶ *Peacock v. Banks*, Minor 387; *Evans v. Irvin*, 1 Port. 390; *Pauling v. Sartain*, 4 J. J. Marsh. 238; *Johnson v. Williams*, 1 id. 489, 20 Am. Dec. 223.

²⁷ *Burchett v. Herald*, 98 Ky. 530.

²⁸ *Mize v. Jackson*, 17 Ky. L. Rep. 750.

²⁹ *Seeley v. Bridgeport*, 53 Conn. 1; *Raymond v. Danbury & N. R. Co.*, 14 Blatch. 133; *Deane v. Willamette B. Co.*, 22 Ore. 167, 15 L.R.A. 614.

³⁰ *Schmid v. Lisiewski*, 53 N. J. Eq. 670.

ceedings the default occurred, if neither party asks that they be assessed by a jury.³¹

§ 429. **What a default or demurrer admits.** A default only admits the defendant's liability to *some* damages where they depend upon facts *in pais*; and, though they are stated in a common-law declaration, they are not admitted; the damages must, in most jurisdictions, be proved before and assessed by a jury.³² The admission arising from a demurrer or a default is not an acknowledgment, or to be considered as evidence, of liability for substantial damages; nor that any such damages were suffered, or if so that the defendant was responsible for them. When the plaintiff in a tort action, standing upon default or upon demurrer overruled, has proved actual and substantial damages, resulting from the wrong complained of, such proof is in the first instance, and *prima facie*, sufficient to indicate

³¹ Gallagher v. Silberstein, 182 Mass. 20.

³² Heyward v. Sanner, 86 Md. 19; McLeod v. Nimocks, 122 N. C. 437; Banks v. Gay Mfg. Co., 108 N. C. 282; Gohres v. Illinois M. Co., 40 Ore. 516; Grinnell v. Bebb, 126 Mich. 156; Ferguson v. Hoshi, 25 Wash. 664, citing the text; Grace v. Park, 5 J. J. Marsh. 57; Goff v. Hawks, id. 341; Kennon v. McRae, 3 Stew. & Port. 249; VanVleet, v. Adair, 1 Blackf. 346; Wood v. Morgan, 6 Barb. 507; Campbell v. Woolen, 5 Blackf. 80; Langdon v. Bullock, 8 Ind. 341; Hanrick v. Farmers' Bank, 8 Port. 539; Logan v. Jennings, 4 Rawle 355; Roulhac v. Miller, 90 N. C. 174; Hanover F. Ins. Co. v. Lewis, 23 Fla. 193; Rosen- crance v. Kelley, 74 W. Va. 100; Manaster v. Kioebge, 257 Ill. 431; Ungar v. Feuer, 172 Ill. App. 204; Graves v. Cameron, 161 N. C. 549; Naderhoff v. Benz, 25 N. D. 165, 47 L.R.A.(N.S.) 853; St. Louis, etc. R. Co. v. Zumwalt, 31 Okla. 159; Parker v. Dekle, 46 Fla. 452, citing the text; Maryland Cas. Co. v. Lanham,

124 Ga. 859; Palmer v. Ingram, 2 Ga. App. 200; Georgia, etc. R. Co. v. Sheppard, 3 Ga. App. 241; Plaff v. Pacific Exp. Co., 251 Ill. 243; Uncle Sam O. Co. v. Forrester, 79 Kan. 610; Mississippi Cent. R. Co. v. Crawford, 96 Miss. 401; Beasley v. New Orleans & N. R. Co., 91 Miss. 268; Fullerton v. Young, 46 N. Y. Misc. 292; Stockton v. Wolverine G. M. Co., 144 N. C. 595; Osborn v. Leach, 133 N. C. 427; Gadsden v. Home F. & C. Co., 89 S. C. 483; Federation W. G. Co. v. Cameron G. Co., 58 W. Va. 477. See Mathot v. Triebel, 102 App. Div. (N. Y.) 426.

A default admits liability for treble damages, the facts entitling the plaintiff thereto being alleged. Eklund v. Lewis L. Co., 13 Idaho 581.

If more than nominal damages can be inferred from the admitted facts the jury may award any sum within the amount demanded without hearing evidence. Adkins v. Kendrick, 131 Ky. 779; Rogers v. Aulick, 63 Ky. (2 Duv.) 419.

that such injury and damage, to the extent proved, is chargeable to the defendant's fault, and that the case made is one which calls upon the defendant to meet it by counter evidence, or submit to judgment for the sum proved.³³ In Maine it has frequently been ruled that in case of default the assessment may be made by the court or by the jury, and that the option as to the mode is with the plaintiff. Such is the practice in tort actions in Connecticut, and, apparently, in Missouri,³⁴ and in Illinois in an action on a replevin bond.³⁵ In Rhode Island the trial judge may exercise his discretion as to the mode in which the assessment shall be made.³⁶ Where damages are assessed after a demurrer overruled there is a like confession of the action.³⁷

³³ *Sprague v. New York, etc. R. Co.*, 68 Conn. 345, 13 Am. Neg. Cas. 653, 37 L.R.A. 638; *Bergin v. Southern New England Tel. Co.*, 70 Conn. 54, 39 L.R.A. 192.

³⁴ *Begg v. Whittier*, 48 Me. 315; *Cummings v. Smith*, 50 id. 568, 79 Am. Dec. 629; *Wood v. Leach*, 69 Me. 560; *Hanley v. Sutherland*, 74 Me. 212; *Raymond v. Danbury & N. R. Co.*, 14 Blatchf. 133; *Lennon v. Rawitzer*, 57 Conn. 583; *Wetzell v. Waters*, 18 Mo. 396; *Snider v. St. Louis, etc. R. Co.*, 73 id. 465. See *Gemmell v. Davis*, 71 Md. 458.

³⁵ *Hopkins v. Ladd*, 35 Ill. 178, ruled under special acts of 1857 and 1859.

³⁶ *King v. Rhode Island Co.*, 27 R. I. 112.

³⁷ *Havens v. Hartford, etc. R. Co.*, 28 Conn. 69, 8 Am. Neg. Cas. 102.

In *Lamphear v. Buckingham*, 33 Conn. 237, *Butler, J.*, said: "Every action at law to redress a wrong or enforce a right, if properly instituted, is a syllogism, of which the major premise is the proposition of law involved, and the minor premise the proposition of fact, and the

judgment the conclusion. Blackstone states it thus (Com., vol. 3, p. 396): 'The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination or sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus:—against him who hath rode over my corn, I may recover damages by law; but A. hath rode over my corn; therefore, I shall recover damages against A.' Usually the major premise is not set out in the declaration, but the proposition claimed is implied from or involved in the facts stated. The plaintiff in an action of tort, for instance, summons the defendant to answer, for that at a certain time and place he committed, in a certain manner, a certain wrong, to the plaintiff's damage, etc.; and by so doing impliedly claims that the law is so that he is entitled on those facts to recover. To this syllogism the defendant must answer according to the rules of law. If he expressly admits on the record the law and the fact, both

A jury may assess damages conditionally in case of a demurrer to evidence, or they may be discharged without making

premises, he consents to the conclusion, the judgment, or, as it is technically expressed, '*confesses judgment.*' If he declines or omits to appear pursuant to the summons, or appearing declines or omits to answer when called upon to do so, he impliedly admits both propositions or premises to be true by his default, and judgment follows, technically, as a judgment by default, pursuant to a necessary rule of law, stated broadly by Mr. Taylor (Ev. 669) thus: 'Whenever a material averment, well pleaded, is *passed over* by the adverse party without denial, whether it be by pleading in confession and avoidance, or by traversing some other matter, or by demurring in law, or by suffering judgment to go by default, it is, thereby, for the purpose of pleading, if not for trial before the jury, conclusively admitted.' So the defendant may traverse or expressly deny the facts of the minor premise, and will be held on the same principle to have admitted the major, and, if the minor is found true, judgment—the conclusion—is awarded in the verdict. And so he may deny the major premise, the proposition of law involved, by a demurrer, and failing thereby to deny, and passing over the facts, if well pleaded and sufficient to constitute a premise, *he defaults as to them*, and thereby and by the same rule is holden to have admitted them; and if the issue in law is found, final judgment passes for the plaintiff. The facts, if well pleaded **and sufficient**, are admitted, not because the demurrer admits them expressly, or by force of any office it performs, but because the defendant

has not denied, and has defaulted as to them. A defendant, therefore, who demurs to a declaration, admits, not by his demurrer, but his omission to deny them, all the material well-pleaded facts alleged in it; and when his demurrer is overruled, the case is in the same condition precisely that it would have been if he had suffered a default and not demurred. All the difference between the two is that in one case he denied the major premise of law, and it has been found true; and the minor having been admitted by a failure to deny, both are to be holden true; in the other, he denied neither, and, therefore, both are to be holden true.

"The condition of a case before the court after a demurrer overruled, and after a default, being precisely the same, and the effect of demurring or defaulting being precisely the same, in admitting the facts the question as to both is answered by what is the law as to either. What then is the effect of a default? What facts does it admit? It has been said by some writers and judges that it admits *the* cause of action, and by others *a* cause of action merely. Mr. Roscoe in his work on Evidence states the proposition broadly thus: 'Suffering a judgment by default is an admission on the record of the cause of action.' The true rule is that it admits the cause of action *as alleged* in full, or to some extent, according to the nature of the action. As it admits all the *material* facts well pleaded, if a distinct, definite, entire cause of action is set forth, which entitles the plaintiff to a sum certain *without further inquiry*, it

the assessment. In the latter case, should the demurrer be overruled, the damages may be assessed by another jury on a writ of inquiry.³⁸ A confession of judgment, but for no certain sum, in an action sounding in damages is not sufficient to authorize the court to make the assessment; a writ of inquiry

admits the cause of action in full as alleged. If by the rules of law further inquiry is to be had to ascertain the amount due, or the extent of the wrong done, and of the damages to be recovered, then it admits the cause of action, but not to the extent alleged, and subject to such inquiry. Thus, if it be debt on a bond for a sum certain, the whole is admitted, and no further inquiry is had; and so if *assumpsit* on a note or bill, and there are no indorsements entered on it, and the defendant does not move for an inquiry, the cause of action and the amount claimed are admitted. The note must be produced, but need not be proved. *Greene v. Hearne*, 3 T. R. 301; *Roscoe Ev.*, 10th ed. 71. But in actions of tort, for unliquidated damages, a *different* rule is *necessarily* applied. In such actions the plaintiff does not declare for a specific thing, but has an unlimited license in declaring, and may allege as much of wrong and injury, and demand as much damage, as he will, and recover by proving any amount, however small, if sufficient to sustain an action. A defendant, therefore, in an action of tort is not holden to have admitted by his default the *extent* of the injury. It is assumed that, as the plaintiff may allege more than is true, he probably has done so; and the defendant by his default is considered as admitting the wrong to some extent, leaving that extent to be inquired into to enable the court to fix the damages, because such an

inquiry is always and necessarily had in such cases. But he admits the wrong, and consequent right of the plaintiff to recover to some extent. By our practice this inquiry is not by writ of inquiry, or by reference, but made by the court on a hearing in damages. On that hearing it results from the very nature of the inquiry, that any evidence tending to belittle or mitigate the injury complained of and admitted, and any evidence tending to aggravate it, is admissible. If in proving the extent to which he was in fault the defendant prove that he was not in fault at all, and that the injury occurred through the fault of the plaintiff, the plaintiff cannot complain. The evidence does not deprive him of his right to judgment; it merely shows that, as he is not in fact entitled to any damages, he can only have such as the law gives him by reason of the admission on the record."

Where a jury has assessed damages by the true measure in a case where the court may assess them the verdict will not be set aside. *Newton v. Newbegin*, 43 Me. 293.

Damages should not be assessed on one count before the issues on others are disposed of. *Ewing v. Coddling*, 5 Blackf. 433; *Fleming v. Langton*, 1 Strange 532; *Duperoy v. Johnson*, 7 T. R. 473; *McClure v. Hall*, 19 Wend. 25.

³⁸ *Hanover F. Ins. Co. v. Lewis*, 23 Fla. 193; *McCreary v. Fike*, 2 Blackf. 374; *Andrews v. Hammond*, 8 id. 540.'

is necessary.³⁹ And to warrant the assessment of damages otherwise than by jury the declaration should not embrace any claim requiring a jury. Where the common counts are added to a special count on a note or bill a *nolle prosequi* should be entered on them before assessment of damages by the court.⁴⁰ Though the action be debt, if it be brought on an account, the damages must be assessed by a jury.⁴¹ A demurrer does not admit the items of an account, and there must be a jury to assess the damages.⁴² Nor will a default in an action for assault and battery admit any of the stated particulars; it admits the assault and battery so far as to entitle the plaintiff to maintain his action; not, however, that it was committed at the time or with the circumstances of aggravation stated in the declaration.⁴³ On the assessment some damages must be found; the jury cannot find a verdict for the defendant.⁴⁴ The failure to demur to the petition is not an admission that it sets out a cause of action so as to preclude the court from passing on the question of the defendant's liability under the fact stated. No technical rule, nor failure to demur or plead, will authorize the court to impose a liability on the defendant where, from the facts stated in the petition or as they appear in evidence, there is no liability in law.⁴⁵

To preserve for review the action of the court in assessing damages after default it is necessary to move to set the assessment aside and take exception to the refusal.⁴⁶ But if the suit

³⁹ *Dunbar v. Lindenberg*, 3 Muhf. 169; *McLeod v. Ninochs*, 122 N. C. 437; *Thompson v. Lumley*, 7 Daly 74; *Harder v. Harder*, 26 Barb. 409.

⁴⁰ *Beard v. Van Wickle*, 3 Cow. 335; *Starbuck v. Lazenby*, 7 Blackf. 268; *McFall v. Wilson*, 6 id. 260; *Carter v. Spencer*, 4 Ind. 78; *Burr v. Waterman*, 2 Cow. 36n; *Wood v. Lemon*, 1 Blackf. 198.

⁴¹ *Wilson v. Darwin*, 1 Hill 670; *Patterson v. Blakeney*, 33 Ala. 338; *Marrone v. Ehrat*, 175 Ill. App. 649.

⁴² *Darrah v. Steamboat*, 15 Mo. 187.

⁴³ *Baker v. Loomis*, 5 Wend. 134; *Havens v. Hartford, etc. R. Co.*, 28 Conn. 69; *Blow v. Joyner*, 156 N. C. 140. Compare *Rogers v. Aulick*, 63 Ky. (2 Duv.) 419, and see *Hyde v. Moffatt*, 16 Vt. 271.

⁴⁴ *Jackson v. Rathbone*, 3 Cow. 297; *Hanks v. Evans*, Hardin 45; *Frazier v. Lomax*, 1 Cranch C. C. 328; *Turner v. Carter*, 1 Head 520.

⁴⁵ *O'Connor v. Brucker*, 117 Ga. 451. See first note to § 413.

⁴⁶ *Phenix Ins. Co. v. Hedrick*, 178 Ill. 212, aff'g 73 Ill. App. 601; *Pederson v. Sorensen*, 162 Ill. App. 522.

is in equity an exception to the judgment is not necessary to entitle the unsuccessful party to appeal.⁴⁷

§ 430. Defendant may offer evidence in reduction of damages. The defendant is entitled to appear,⁴⁸ cross-examine the plaintiff's witnesses and introduce evidence to mitigate the damages.⁴⁹ He may show the whole *res gestæ*; and though it may establish that the plaintiff has no legal claim to any damages it will only have the effect to reduce or mitigate those he may recover.⁵⁰ A default in a tort action based on negligence throws

⁴⁷ *Mize v. Jackson*, 17 Ky. L. Rep. 750.

⁴⁸ Under a statute providing that on a judgment for the plaintiff upon an issue of law he may proceed in the manner prescribed by it upon the failure of the defendant to answer, where the summons was personally served, and another section to the effect that after appearance a defendant is entitled to notice of all subsequent proceedings, there cannot be an assessment of damages in a tort action without notice to the defendant who has appeared in the action. *Davis v. Red River L. Co.*, 61 Minn. 534.

⁴⁹ *Pittman v. Colbert*, 120 Ga. 341; *St. Louis, etc. R. Co. v. Zumwalt*, 31 Okla. 159; *Johnson v. Hoxsie*, 19 R. I. 703; *Slater v. Skirving*, 51 Neb. 108, 66 Am. St. 444; *Grinnell v. Bebb*, 126 Mich. 157; *Gohres v. Illinois M. Co.*, 40 Ore. 516; *Chicago, etc. R. Co. v. Ward*, 16 Ill. 522; *Hightower v. Hawthorne*, Hempst. 42; *South Ottawa v. Foster*, 20 Ill. 296; *Cox v. Way*, 3 Blackf. 143; *Ewing v. Codding*, 5 id. 433; *Dennison v. Mair*, 14 East 622; *Cairo, etc. R. Co. v. Holbrook*, 72 Ill. 419; *Thompson v. Haislip*, 14 Ark. 220; *Mizell v. McDonald*, 25 Ark. 38; *Bridges v. Stephenson*, 10 Ill. App. 369; *Madison County v. Smith*, 95 Ill. 328.

⁵⁰ *Loellke v. Grant*, 120 Ill. App. 74; *Briggs v. Snegham*, 45 Ind. 14; *Turner v. Carter*, 1 Head 520; *Carey v. Day*, 36 Conn. 152; *Dailey v. New York, etc. R. Co.*, 32 Conn. 356, 87 Am. Dec. 176; *Daniels v. Saybrook*, 34 Conn. 377; *Lamphear v. Buckingham*, 33 Conn. 237.

In *Havens v. Hartford, etc. R. Co.*, 28 Conn. 69, 8 Am. Neg. Cas. 102, the court considered the effect of a demurrer overruled on the assessment of damages, and held that the case stood with reference to the evidence necessary and admissible, precisely as it would have stood upon default; that the admissions of the demurrer are applicable even to the principal wrongful act only in its relation to the question whether there is a cause of action, and not at all in its relation to the question of damages. And as to the scope of exonerating evidence for the purpose of mitigation, *Ellsworth, J.*, said: "Nothing would be more extraordinary than, on such a general open declaration as this, for the court to overlook and reject evidence already received, conducing to show the cause, occasion or extent of any supposed injuries sued for. We say it would be an extraordinary spectacle—a court overlooking and disregarding material and decisive proof, upon the idea

upon the defendant, on a hearing in damages, the burden of

that a demurrer blinds the eyes of the judge to whatever is beneficial to the defendants. Why, on a hearing in damages even, that which might have availed as a complete defense, had it been so pleaded may be brought in to reduce the damages—as the payment of an account, or a discharge and release, is evidence before auditors in an action of account, to prove there is nothing in arrear. In the case of *Williams v. Miner*, 18 Conn. 464, this court held that evidence tending to prove the truth of the slanderous words might be admitted to affect the question of damages, although a plea in bar might have been put in. In this case, Ch. J. Church says: ‘We are not satisfied that a defendant should be deprived of the benefit of mitigating circumstances for no better reason than that they conduce to prove the truth of the charge.’ The same general doctrine is held in *Hyde v. Moffatt*, 16 Vt. 271. Besides, for aught that appears, the plaintiff was willing that all this evidence should come in. He certainly did not object to it until afterwards, and perhaps the material parts of it came from his own lips in his testimony in chief or on his cross-examination. And so, too, he need not have gone into the transaction at all, if he had confidence in the consequences of the demurrer; and we think he would not, but would have remained silent, if he had not believed and was not instructed by counsel that the burden of proof lay on him if he expected to recover substantial damages. And certainly whatever the plaintiff might attempt to prove to aggravate the damage he sought to re-

cover, the defendant may meet with counter-proof, and so confine him to his mere nominal damages.

‘I have already said that the most correct view of this declaration is, that the defendants are sued as common carriers for a breach of duty in not carrying the plaintiff safely and carefully to Middleton. If this be so, if negligence and omission are the gist of the action, and all that is said about the ticket and the scuffle and the special injuries sustained by the plaintiff are collateral to the issue, and need not be proved to enable the plaintiff to recover, then they are not admitted, any of them, by the demurrer, and there is nothing left for further controversy between the parties.

‘Following out this view of the declaration I inquire what are we to understand as admitted *in this case* by the demurrer? In my judgment nothing but that the defendants were common carriers on the road in question, and received the plaintiff into one of their cars to carry him with care and safety from New Haven to Middleton, and have failed to do as it agreed. This gives a complete cause of action. Strike this out of the declaration and it is by no means certain that there is enough left to enable the plaintiff to recover; but with this in and the rest stricken out there is enough left for a good cause of action. The wrongful acts specified go only to the manner and special consequences of the defendant’s default. But if we are wrong in our view, if the action is founded in misfeasance rather than non-feasance, and the gist of the action is the positive acts of the defendants’ agents, the

disproving the negligence alleged,⁵¹ as well as proving contributory negligence upon the part of the plaintiff.⁵² The defendant in an action for slander may show that the words were spoken without express malice so as to relieve himself from the imposition of punitive damages; but he cannot disprove the cause of action by showing that the words were privileged.⁵³ It is settled in Tennessee that where a demurrer to the evidence in an action to recover unliquidated damages is overruled the

result will not be essentially different; for that only one of these acts needs to be proved on the general issue—the tearing of the plaintiff's coat—the putting the hand violently upon his person—the raising him from the seat—or the attempt to eject him from the car; each would sustain the action, even in that point of view; and therefore only one is proved by the verdict or demurrer, and not even that specifically. May not the defendants show on the hearing in damages, notwithstanding the demurrer, that the plaintiff's knee was not hurt at all? Or if so that it was caused by his attempt to assail the conductor, or in his twisting his limb under the seat to keep from being ejected from the car, or in springing over the seat to avoid the conductor? If so and the injury to the knee may be denied and disproved, the manner and degree in which it is claimed to have been done by the defendants may be disproved; for the greater includes the less, and the proof of the manner may well show, as it did in this case, that the plaintiff was the author of this particular injury; and were it true that the defendants by plea could have set up such misconduct of the plaintiff in bar of the action, which we by no means concede, still the entire proof being before the court, and it appearing that there had been no

negligence, misconduct or fault of the defendants, it would be strange indeed for the court to adjudge the defendants to pay the plaintiff damages brought upon himself by his unpardonable contumacy and violence, when it is not found that the particular injury to the knee was caused by the defendants' agents at all.

“Nor does it follow from the demurrer that the character of the scuffle in the car, when the plaintiff set the rules of the company at defiance, cannot be known and judged of and made the rule of right between the parties. It cannot be so. The demurrer cannot be allowed to clothe the acts of the defendants' agents (supposing them to be improper) with a character or quality which will not allow a full examination of them on their merits, or which *must* exonerate the plaintiff contrary to the justice of the case, and contrary to what would have been the result in a trial on the general issue.”

⁵¹ Cutler v. Putnam L. & P. Co., 80 Conn. 470; Metcalf v. Central Vermont R. Co., 78 Conn. 614; Hoyt v. New York, etc. R. Co., 78 Conn. 709, 20 Am. Neg. Rep. 261; Walsh v. Hayes, 72 Conn. 397, 7 Am. Neg. Rep. 20.

⁵² Ebert v. Hartley, 72 Conn. 453.

⁵³ Heyward v. Sanner, 86 Md. 19.

amount of the recovery must be fixed upon the evidence embodied in the demurrer, and upon that alone.⁵⁴ It is error to add interest to the amount found in favor of the plaintiff by the jury for the time elapsed prior to the inquiry, it being presumed that it was included in the verdict.⁵⁵

§ 431. **Cause of action may not be controverted.** It is generally held that on the assessment of damages after a default, or on an equivalent state of the record, evidence denying the cause of action or tending to show that no right of action exists is inadmissible in mitigation of damages.⁵⁶ In an action for false imprisonment it is not admissible to show that the plaintiff was guilty of the offense charged and the regularity of the proceedings against him. The default admitted all the material averments properly set forth in the declaration, and, of course, the false imprisonment and everything essential to establish the right to recover. The only debatable question for the examination or consideration of the jury is the amount of damages, and that ought to be examined and decided on the assumption that the false imprisonment had been committed by the defendants.⁵⁷ The evidence in such a case would not be admissible under the general issue in justification, without being specially pleaded, unless made so by statute; and the reasons given are to prevent surprise upon the plaintiff on the trial and to enable

⁵⁴ *Manufacturing Co. v. Morris*, 105 Tenn. 654, and cases cited.

⁵⁵ *Williams v. Crosby L. Co.*, 118 N. C. 928.

It is not inconsistent with the admission that the default judgment establishes a liability to show that in fact there was none beyond the costs by reason of the release of the defendant from the damages claimed prior to the inquiry as to their extent. *Graves v. Cameron*, 161 N. C. 549.

⁵⁶ *Werten v. Koosa*, 169 Ala. 258; *Lenney v. Finley*, 118 Ga. 427; *Southern Bell Tel. & T. Co. v. Earle*, 118 Ga. 506; *O'Connor v. Brucker*, 117 Ga. 451, 13 Am. Neg. Rep. 500;

Wolf v. Powers, 241 Ill. 9; *Jerseyville S. Mfg. Co. v. Bell*, 125 Ill. App. 496; *Blow v. Joyner*, 156 N. C. 140; *Russ v. Gilbert*, 19 Fla. 54; *Lee v. Knapp*, 90 N. C. 171; *Froust v. Burton*, 15 Mo. 619; *Sweet v. McDaniels*, 39 Vt. 272; *Garrard v. Dollar*, 4 Jones 175; *Curry v. Wilson*, 48 Ala. 638. See *McKyring v. Bull*, 16 N. Y. 297; *Martin v. New York, etc. R. Co.*, 62 Conn. 331; § 430.

As to the difference between the proceedings in this particular under the statutory and common-law writ of inquiry, see *Reeb v. Bosch*, 17 Ill. App. 426.

⁵⁷ *Foster v. Smith*, 10 Wend. 377.

him to meet the defendant upon equal terms in respect to the evidence.⁵⁸ These reasons are equally strong against allowing the evidence without notice *in mitigation* of damages, besides the inconsistency of hearing evidence in contradiction of the legal effect of the record, and which is not pertinent to any issue presented by it. If this practice were tolerated it would enable defendants to have substantially the benefit of a justification in every case in which evidence could be procured to establish it without notice to the plaintiff of such defense; for, if admissible, and the justification should be proved, the least effect that could reasonably be given to it would be to reduce the inquest to nominal damages. This would be the standard of damages in all cases upon such proof.⁵⁹ When an action is brought on a contract set out in the declaration and there is a default on the assessment of damages no evidence which goes to deny the existence of the contract, or tends to avoid it, is competent; the default admits it as set forth and concludes the defendant from denying it.⁶⁰

A sheriff's jury was not uniformly resorted to at common law or by the English practice for the assessment of damages upon proof. When it was anticipated that some difficult point of law would arise in the course of the inquiry, or where the facts were deemed important the inquiry was conducted before the chief justice or a judge of assize.⁶¹ So in this country as to the manner of selecting the jury and conducting the inquiry, or under what circumstances a referee by some name may perform the same office, there is no uniformity.

§ 432. **Jury tam quam.** Where there are several defendants and one suffers default and the others plead the same jury that tries the issue will assess the damages on the default. If those who plead succeed only nominal damages can be assessed against the defaulting defendant.⁶² On the determination of the issue

⁵⁸ *Id.*; 1 Chitty's Pl. 493.

⁵⁹ *Foster v. Smith*, *supra*, per Nelson, C. J.

⁶⁰ *Id.*; *East India Co. v. Glover*, 1 Strange 612; *Lamphear v. Buckingham*, 33 Conn. 237; *Curry v. Wilson*, 48 Ala. 638.

⁶¹ 1 Sellon's Prac. 344; *Havens v. Hartford*, etc. R. Co., 28 Conn. 90,

8 Am. Neg. Cas. 102.

⁶² *State v. Reinhardt*, 31 Mo. 95; *Day v. Brawley*, 1 Pa. 429.

on a plea in abatement the judgment is peremptory, and the same jury should assess damages;⁶³ but if this is omitted they may be subsequently assessed as upon default by another jury or the court according to the nature of the case.⁶⁴

§ 433. **When new jury may be called.** If the court or referee in an early case in New Jersey that where the jury who try the cause omit to assess the damages, in case the matter omitted to be inquired of by them is such as goes to the very point of the issue and constitutes the gist of the action, as in *assumpsit* and trespass, and upon which, if a false verdict be found by the jury, an attaint will lie against them, then such matter cannot be supplied by a writ of inquiry; for there the party injured may lose his action of attaint, which will not lie upon an inquest of office. But where the matter omitted to be inquired of by the principal jury does not go to the point in issue, nor constitute the gist of the action, but is collateral thereto, it may be supplied by a writ of inquiry. Therefore, in an action for dower, the jury not having assessed damages, a writ of inquiry was allowed.⁶⁵

§ 434. **Correction of error in assessment.** If the court or referee assessing damages have made a mistake in the computation of the amount, which can be clearly shown, it may, even after judgment, be corrected by the court if it be of such a nature that it may be done without injustice to the opposite party. In an early case in New York⁶⁶ there was a mistake in the assessment of damages by computing interest for one year less than the actual time. It not being observed, judgment was perfected and collected; and plaintiff's satisfaction thereof was entered of record. When the mistake was shown to the court it was adjudged that the proceedings should be amended subsequently to the interlocutory judgment, unless the defendant should pay the additional interest within thirty days after service of the rule. A new trial may be granted where the verdict has been taken for too small a sum in consequence of the

⁶³ Eichorn v. Le'maitre, 2 Wils. 367.

⁶⁴ Frye v. Hinckley, 18 Me. 320.

⁶⁵ Stalcope v. Copner, 2 N. J. L. 131.

⁶⁶ Mechanics' Bank v. Menthorn, 19 Johns. 244.

plaintiff's attorney inadvertently computing interest for too short a time.⁶⁷ And the proper mode of making such corrections, as for excessive interest, is by a new trial. Where a verdict was taken on a note and the jury had to ascertain simply principal and interest, and the error assigned was that the amount found exceeded both, it was held that, as the jury determined the matter on evidence and it was their peculiar province to assess damages, neither the appellate court, nor even the court below, had control over the matter unless by awarding a new trial. And such a trial cannot be awarded by the appellate court for insufficiency of evidence.⁶⁸

Under the New York code as it stood in 1892 the effect of a decision by the court of appeals affirming an order granting a new trial and directing judgment absolute in the supreme court in favor of the plaintiff, in an action to recover damages, is the same as if the whole of the plaintiff's cause of action had been admitted. The proceeding for the assessment of damages under section 194 of the code after the judgment of the court of appeals has become that of the court below is similar to the taking of an ordinary inquest of damages, and while it is better that the assessment be made at the circuit, it is not essential. The rules of the code for reviewing the trial of an action do not prevail as to such proceeding, there being no provision for making a case and exceptions or for a motion for a new trial on the judge's minutes. After the trial a motion may be made to set aside the inquisition, but such motion will not be granted upon the same grounds as a new trial would be for the mere admission of improper evidence. It is a motion addressed largely to the discretion of the court in which the proceeding was had, and when refused as not tending to the ends of justice a judgment entered upon the inquisition is not reviewable by the court upon legal grounds, though an appeal might be taken from the order of the special term refusing to set aside the inquisition to the general term, as the judicial discretion exercised by the court in acting on the motion is not confined to the special term.⁶⁹ Any agree-

⁶⁷ Winn v. Young, 1 J. J. Marsh. 51, 19 Am. Dec. 52.

⁶⁸ Baldwin v. Stebbins, 1 Ala. 180.

⁶⁹ Bossout v. Rome, etc. R. Co.,

ment the parties may make concerning the damages to be assessed will be enforced by the court.⁷⁰

SECTION 3.

PAYING MONEY INTO COURT.

§ 435. **Admits cause of action to amount paid.** Payment of money into court admits the cause of action stated in the declaration to the amount paid in, but nothing more; and beyond that amount the defendant may make his defense.⁷¹ It is a payment, *pro tanto*.⁷² The plaintiff has a right to take it out, and the defendant has not.⁷³ The subsequent death of the defendant, and the revival of the action against his administrator do not change the effect of the payment.⁷⁴

§ 436. **Payment to plaintiff after suit.** Payments made by the defendant to the plaintiff after suit brought may be proved under the general issue to reduce damages.⁷⁵ If after suit brought the defendant pays and the plaintiff receives the full amount of the claim sued for the latter cannot afterwards obtain judgment for nominal damages so as to recover costs. Such payment, it has been held, may be proved under the general issue with notice of payment; a special plea to the further maintenance of the action is not necessary.⁷⁶ When paid into court the sum paid is considered as stricken out of the declaration;

131 N. Y. 37; *Bassett v. French*, 155 N. Y. 46 (1898). See *Thompson v. Lumley*, 7 Daly 74.

⁷⁰ *Fry v. American Ins. Co.*, 155 Ill. App. 384.

⁷¹ *Berkheimer v. Geise*, 82 Pa. 64; *Spaulding v. Vandercreek*, 2 Wend. 431; *Johnston v. Columbian Ins. Co.*, 7 Johns. 315; *Murray v. Bethune*, 1 Wend. 191; *Phelps v. Town*, 14 Mich. 374; *Hubbard v. Knous*, 7 Cush. 556.

⁷² *Murray v. Bethune*, *supra*; *Goslin v. Hodson*, 24 Vt. 140.

⁷³ *Id.*; *Reed v. Armstrong*, 18 Ind. 446; *Hopkins v. Stephenson*, 1 J.

J. Marsh. 341; *Morrow v. Smith*, 4 B. Mon. 99; *Taylor v. Brooklyn E. R. Co.*, 119 N. Y. 561; *Schnur v. Hickcox*, 45 Wis. 200; *Gilpatrick v. Ricker*, 82 Me. 185.

⁷⁴ *Id.*; *Carey v. Choat*, 6 Up. Can. Q. B. (O. S.) 467.

⁷⁵ *McMillian v. Wallace*, 3 Stew. 185; *Williams v. Tappan*, 23 N. H. 385; *Britton v. Bishop*, 11 Vt. 70; *Dana v. Sessions*, 46 N. H. 509.

⁷⁶ *Buell v. Flower*, 39 Conn. 462, 12 Am. Rep. 414; *Bendit v. Annesley*, 27 How. Pr. 184. But see *Williams v. Tappan*, 23 N. H. 385.

if the plaintiff proves no larger indebtedness the defendant is entitled to the verdict.⁷⁷ But if the jury find that a larger sum was due the verdict and judgment should be for the whole amount of the plaintiff's demand;⁷⁸ the sum paid in will be credited on the execution.

SECTION 4.

EVIDENCE.

§ 437. **Must be adapted to damages claimed.**⁷⁹ The proof of damages must vary with the causes for which they are recoverable. They are, however, susceptible of one general division, marking a plain distinction in respect to the matter of proof; that is, a division into damages which are fixed by rules of law and measurable by pecuniary valuation; and those recoverable in other cases, in which elements of damage may be considered by the jury without pecuniary estimate of the injury in evidence, or any precise legal guide for determining the amount. Of the former class are damages for breach of contract, other than promises to marry, and for torts in respect to property, unaccompanied by aggravations for which punitive damages are allowed, or where the damages are at large, as in case of a private nuisance.⁸⁰ Of the latter class are all damages recoverable for bodily pain or mental suffering. The inquiry of damages, when it is properly entered upon, whether upon trial of an issue or mere assessment presupposes a right of action established, except where actual injury and damage are the gist of the action. In either case a specific cause of injury, stated in the declaration, is assumed; and unless it can be legally assumed the inquiry of damages is premature. On trial the plaintiff is entitled to that assumption when he has introduced proof of that cause which gives him a right to go to the jury upon it;

⁷⁷ *Bank v. Sutherland*, 3 Cow. 336; *Dakin v. Dunning*, 7 Hill 30, 42 Am. Dec. 33.

⁷⁸ *Dakin v. Dunning*, *supra*; *Bennett v. Odom*, 30 Ga. 940.

⁷⁹ *Middleworth v. Lowery*, 89 App. Div. (N. Y.) 418.

⁸⁰ *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 34 L. ed. 784; *Berlin v. Thompson*, 61 Mo. App. 234.

and in cases of default or demurrer overruled the cause stated is admitted by failure to deny it by pleading. If that assumption or admission is maintained the law declares, except in cases where actual injury is the gist of the action, that the plaintiff has sustained some damage. Whether he shall have more than nominal damages depends on whether the case stated and proved or admitted includes the legal measurement of his damages to a larger amount; or, otherwise, whether the required proof to show them has been introduced.⁸¹ The plaintiff is not to be confined to proving damages on any particular theory if alternative rules may be applied.⁸²

In the nature of things, therefore, the evidence appropriate to the mere question of damages must relate to and tend to show the extent of the injury and aid the jury in fixing an equivalent expression in money. In many supposable cases much of the learning which pertains to that luxuriant branch of the law may be invoked on this question, but it is not practicable or necessary for the present purpose to pursue the subject into much detail.

§ 438. **Burden of proof.** An important consideration at the outset of the inquiry of damages, and at every step in its progress, is the *burden of proof*, or to what extent the plaintiff has made a *prima facie* showing. If his action is upon an express promise to pay money the establishment of the right to maintain it involves a *prima facie* showing of the amount due according to the purport and tenor of the promise. Matter of dis-

⁸¹ Helmstetter v. Pittsburgh Rys. Co., 243 Pa. 422; Scott v. Lewis, 177 Mo. App. 8; Hall v. Philadelphia Co., 74 W. Va. 172; North Alabama C. I. & R. Co. v. Jones, 156 Ala. 360. See Crowley v. Burns B. & Mfg. Co., 100 Minn. 178; Sessinghaus M. Co. v. Hanebrink, 247 Mo. 212.

"In an action *ex delicto* upon proof of part only of the injury charged or of one of several injuries laid in the same count the plaintiff will be entitled to recover

pro tanto, provided the part which is proved afford, *per se*, a sufficient cause of action; for torts are, generally speaking, divisible." Jacksonville v. Loar, 65 Ill. App. 218.

"After two verdicts, the discretion of the court in granting a new trial for insufficiency of evidence should be exercised with caution." Ladwig v. Supreme Assembly Equitable Fraternal Union, 125 Minn. 72.

⁸² Kerns v. Kansas City, 79 Kan. 562.

charge or reduction must be shown by the defendant.⁸³ A promise, not fulfilled, of something else which is definite in quantity and capable of valuation presents, at first, only the one question of value at the time when the contract should have been performed.

§ 439. Intendments against defendant for holding back evidence. When money or property has been intrusted by the plaintiff, or has otherwise come to the defendant under such circumstances as to impose on him the duty to return or account for it, the plaintiff may rest on proof of the value of that which would naturally and directly result from the performance of that duty. The defendant's refusal or omission to account according to his duty, or to make disclosure necessary on account of his fault or superior means of information, will subject him to the consequences of having all doubts resolved on the most favorable hypothesis for the plaintiff, within his proof.⁸⁴ In other words, the law will make every reasonable intendment

⁸³ *McGonigal v. Pittsburgh Rys. Co.*, 243 Pa. 47; *Larabee F. M. Co. v. Missouri Pac. R. Co.*, 85 Kan. 214; *Norman v. Vandenberg*, 157 Mo. App. 488; *Huntington E. P. Co. v. Parsons*, 62 W. Va. 26, 125 Am. St. 954; *McDermott v. DeMeridor*, 80 N. J. L. 67; *Star Pub. Co. v. Knosher*, 62 Wash. 215; *Sedro & Co. v. Kwapil*, 62 Wash. 385; *Lillard v. Kentucky D. & W. Co.*, 134 Fed. 168, 67 C. C. A. 74; *Cornwall v. Moore*, 132 Fed. 868; *Campfield v. Sauer*, 189 Fed. 576, 38 L.R.A.(N.S.) 837, 111 C. C. A. 14; *Good v. West M. Co.*, 154 Mo. App. 591; *Jones v. Bondurant*, 21 Colo. App. 24; *Alabama S. & I. Co. v. Kratzer I. C. Co.*, 2 Ala. App. 604; *Mug v. Ostendorf*, 49 Ind. App. 71; *Rumberg v. Cutler*, 86 Conn. 8; *Stumpf v. Cohen*, 78 N. Y. Misc. 158; *Wolf v. Humboldt County*, 36 Nev. 26, 45 L.R.A.(N.S.) 762; *Chapman v. Carrothers (Wyo.)*, 129 Pac. 434.

⁸⁴ *Eedford v. Emerson*, 141 N. C. 596; *Postal Tel.-C. Co. v. Douglass*, 96 Ga. 816; *Schwieger v. New York Cent. etc. R. Co.*, 12 Am. Neg. Cas. 313, 90 N. Y. 558; *Iddings v. Equitable G. Co.*, 8 Pa. Super. 244; *Hubbert v. Borden*, 6 Whart. 79; *Bryant v. Stilwell*, 24 Pa. 314; *Askew v. Odenheimer*, 1 Baldwin 380; *Mortimer v. Cradock*, 7 Jurist 45; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Betts v. Jackson*, 6 Wend. 180; *Gray v. Haig*, 20 Beav. 219; *Jones v. Murphy*, 8 W. & S. 275, 301; *Arrott v. Brown*, 6 Whart. 9; *McReynolds v. McCord*, 6 Watts 288.

A party may account for the absence of a witness if the failure to produce him, in case of ability to do so, would warrant an inference against him. *Hall v. Austin*, 73 Minn. 134, 5 Am. Neg. Rep. 271. See *Sugarman v. Brengel*, 68 App. Div. (N. Y.) 377.

against him.⁸⁵ Thus, where a person who has wrongfully converted property will not produce it, it will be presumed against him to be of the best description.⁸⁶ A man who wilfully places the property of others in a situation where it cannot be recovered or its true amount or value ascertained, either by mixing it with his own, or in any other manner, will be compelled to bear all the inconveniences of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole if the parts cannot be discriminated; or responding in damages for the highest value at which it can be reasonably estimated.⁸⁷ The same principle applies when the defendant fails to produce evidence in his possession showing the nature and extent of a personal injury.⁸⁸ Where it is difficult for the plaintiff to prove how many breaches of a contract the defendant has made and one breach is shown in the absence of evidence by the defendant the jury may infer that other breaches were made.⁸⁹

§ 440. **Same as to plaintiff.** If goods are sold without any express stipulation as to price and the vendor refuses to give clear evidence of their value they are presumed to be worth only the lowest price for which goods of that description usually sell, unless the vendee himself be shown to have suppressed the means of ascertaining the truth; then a contrary presumption arises, and they are taken to be of the very best description.⁹⁰ Where a contractor was prevented by the defendant, his employ-

⁸⁵ *Adams Exp. Co. v. Berry*, 35 App. D. C. 208; *Isabella G. M. Co. v. Glenn*, 37 Colo. 165; *Lamont v. Wenger*, 22 Ont. L. R. 642; *White-side v. Connolly*, 21 N. Y. Misc. 19; *Preston v. Leighton*, 6 Md. 88. See § 933 for cases sustaining this rule against carriers.

⁸⁶ *Armory v. Delamirie*, 1 Str. 504, 1 Smith Lead. Cas. 584; *Curry v. Wilson*, 48 Ala. 638.

⁸⁷ Note to *Armory v. Delamirie*, 1 Smith Lead. Cas. 589, citing *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108; *Crichfield v. Julia*, 147 Fed. 65, 77

C. C. A. 297; *Adams v. Loraine Mfg. Co.*, 29 R. I. 333. See *North Michigan L. & L. S. Co. v. Kneeland*, 149 Mich. 495; *Maloney v. King*, 30 Mont. 158; *Gilbert v. Kennedy*, 22 Mich. 117; *Allison v. Chandler*, 11 Mich. 542; *Harris v. Rosenberg*, 43 Conn. 227.

⁸⁸ *Frick v. Aurora, etc. R. Co.*, 154 Ill. App. 277.

⁸⁹ *St. John River S. Co. v. Star Line S. Co.*, 40 New Bruns. 405.

⁹⁰ *Smith's Note to Armory v. Delamirie*, *supra*; *Clunnes v. Pessey*, 1 Camp. 8 and note.

er, from fulfilling his contract, for which an entire sum was to be paid, and the cost of completing it could not be shown the plaintiff recovered as the measure of damages the contract price.⁹¹ The plaintiff is not entitled to recover, without proof of damages, solely on the presumption *contra spoliatores*; but, by its operation, his evidence will receive more favorable consideration and he may have the right to resort to evidence of inferior grade.⁹² If the plaintiff refuses to produce evidence at his command the jury may consider that fact in connection with all the testimony;⁹³ but the refusal does not raise such a presumption against the party that testimony from other sources on the subject is not to be considered.⁹⁴ It is otherwise as to an injured plaintiff who fails to call his physician.⁹⁵ Though the failure of a plaintiff to call the physician who treated him for his injury may be explained by showing the necessary expense of procuring his attendance.⁹⁶

§ 441. Plaintiff must prove pecuniary items; opinions. The plaintiff must prove pecuniary elements of damage, payments made, liabilities incurred, or any other losses sustained, and that they proceeded as effects from the act complained of.⁹⁷ His

⁹¹ *Baldwin v. Bennett*, 4 Cal. 392; *Coffee v. Meiggs*, 9 Cal. 363.

⁹² *Askew v. Odenheimer*, 1 Baldw. 380; *Life, etc. Ins. Co. v. Mechanics' F. Ins. Co.*, 7 Wend. 31; *Harden v. Hesketh*, 4 H. & N. 175.

⁹³ *Grinnell v. Taylor*, 85 Hun 85, 1 Am. Neg. Cas. 332; *Carpenter v. Pennsylvania R. Co.*, 13 App. Div. (N. Y.) 328; *McClanahan v. St. Louis, etc. R. Co.*, 147 Mo. App. 386.

An injured person who calls the physician by whom he has been regularly attended is not bound to call consulting physicians who had seen him but once or twice. *Wood v. Los Angeles T. Co.*, 1 Cal. App. 474.

⁹⁴ *Fordyce v. McCants*, 55 Ark. 384.

⁹⁵ *Arnold v. Maryville*, 110 Mo. App. 254.

⁹⁶ *Johnson v. Peoria R. Co.*, 179 Ill. App. 304.

⁹⁷ *Mueller F. Co. v. Cascade F. Co.*, 145 Fed. 596, 76 C. C. A. 286; *Lake Drummond C. & W. Co. v. West End. T. & S. D. Co.*, 142 Fed. 41, 73 C. C. A. 227; *Western U. Tel. Co. v. Totten*, 141 Fed. 533, 72 C. C. A. 591; *Pennsylvania Co. v. Scofield*, 121 Fed. 814, 58 C. C. A. 176; *Keroes v. Weaver*, 27 App. D. C. 384; *Birmingham R. L. & P. Co. v. Camp*, 161 Ala. 456; *Rush v. Masonic T. Ass'n*, 157 Ala. 601; *Jaeger v. Metcalf*, 11 Ariz. 283; *Scurich v. Ryan*, 14 Cal. App. 750; *Johnson v. Levy*, 3 Cal. App. 591; *Mustang R. C. & L. Co. v. Hissman*, 49 Colo. 308; *Milledgeville W. Co. v. Fowler*, 129 Ga. 111; *Amann v. Chicago Consol. Traction Co.*, 243 Ill. 263; *Joliet v. Fox*, 135 Ill. App. 444; *Jo-*

proof, for this purpose, must often be required to exhibit pecuniary loss occasioned by the defendant preventing, by the al-

Hiet v. Donnelly, 129 Ill. App. 119 (in case of injury to property a general statement, without any basis of computation, is insufficient); *Indianapolis & M. T. Co. v. Reeder*, 42 Ind. App. 520; *American C. & F. Co. v. Clark*, 32 Ind. App. 644; *Salinger v. Western U. Tel. Co.*, 147 Iowa 484; *Platt v. Ottumwa*, 136 Iowa 221; *Hobbs v. Marion*, 123 Iowa 726; *Larabee F. M. Co. v. Missouri Pac. R. Co.*, 85 Kan. 214; *Cudahy P. Co. v. Broadbent*, 70 Kan. 535; *Green v. Chicago, etc. R. Co.*, 156 Mo. App. 259; *Field v. Metropolitan St. R. Co.*, 156 Mo. App. 646; *Franklin v. Butcher*, 144 Mo. App. 671; *Bradner v. Rockdale P. Co.*, 115 Mo. App. 102; *Carman v. Montana Cent. R. Co.*, 32 Mont. 137; *American P. F. Co. v. Elliott*, 151 N. C. 393, 31 L.R.A.(N.S.) 910; *Bigham v. Wabash P. T. R. Co.*, 223 Pa. 106; *Withrow v. Walker*, 41 Pa. Super. 155; *Sanz v. Lavin*, 6 Philip. Isl. 299; *Marker v. Garcia*, 5 id. 557; *Rapid T. R. Co. v. Williams (Tex. Civ. App.)*, 136 S. W. 267; *Orient M. Co. v. Freckleton*, 27 Utah 125; *Rodgers v. Bailey*, 68 W. Va. 186; *Derr C. Co. v. Gelruth*, 29 Okla. 538; *Clarke v. Western U. Tel. Co.*, 112 Ga. 633; *Peek v. Steinberg*, 163 Cal. 127; *Rumberg v. Cutler*, 86 Conn. 8; *Elward v. Illinois Cent. R. Co.*, 184 Ill. App. 107; *Hatcher v. Quincy Horse Railway & Carrying Co.*, 181 Ill. App. 30; *Ruff v. Georgia, S. & F. Ry. Co.*, 67 Fla. 224; *United States Cast Iron Pipe & Foundry Co. v. City of Chicago*, 185 Ill. App. 558; *Kethledge v. City of Petoskey*, 179 Mich. 301; *Coffey v. Sutton*, 175 Ill. App. 331; *Virtue v. Creamery P. Mfg. Co.*, 123

Minn. 17; *Raas v. Sharp*, 46 Mont. 474; *Sotel v. New York*, 81 N. Y. Misc. 344.

A contractor who has been prevented from performing a contract cannot show the profits he would have made by proving the price for which another agreed to do the work. *Levenson v. Bollowa (N. Y. Misc.)*, 85 N. Y. Supp. 386.

A party may not testify that he was damaged by the breach of a contract. *Richmond v. Brandt*, 118 Ill. App. 624.

The damages claimed need not be itemized. *Hartford D. Co. v. Calkins*, 109 Ill. App. 579.

"Juries are in many cases permitted to exercise their individual judgments as to values upon subjects presumptively within their own knowledge, which they have acquired through experience or observation, and the objection that no evidence was presented before them upon such subjects is insufficient to defeat their verdict." *Cederberg v. Robinson*, 100 Cal. 93.

"The amount of damage resulting from the unsanitary and uncomfortable condition of a house" affected by a nuisance "and from the closing of the passageway to and from the street, not being susceptible of arithmetical computation, was properly sent to the jury without the aid of opinion evidence." *Frick v. Kansas City*, 117 Mo. App. 488.

If it is shown what services a physician has rendered, the jury may fix their value from their knowledge and experience. *St. Louis, etc. R. Co. v. Stell*, 87 Ark. 308.

The value of the aid, comfort and society of an injured wife need not be shown in dollars and cents, but

leged wrong or breach of contract, a state of things which the plaintiff had contracted or otherwise prepared for, or by the destruction or partial change of an existing state of things which he had a right to have continue. In making this proof the general rule in respect to witnesses must be observed, that they can only testify to facts, except that, in matters of science and skill, or as to value, those having special knowledge may give their opinions. The exception, in other words, is that a witness may be asked his opinion as an expert when the question relates to a deduction from facts supposed, or from facts which are within his knowledge, and they are peculiar to a science, art or profession in which he has special training or knowledge not common to the world. Before considering the admissibility of opinions it may be noted that only reasonable certainty as to the amount of damages and as to the severance or establishment of items and amounts for which there may be a recovery is required.⁹⁸ A lesser degree of certainty as to future pain, as

may be fixed by the jury without direct evidence. See § 1252.

⁹⁸ *Crichfield v. Julia*, 147 Fed. 65, 77 C. C. A. 297; *Richner v. Plateau L. S. Co.*, 44 Colo. 302; *Dudley v. New Britain*, 77 Conn. 322; *National R. & B's S. Co. v. Parmelee*, 9 Ga. App. 725; *Raymore R. Co. v. Postenhauser N. Co.*, 145 App. Div. (N. Y.) 163; *French v. French* (N. Y. Misc.), 125 N. Y. Supp. 1099; *Dinger v. New York*, 42 N. Y. Misc. 319; *Bates v. Holbrook*, 89 App. Div. (N. Y.) 548; *Wilkinson v. Dunbar*, 149 N. C. 20; *Raymond v. Yarrington*, 96 Tex. 443, 62 L.R.A. 962; *Hurxthal v. St. Lawrence B. & M. Co.*, 65 W. Va. 346; *Pickens v. Boom Co.*, 58 W. Va. 11; *Forster v. MacKinnon Mfg. Co.*, 130 Wis. 281; *Kelley v. La Crosse C. Co.*, 120 Wis. 84, 102 Am. St. 971; *Bigbee F. Co. v. Scott*, 3 Ala. App. 333; *Stevens v. Amsinck*, 149 App. Div. (N. Y.) 220; *Kitchin v. Oregon N. Co.*, 65 Ore. 20; *Hawley*

v. Florsheim, 44 Ill. App. 320; *Allison v. Chandler*, 11 Mich. 542. See § 1248; *Ironton L. Co. v. Butchart*, 73 Minn. 39.

"Compensation is the fundamental principle of the law of damages not necessarily to be shown with precision and accuracy, but approximately." *Kruegel v. Kitchen*, 33 Wash. 214, citing *Whelan v. Lynch*, 60 N. Y. 669, 19 Am. Rep. 202; *Muser v. Magone*, 155 U. S. 240, 39 L. ed. 135.

In an action for damages for breach of warranty of machines proof by the vendee of an itemized account of cost of repairs of some of them and that the cost was substantially the same for all was held not indefinite, uncertain and speculative in *Showen v. J. L. Owens Co.*, 182 Mich. 264.

A wrongdoer may not take advantage of the fact that the damages are not capable of exact measurement. *New York M. G.'s Ass'n*

that it may continue, is not sufficient.⁹⁹ A demand for compensation for the services of an attorney must be supported by proof that they were reasonably necessary and their reasonable value.¹

§ 442. Opinions upon subjects of common experience and observation. In some cases a witness who is not an expert is allowed to state his conclusion as to a fact of common experience and observation, when that conclusion is arrived at by the exercise of judgment in view of a multitude of minute particulars which cannot be adequately described to a jury.² In an action upon a building contract a mason may be asked how long, in his opinion, it would take to dry the walls of a house so as to render it safe and fit for human habitation.³ A witness properly qualified has been allowed to give his opinion to aid in establishing

v. Adams D. G. Co., 115 App. Div. (N. Y.) 42. This is especially true if he acted maliciously. Wall v. Hardwood Mfg. Co., 127 La. 959 and local cases cited.

Where the difficulty of making proof springs out of the wrongful act of the defendant he may not reap any advantage by requiring that kind of evidence which he has rendered it difficult or impossible to obtain. Allen v. Field, 130 Fed. 641, 65 C. C. A. 19.

⁹⁹ Ford v. Des Moines, 106 Iowa 94. See § 1251.

¹ Waltham P. Co. v. Freeman, 159 Iowa 567.

² McConnell v. Corona City W. Co., 149 Cal. 60, 8 L.R.A.(N.S.) 1171; Smith v. Gugerty, 4 Barb. 614; Missouri, etc. R. Co. v. Richards, 8 Kan. 101; Alfonso v. United States, 2 Story 421; Tibbetts v. Haskins, 16 Me. 283; Crouse v. Holman, 19 Ind. 30; Ottawa University v. Parkinson, 14 Kan. 159; Lewis v. Trickey, 20 Barb. 387; Sowers v. Dukes, 8 Minn. 23; Thomas v. Malinckrodt, 43 Mo. 58; Doane v. Garretson, 24 Iowa 351; Dwight v. County Com'rs, 11 Cush. 201; Rog-

ers v. Ackerman, 22 Barb. 134; Nellis v. McCarn, 35 Barb. 115; Harris v. Panama R. Co., 58 N. Y. 660; Kerr v. McGuire, 28 N. Y. 446; Phillips v. Terry, 6 Abb. Pr. (N. S.) 327; Smith v. Hill, 22 Barb. 656; Barber v. Merriam, 11 Allen 322; Decker v. Myers, 31 How. Pr. 372; Wetherbee v. Bennett, 2 Allen 428; Canandaigua R. Co. v. Payne, 16 Barb. 273; Priest v. Nichols, 116 Mass. 401; Vandine v. Burpee, 13 Metc. (Mass.) 288; Brill v. Flagler, 23 Wend. 354; Whitbeck v. New York Cent. R. Co., 36 Barb. 644; Joy v. Hopkins, 5 Denio 84; Sisson v. Cleveland, etc. R. Co., 14 Mich. 489; Whitman v. Boston, etc. R. Co., 7 Allen 313; Simpkins v. Low, 49 Barb. 382; Brainard v. Boston, etc. R. Co., 12 Gray 407; Clark v. Baird, 9 N. Y. 183; McDonald v. Christie, 42 Barb. 36; White v. Hermann, 51 Ill. 243; Ohio, etc. R. Co. v. Irvin, 27 Ill. 178; Same v. Taylor, 27 Ill. 207; La Fayette, etc. R. Co. v. Winslow, 66 Ill. 219; McCollum v. Seward, 62 N. Y. 316.

³ Smith v. Gugerty, 4 Barb. 614.

how much or what proportion of the grain was left upon the straw after threshing buckwheat.⁴ There is a growing tendency

⁴*Harpending v. Shoemaker*, 37 Barb. 270. In this case Johnson, J., said: "The standard works upon the law of evidence do not furnish us any light on this question, and the reported cases do not seem to have established any clear and well defined rule upon the subject of the admissibility of evidence resting in the judgment or opinion of an informed and competent witness, in matters of common experience and observation, having little, if any, relation to questions of science and skilled experts. Indeed, the cases appear to have created confusion and uncertainty, instead of establishing order and certainty upon this subject. I shall cite only a few of them. *De Witt v. Barly*, 17 N. Y. 340; *Clark v. Baird*, id. 183; *Morehouse v. Mathews*, 2 Const. 514; *People v. Eastwood*, 14 N. Y. 562; *Rochester & S. R. Co. v. Budlong*, 6 How. Pr. 467, 10 id. 289; *Cook v. Brockway*, 21 Barb. 331; *Nellis v. McCarn*, 35 id. 115. The books are full of cases upon this subject, but enough have been cited to show that the rule is not yet fixed upon any well defined principle. . .

"Much of the difficulty, I think, upon many of these questions, has arisen from not discriminating between mere opinion, founded and expressed upon some hypothesis stated, or statement of facts related by another, and knowledge of a witness, which is in part opinion or judgment, and in part observation and experience, in regard to the very matter upon which he is called to testify. It is every day's experience in the trial of causes at the circuit that witnesses are called up-

on to state their judgment or opinion upon questions of value, of quantity, of size, of distance, of time and the like, where there has been no test applied by measurement or otherwise. And this species of evidence has been found absolutely necessary to even a tolerable administration of justice. Indeed, to refuse it would in very many cases operate as a complete denial of justice. A brief reference to a very few of the most common cases will not be inappropriate in the discussion of this question. In actions of trespass, to recover for the destruction of crops, partial or total, by animals or otherwise, witnesses acquainted with the crop, and the average yield of such crops, after seeing the extent of the destruction, are allowed to state their judgment or opinion as to the quantity of grain destroyed. In actions of tort, for taking an unmeasured quantity of grain, or an unmeasured portion from a quantity measured, witnesses who had seen the grain before, and the portion, if any, left afterwards, are allowed to give their opinion or judgment as to the quantity taken. In actions of assault and battery, where the instrument is not produced, witnesses who saw it are uniformly allowed to state their judgment or opinion as to the length and size of it, and the distance they were at the time of the affray from the spot where it took place, the time when, etc. Many more instances might be mentioned, equally in point, in which the rule would scarcely be disputed by any one; where it is perfectly obvious that the knowledge, in great part, rests on the judgment or opinion of the

to the doctrine, if it be not already established, that opinions of ordinary witnesses may be given upon matters of which they have personal knowledge in all cases in which, from the very nature of the subject, the facts disconnected from such opinions cannot be so presented to a jury as to enable them to pass upon the question with the requisite knowledge.⁵ But this rule does

witness, founded upon his observation. It is his conclusion of fact from what he saw or experienced. That this is *the common law of evidence* upon trials, and must have been always, will, I am confident, be confirmed by the assent of all judges and lawyers of much experience in trials at *nisi prius*. A question of this character, precisely, was put to the same witness upon the trial in this case. The crop, it seems, had been injured by the frost, and the witness was asked what proportion of the crop had been destroyed by the frost. He answered that, in his judgment, one-half had been thus destroyed. The question was objected to, but the answer was allowed. That it was properly allowed can, I think, admit of no doubt. The fact could scarcely be proved to the apprehension of the jury in any other way. No description in language could have brought the facts before their minds in such a manner as would enable them to form any intelligent judgment upon it. But the question rejected was precisely of the same character. It sought to ascertain the proportion or quantity of the grain left upon the straw after threshing. How could this be described to a jury, so as to enable them to decide, without the conclusion of fact of the witness, founded upon his examination? This question was not framed with much skill, but the object of it is entirely apparent. It did not call for a

mere opinion, but for the knowledge of the witness, of an existing fact; knowledge inferior in degree, however, to that which is absolute and certain. But it was his knowledge, nevertheless, derived partly from observation and partly from opinion or judgment. And this knowledge must, of necessity, have existed in the mind of the witness, with far greater clearness and certainty than it could have been communicated to the minds of the jury by any statement he might have made of what he saw merely, however clear and lucid such statement might have been. If witnesses were to be permitted to state to a jury those facts only of which they have absolute and certain knowledge, not only the range of inquiry but the province of remedial justice would be very materially contracted."

⁵ St. Louis, I. M. & S. Ry. Co. v. Edwards, 24 C. C. A. 300, 78 Fed. 745, quoting the text; Spear v. Drainage Com'rs, 113 Ill. 632; Carthage T. Co. v. Andrews, 102 Ind. 134, citing numerous cases; Parker v. Chambers, 24 Ga. 518; Kearney v. Farrell, 28 Conn. 317, 73 Am. Dec. 677; Townsend v. Bonwill, 5 Harr. 474; Lund v. Tyngsborough, 9 Cush. 36; Detroit, etc. R. Co. v. Van Steinburg, 17 Mich. 99, 12 Am. Neg. Cas. 116; Norton v. Moore, 3 Head, 480; Curtis v. Chicago, etc. R. Co., 18 Wis. 312; Butler v. Mehrling, 15 Ill. 488; Harris v. Panama R. Co., 3 Bosw. 7; Willis v. Quimby, 31 N. H. 485; Eastman

not extend to expert testimony, which is incompetent where the subject of inquiry is of such a character as to be within the knowledge of men of common education and experience, and to call for no special skill, knowledge or experience.⁶ It is not a valid objection to the expression of an opinion by a witness that it is upon the precise question which the jury are to determine;⁷ but evidence of that character is only allowed when, from the nature of the case, the facts cannot be stated or described to the jury in such manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable.⁸

§ 443. Instances of rejection and admission of opinions.

Ordinary witnesses may testify whether a person is intoxicated or sober.⁹ Upon such a question it was said in a New York case: "A child six years old may answer whether a man (whom it has seen) was drunk or sober; it does not require science or opinion to answer the question, but observation merely; but the child could not, probably, describe the conduct of a man so that from its description others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if

v. Amoskeag Mfg. Co., 44 id. 143, 82 Am. Dec. 201; *Carrier v. Boston, etc. R. Co.*, 34 N. H. 498; *Hackett v. B. C. & M. R. Co.*, 35 id. 390; *State v. Avery*, 44 id. 392; *Whittier v. Franklin*, 46 id. 23, 88 Am. Dec. 185; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *McKee v. Nelson*, 4 Cow. 355, 15 Am. Dec. 384; *Commonwealth v. Sturtevant*, 117 Mass. 122; *Benson v. McFadden*, 50 Ind. 431; *State v. Folwell*, 14 Kan. 105; *Underwood v. Waldron*, 33 Mich. 232; *Milwaukee & M. R. Co. v. Eble*, 3 Pin. 334; *Terre Haute & L. R. Co. v. Walsh*, 11 Ind. App. 13.

⁶ *Missouri Pac. R. Co. v. Fox*, 56 Neb. 746.

⁷ *Transportation Line v. Hope*, 95 U. S. 297, 24 L. ed. 477; *Bellinger v. New York, etc. R. Co.*, 23 N. Y. 42; *Cornish v. Farm Buildings F. Ins. Co.*, 74 N. Y. 296; *Ferdon v. Dickens*, 161 Ala. 181 (as that the act complained of inflicted damage); *Elizabethtown & P. R. Co. v. Pottinger*, 10 Bush 185; *Vandine v. Burpee*, 13 Metc. (Mass.) 288.

⁸ *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 429.

⁹ *People v. Eastwood*, 14 N. Y. 562.

their testimony were excluded great injustice would frequently ensue.”¹⁰ The opinions of unprofessional witnesses may be received on the question of mental imbecility or insanity,¹¹ and

¹⁰ *Id.* See *Clark v. Baird*, 9 N. Y. 196.

In the last case *Johnson, J.*, said: “Evidence of opinion is also recognized as proper on the same ground of necessity in cases where language is not adapted to convey those circumstances on which the judgment must be formed. In questions of identity of persons or things language is wholly incapable to convey the appearances and sensible marks on which alone an intelligent judgment can be formed. So, too, in respect to handwriting; who would undertake to describe in words the ground upon which he recognizes his own, with any expectation, by that means, of enabling another person to pronounce upon its genuineness? In these cases the opinion of the witness is received because there are no other means of investigation adapted to the inquiry.” *Mayor v. Pentz*, 24 Wend. 675; *Priest v. Nichols*, 116 Mass. 401.

¹¹ *Finger v. Pollack*, 188 Mass. 208; *De Witt v. Barly*, 17 N. Y. 340; *White v. Bailey*, 10 Mich. 155; *Turner v. American S. & T. Co.*, 213 U. S. 257, 153 L. ed. 788. *Contra*, as to mental suffering. *Missouri, etc. R. Co. v. Linton* (Tex. Civ. App.), 126 S. W. 678, 109 S. W. 942; *Carp v. Queen Ins. Co.*, 203 Mo. 295.

In *Beaubien v. Cicotte*, 12 Mich. 501, *Campbell, J.*, after an extended review of cases, said: “From the best examination which it has been possible for us to make of the English practice, we are satisfied that in all of the courts, civil and criminal, as well as in the ecclesiastical courts, the practice concerning

proof of mental condition is the same, and permits all who have had means of observation to testify concerning the existence and measure of capacity with reference to the matter in controversy; while it does not permit those who do not testify from personal observation to give a direct opinion of capacity, except upon some given hypothesis. In every case the witnesses who speak from their own observation are expected to describe, as well as they can, what has led to their conclusions, as well as the means of observation. But the cases referred to show that, in many instances, the results of very limited observation have been permitted;—the safeguard of cross-examination and a comparison of testimony being deemed sufficient to prevent any mischief from the imperfect knowledge of single witnesses. In the United States the authorities all require the witness to state such facts as he can, in order that the jury may be better enabled to determine the value of his opinions;—stress being, of course, laid upon his opportunities of judging. In many cases the facts which can be described will be very significant to a jury, while there are many facts susceptible of a different interpretation from which a jury could obtain no light whatever without the aid of the witnesses’ judgment. The strongest indications of mental weakness or aberration often exist in expressions and appearances incapable of reproduction, even by an accomplished mimic; and yet decisive to any intelligent eye-witness. The great body of decisions

as to the health or physical condition of another person. When questions as to the condition of the mind or body are in issue there are many things in the acts, deportment and appearance of the party which create a fixed and reliable judgment in the mind of the observer that words cannot convey to the jury. That a person appears to be sick or sad may well be known by observation, and yet there is no way to describe the appearance except by words that necessarily embody the conclusion reached by observation.¹² A non-professional witness who has observed a sick or injured person may testify as to his opinion as to such person's physical condition and the degree of suffering he endured, such opinion being founded on his observation.¹³

in the United States adopt the English practice, and open the door to all testimony which can enlighten the jury, from every kind of witnesses. . . . The mere fact that a person is a physician does not of necessity qualify him to speak *ex cathedra* on this subject, especially when every one can assume the title with impunity. Men of real knowledge can always gain a respectable hearing on their own merits. The fact that in all important litigations the experts are found arrayed against each other renders it necessary for the jury to determine which is right, and in doing this they must fall back upon their own knowledge of human nature. Judge Redfield has referred to this difficulty in the chapter on Senile Dementia, Am. Law Reg., vol. 13, 458, 459. See also Taylor's Med. Juris. 890, 891, 907, and *Delafeld v. Parish*, 25 N. Y. 9. And where the witnesses speak from their own observation the questions which may be put to one may be also properly put to another." *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *Hathaway v. National L. Ins. Co.*, 48 Vt. 355.

¹² *Lay v. Postal Tel.-C. Co.*, 171

Ala. 172; *Southern R. Co. v. Cunningham*, 152 Ala. 147; *St. Louis, etc. R. Co. v. Osborne*, 95 Ark. 310; *Fearon v. Mullins*, 38 Mont. 45; *Crosby v. Portland R. Co.*, 53 Ore. 496; *El. Paso E. R. Co. v. Kendall*, 38 Tex. Civ. App. 221; *Sheldon v. Wright*, 80 Vt. 298; *Carthage T. Co. v. Andrews*, 102 Ind. 138, 52 Am. Rep. 653; *Bridge v. Oshkosh*, 17 Wis. 363; *Sydleman v. Beckwith*, 43 Conn. 9; *Thompson v. Stevens*, 71 Pa. 161; *Wilkinson v. Moseley*, 30 Ala. 562; *McDonald v. Franchere*, 102 Iowa 496; *Will v. Mendon*, 108 Mich. 251; *Keller v. Gilman*, 93 Wis. 9; *Cicero, etc. St. R. Co. v. Priest*, 190 Ill. 592; *Hall v. Austin*, 73 Minn. 134, 5 Am. Neg. Rep. 271; *Jackson v. Wells*, 13 Tex. Civ. App. 275.

¹³ *Fulton v. Metropolitan St. R. Co.*, 125 Mo. App. 239 (indications of pain and activity); *Morris v. St. Paul City R. Co.*, 105 Minn. 276; *Partello v. Missouri Pac. R. Co.*, 217 Mo. 645; *Reardon v. St. Louis, etc. R. Co.*, 215 Mo. 105; *Georgia R. & E. Co. v. Gilleland*, 133 Ga. 621 (and contrast his seeming condition with what it formerly was); *Lauth v. Chicago Union T. Co.*, 244 Ill. 244 (same point); *Federal B.*

Similarly a non-expert witness may testify as to the ability of another to labor.¹⁴

A witness cannot be permitted to express an opinion which depends upon events which may or may not transpire, and which cannot be foreseen and foretold as the result of any experience, nor stated as a deduction of science or law;¹⁵ and cannot be asked his opinion of the amount of injury from a competitive business carried on in violation of an agreement,¹⁶ nor of the value of the reversion of land over which a railroad has been located, for it depends on the length of time that the easement will continue, and in relation to that there has been no experience on which a satisfactory opinion can be based.¹⁷ For the same reason the opinions of witnesses are regarded as mere conjectures in respect to the detriment to a turnpike from a near railroad by reason of its trains frightening horses traveling upon such turnpike;¹⁸ so as to the effect of building a railroad on the good will of a mill;¹⁹ or the effect in depre-

Co. v. Reeves, 77 Kan. 111; Robinson v. Exempt F. Co., 103 Cal. 1, 24 L.R.A. 715, 42 Am. St. 93; Lawson v. Conaway, 37 W. Va. 159, 18 L.R.A. 627, 38 Am. St. 17; Chicago City R. Co. v. Van Vleck, 143 Ill. 480; Chicago v. McNally 227 Ill. 14 (opinions must be based on objective rather than subjective conditions); Scott v. O'Leary, 157 Iowa 222; Shelby v. Claggett, 46 Ohio St. 549, 5 L.R.A. 606; Baltimore & O. R. Co. v. Rambo, 8 C. C. A. 6, 59 Fed. 75; Barlow v. Hamilton, 151 Ala. 634; Kimball v. Northern E. Co., 159 Cal. 225; Kline v. Santa Barbara C. R. Co., 150 Cal. 741; Underwood v. Gulf Ref. Co., 128 La. 968; Fletcher v. Dixon, 113 Md. 101; Struble v. De Witt, 89 Neb. 726; International, etc. R. Co. v. Sandlin, 57 Tex. Civ. App. 151; Pullman Co. v. Hoyle, 52 Tex. Civ. App. 534; Cunningham v. Neal, 49 Tex. Civ. App. 613; Davis v. Oregon S. L. R. Co., 31 Utah 307; Yount v. Strickland, 17 Suth. Dam. Vol. II.—12.

Wyo. 526. *Contra*, Kirby v. Western U. Tel. Co., 77 S. C. 404, 122 Am. St. 580.

¹⁴ Young v. Beveridge, 81 Neb. 180; Kirchof v. United R. Co., 155 Mo. App. 70.

¹⁵ Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Norman v. Wells, 17 Wend. 162.

¹⁶ Norman v. Wells, 17 Wend. 136.

¹⁷ Boston, etc. R. Co. v. Old Colony, etc. R. Co., 3 Allen 142. See Perrine v. Hotelkiss, 58 Barb. 77.

¹⁸ Troy, etc. R. Co. v. Northern T. Co., 16 Barb. 100.

¹⁹ Canandaigua, etc. R. Co. v. Payne, 16 Barb. 273.

In a petition for the assessment of damages caused by the location of a railroad upon a wharf used for the wood and lumber business and the land connected therewith, one who has been engaged in the lumber business for several years, on a wharf in the vicinity, and has been for several years connected with

ciating the value of a stock of goods by impairing their reputation from the seizure and detention of them on an attachment.²⁰ To ascertain the value of a growing crop damaged by an overflow of water it is competent to ask a witness conversant with the growth of such crops how much, in his opinion, a given field would produce per acre.²¹ A farmer may testify as to the damage done by the destruction of grass.²² The extent to

railroads, but who has no particular means of knowledge as to the effect of constructing railroads over wharves similar to that in question, is not thereby qualified to give an opinion as an expert as to the effect of the location or the value of that wharf for the business there conducted. *Boston, etc. R. Co. v. Old Colony, etc. R. Co., supra.*

²⁰ *Alexander v. Jacoby*, 23 Ohio St. 358. In this case a witness testified that there would, by the mere act of seizure and levy of attachment, be a stigma or discredit cast on them which would diminish their market value in the hands of the owners, to whom they were returned, from five to fifteen per cent. He added that it arises from the fact that the community would expect to buy the goods lower on account of their having been seized by the sheriff. That it depended to some extent on the length of time the sheriff held them, and the extent that it was known in the community, and the amount of competition which existed at the time in that business at that place, and the extent of the interruption of the business. *McIlvaine, J.*, said: "We think * * * that the admission of this testimony cannot be justified. * * * The testimony given cannot be regarded as an opinion as to the market value of the goods discharged from the attachment. No reference was had to knowledge of the goods, or prices

realized on sales, or prices demanded or offered in the market. The opinion was not based upon a knowledge of any fact, nor upon the assumption of any fact, which fairly and reasonably indicates the amount of loss or damage resulting from the causes named, unless it be the very limited experience of the witness in relation to matters of that sort. But experience in such matters is not within the exception in favor of the opinion of experts. There is no skill or peculiar knowledge to be acquired by persons engaged in that particular line of trade, or any other trade, whereby a better opinion may be given in relation to the effect of the causes referred to. Customers would be quite as capable as tradesmen to form an opinion in relation thereto. Indeed, the only end accomplished by the admission of such testimony is the substitution of witnesses for jurors, and theories for facts."

In *Knapp v. Barnard*, 78 Iowa 347, it is held that a dealer in goods similar to those attached may testify as an expert as to the damage done by carrying over to another season goods which were only salable at certain periods.

²¹ *Phillips v. Terry*, 5 Abb. Pr. (N. S.) 327; *Lommelund v. St. Paul, etc. R. Co.*, 35 Minn. 412.

²² *Chicago, etc. R. Co. v. Larsen*, 19 Colo. 71; *Myers v. Charlotte*, 146 N. C. 246.

which land has deteriorated in value in consequence of allowing weeds to grow upon it may be shown by opinion testimony.²³ An expert witness' opinion is admissible in an action for breach of a covenant against incumbrances to prove the difference in value occasioned by a right of way,²⁴ and such evidence is also admissible to show the value of the advantage which may result to a manufacturer from being released from the performance of a contract the execution of which would require several years.²⁵ In an action for a personal injury a physician who attended the plaintiff after he had been in the care of another physician for two weeks may testify what, so far as he can judge, had been the first physician's treatment, and in what respects it differed from his own; what effect, so far as he could judge, it had upon the plaintiff; and whether or not he saw any evidence that the plaintiff had been injured by such treatment.²⁶ A physician may form and express an opinion of the nature and cause of the bodily or mental condition of his patient, derived from his knowledge, based on his attendance, treatment and examinations of the patient and in part on his sentiments and complaints as to pain and suffering, and in the same connection give his opinion whether the injuries are liable to be permanent, and as to the cause of the plaintiff's condition.²⁷ Physicians may testify as to their

But see *Sloss-Sheffield Steel & Iron Co. v. Webb*, 184 Ala. 452, holding it error to permit the plaintiff to testify as to the quantum of damages to his crop caused by overflowing of water. He should testify to the facts upon which the jury may determine the amount of damage.

The value of wood cut on land may be shown by witnesses who have made a comparison of the yield on contiguous lands which were cut and measured by cords on such lands though that cut on the land in question was not measured by them. *Perry v. Jeffries*, 61 S. C. 292.

²³ *Dunsford v. Webster*, 14 Manitoba 529.

²⁴ *Wetherbee v. Bennett*, 2 Allen 428.

²⁵ *Allen v. Field*, 130 Fed. 641, 65 C. C. A. 19.

²⁶ *Barber v. Merriam*, 11 Allen 322.

²⁷ *Birmingham Railway, Light & Power Co. v. Roach*, — Ala. —, 66 So. 82; *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748; *Hatcher v. Quincy Horse Railway & Carrying Co.*, 181 Ill. App. 30; *Southern R. Co. v. Hobbs*, 151 Ala. 335; *Indianapolis & M. T. Co. v. Reeder*, 37 Ind. App. 262 (and the extent of his patient's suffering); *Denver, etc. R. Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738, 49

opinions, based on a personal examination of the patient, and on statements made by him at the time touching his physical condition.²⁸ If the apprehended consequences of a personal injury are such as, in the ordinary course of nature, are reasonably certain to ensue experts may testify concerning them; but not if such consequences are contingent, speculative and merely possible.²⁹ A physician may testify as to whether a cause which is alleged to have existed would be sufficient to produce a condition which is claimed to have resulted from such cause.³⁰ By three to two the justices of the Wisconsin court have held that an expert opinion as to the necessity of medical attendance and the services of nurses for an injured plaintiff in the future, and as to the extent to which these may be required is inadmissible.³¹ An injured person may not testify as to his opinion

L.R.A. 77; Northern Pac. R. Co. v. Urlin, 158 U. S. 271, 39 L. ed. 977; McKeon v. Chicago, etc. R. Co., 94 Wis. 477, 7 Am. Neg. Cas. 290, 35 L.R.A. 252, 59 Am. St. 809; McClain v. Brooklyn City R. Co., 110 N. Y. 459, 12 Am. Neg. Cas. 290; Perkins v. Concord R., 44 N. H. 223; Chicago, etc. R. Co. v. Spilker, 134 Ind. 380, 11 Am. Neg. Cas. 508; Sanders v. O'Callaghan, 111 Iowa 574.

²⁸ Johnson v. Northern Pac. R. Co., 47 Minn. 430; Brusch v. St. Paul City R. Co., 52 Minn. 512; Neiner v. Chicago City Ry. Co., 181 Ill. App. 449.

²⁹ Strohman v. New York, etc. R. Co., 96 N. Y. 305; Turner v. Newburgh, 109 id. 301, 4 Am. St. 450; Griswold v. New York, etc. R. Co., 115 N. Y. 61, 12 Am. St. 775; Holman v. Union St. R. Co., 114 Mich. 208, 214; Streng v. Ibert B. Co., 50 App. Div. (N. Y.) 542, 7 Am. Neg. Rep. 650; Denver, etc. R. Co. v. Roller, 41 C. U. A. 22, 100 Fed. 738, 49 L.R.A. 77.

Where a physician testified to the

effect that a man who, while riding over a corduroy road on a wagon, was pitched out into a hole, striking his shoulder on the logs, *might* sustain such an injury as the plaintiff alleged he had received, and that the injuries sustained incapacitated the plaintiff to the extent about two-thirds of his capacity for manual labor, it was regarded as conjectural, but not as improper to the extent of justifying a reversal of the plaintiff's judgment. Conrad v. Ellington, 104 Wis. 367.

³⁰ Lucas v. Detroit City R. Co., 92 Mich. 412; Davey v. Janesville, 111 Wis. 628, 11 Am. Neg. Rep. 68; City of Chicago v. Didier, 227 Ill. 571, aff'g 131 Ill. App. 406; Wood v. Louisville & N. R. Co., 183 Ill. App. 543; Wheeler v. Chicago & W. I. R. Co., 182 Ill. App. 194; Lyons v. Metropolitan St. R. Co., 253 Mo. 143.

³¹ Crouse v. Chicago, etc. R. Co., 104 Wis. 473; Selleck v. Janesville, 104 Wis. 570, 76 Am. St. 892, 47 L.R.A. 691. See § 1250 for cases to the contrary.

concerning the permanency of his injuries.³² An injured person may testify whether his condition is as good as before he was injured and in what respect it is different from what it was.³³

A competent witness may give his opinion of the amount of work a mill would do in a given time to assist a jury in determining the amount of damage a party sustained by the failure of a mill-wright to complete its construction within the agreed time.³⁴ A competent practical machinist may testify whether a machine is so made as to successfully do the work it was designed for,³⁵ but opinions as to the profits which might have been realized from the use of a machine if plaintiff's possession of it had not been disturbed are not admissible.³⁶ The opinion of one who has never done work like that he is asked to testify to, as to the cost of doing it is inadmissible.³⁷ A witness who has had several years' experience in shipping livestock and has observed their weight at the places of shipment and delivery, and who knew the age and condition of cattle shipped by the plaintiff may testify as to their probable shrinkage between the time of their shipment and delivery.³⁸ A person who has knowledge of the effect which the construction of a railroad embankment will have upon the market value of property may give his opinion thereon.³⁹ The fact that property has been damaged may be shown by a witness who knows its condition.⁴⁰ An experienced builder may testify as to the cost and time required to repair a building.⁴¹ And so an automobile repair man may

³² *Atlanta St. R. Co. v. Walker*, 93 Ga. 462; *Central R. Co. v. Stancel*, 118 Ga. 142.

³³ *Southern R. Co. v. Hobbs*, 151 Ala. 335.

³⁴ *Clifford v. Richardson*, 18 Vt. 620.

³⁵ *Greenleaf v. Stockton Combined H. & A. Works*, 78 Cal. 606.

³⁶ *Crabbs v. Koontz*, 69 Md. 59.

³⁷ *Little Rock, etc. R. Co. v. Alister*, 62 Ark. 1.

³⁸ *Cleveland, etc. R. Co. v. Heath*, 22 Ind. App. 47; *St. Louis, I. M. & S. R. Co. v. Keefe*, 113 Ark. 215;

Midland Val. R. Co. v. Larson, 41 Okla. 360; *St. Louis & S. F. Ry. Co. v. Knox*, — Tex. Civ. App. —, 151 S. W. 902; *St. Louis & S. F. R. Co. v. Rich*, — Tex. Civ. App. —, 162 S. W. 1194; *St. Louis, S. F. & T. Ry. Co. v. Armstrong*, — Tex. Civ. App. —, 166 S. W. 366.

³⁹ *Chicago, etc. R. Co. v. Howell*, 65 Ill. App. 373.

⁴⁰ *Baltimore B. R. Co. v. Sattler*, 102 Md. 595. *Contra*, *Gosdin v. Williams*, 151 Ala. 592.

⁴¹ *Higgins v. Los Angeles G. & E. Co.*, 159 Cal. 651, 34 L.R.A.(N.S.)

testify as to the reasonable cost of repairs to an automobile.⁴² One engaged in installing insulating plants may testify as to the cost of production and installation thereof though he is not a skilled mechanic and competent to manufacture them.⁴³

§ 444. **Opinions as to amount of damages.** Ordinarily a witness is not allowed to give his opinion of the amount of *damages* a party sustains from a given act or omission, because when he does so he includes the law as well as the fact. It is the duty of the jury to assess the damages according to the rule of law which it is the province of the court to lay down for their guidance; witnesses are allowed only to furnish the data from which the amount is arrived at.⁴⁴ And where the injury

717; *Frick v. Kansas City*, 117 Mo. App. 488.

⁴² *Peabody v. Lynch*, 184 Ill. App. 78.

⁴³ *Union Fibre Co. v. Aaron Poultry Co.*, 176 Mo. App. 26.

⁴⁴ *Patterson v. McMin*n (Tex. Civ. App.), 152 S. W. 223; *International Agr. Corp. v. Abercrombie*, 184 Ala. 244, 49 L.R.A.(N.S.) 415; *Hardaway-W. Co. v. Bradley*, 163 Ala. 596; *Atlanta & B. A. L. R. Co. v. Brown*, 158 Ala. 607; *Seaboard A. L. R. Co. v. Brown*, 158 Ala. 630; *Central R. Co. v. Barnett*, 151 Ala. 407; *Cross v. Coffin-F. P. Co.*, 123 Ga. 817; *McCrary v. Pritchard*, 119 Ga. 876; *Jenkins v. Commercial Nat. Bank*, 19 Idaho 290; *Axtell v. Northern Pac. R. Co.*, 9 Idaho 392, 15 Am. Neg. Rep. 367; *Springfield & N. T. Co. v. Warriek*, 249 Ill. 470, citing the text; *Smythe's Est. v. Evans*, 209 Ill. 376; *Martin v. Porter*, 150 Ill. App. 411; *Podlaski v. Bender*, id. 312; *Huntington v. Stemen*, 37 Ind. App. 553; *Cincinnati, N. O. & T. P. R. Co. v. Brandenburg*, 142 Ky. 814; *Carter v. Maryland & P. R. Co.*, 112 Md. 599; *Stewart v. American B. Co.*, 108 Md. 200; *Western U. Tel. Co. v. Ring*, 102 Md. 677; *Wiggins v. St. Louis R. Co.*,

119 Mo. App. 492; *Odell v. Story*, 81 Neb. 437; *McCook v. McAdams*, 76 Neb. 1; *Raymond v. Edelbrock*, 15 N. D. 231 (no facts being called for); *Montgomery v. Somers*, 50 Ore. 259; *Pacific L. Co. v. Murray*, 45 Ore. 103; *Byrne v. Cambria & C. R. Co.*, 219 Pa. 217; *Kirk v. Seattle E. Co.*, 58 Wash. 283, 31 L.R.A.(N.S.) 991; *Church v. Wilkerson-T. Co.*, 58 Wash. 262, 137 Am. St. 1059; *Berg v. Humptulips B. & R. I. Co.*, 38 Wash. 342; *De Wald v. Ingle*, 31 Wash. 616, 96 Am. St. 927; *Wasioto, etc. R. Co. v. Hensley*, 148 Ky. 366; *Harriman v. New Nonpareil Co.*, 132 Iowa 616; *International, etc. R. Co. v. Fickey* (Tex. Civ. App.), 125 S. W. 327; *Chicago, etc. R. Co. v. Lewis*, 48 Ill. App. 274, 9 Am. Neg. Cas. 228; *St. Louis, etc. R. Co. v. Law*, 68 Ark. 218; *Railway Co. v. Jones*, 59 Ark. 105; *Louisville, etc. R. Co. v. Sparks*, 12 Ind. App. 410; *Sunnyside C. & C. Co. v. Reitz*, 14 Ind. App. 478; *Elwood P. M. Co. v. Harting*, 21 Ind. App. 408; *McKinnon v. Palen*, 62 Minn. 188; *Wellington v. Moore*, 37 Neb. 560; *Jameison v. Kent*, 42 Neb. 412; *Bennett v. Wolfolk*, 80 Hun 390; *Landrum v. Wells*, 7 Tex. Civ. App. 625;

consists of distinct elements it is not competent to ask a witness to make a general estimate, but he should be asked to estimate the specific items separately.⁴⁵ But where unliquidated dam-

Upcher v. Oberlender, 50 Kan. 315; Atchison, etc. R. Co. v. Wilkinson, 55 Kan. 83; Foote & D. Co. v. Malony, 115 Ga. 985; Barron v. Collenbaugh, 114 Iowa 71; Kochmann v. Baumeister, 73 App. Div. (N. Y.) 310; St. Louis, etc. R. Co. v. Jacobs, 70 Ark. 401; Read v. Valley L. & C. Co., 66 Neb. 423; Morris v. Williford (Tex. Civ. App.), 70 S. W. 228; Van Deusen v. Young, 29 N. Y. 9; Morehouse v. Matthews, 2 id. 514; Harger v. Edmonds, 4 Barb. 256; Giles v. O'Toole, id. 261; Clark v. Baird, 9 N. Y. 183; Rodgers v. Fletcher, 13 Abb. Pr. 299; Doolittle v. Eddy, 7 Barb. 74; Atlantic, etc. R. Co. v. Campbell, 4 Ohio St. 583, 64 Am. Dec. 607; Cleveland, etc. R. Co. v. Ball, 5 Ohio St. 568; Richardson v. Northrup, 66 Barb. 85; Thompson v. Dickhart, id. 604; Green v. Plank, 48 N. Y. 669; Whitmore v. Bowman, 4 G. Greene 148; Norman v. Wells, 17 Wend. 136; Fish v. Dodge, 4 Denio 311, 47 Am. Dec. 254; Doff v. Lyon, 1 E. D. Smith, 536; Evansville, etc. R. Co. v. Fitzpatrick, 10 Ind. 120; Armstrong v. Smith, 44 Barb. 120; Simons v. Monier, 29 id. 419; Gilbert v. Cherry, 57 Ga. 128; Montgomery, etc. R. Co. v. Varner, 19 Ala. 185; Stein v. Burden, 24 id. 130, 60 Am. Dec. 453; Decker v. Myers, 31 How. Pr. 372; Bass F. Co. v. Glasscock, 82 Ala. 452, 60 Am. Rep. 748; Chandler v. Bush, 84 Ala. 102 (sum witness entitled to as punitive damages); Young v. Cureton, 87 id. 727; Little Rock, M. R. & T. Ry. v. Haynes, 47 Ark. 497; Montelius v. Atherton, 6 Colo. 224; Central R. v. Senn, 73 Ga. 705, 9 Am. Neg. Cas.

186; Stewart v. Lanier H. Co., 75 Ga. 582; Hurt v. St. Louis, etc. R. Co., 94 Mo. 225, 4 Am. St. 374; White v. Stoner, 18 Mo. App. 540; Wakeman v. Wheeler & W. Mfg. Co., 101 N. Y. 205, 54 Am. Rep. 676; Reed v. McConnel, 101 N. Y. 270; Houston, etc. R. Co. v. Burke, 55 Tex. 323, 40 Am. Rep. 808; Bain v. Cushman, 60 Vt. 343; Burlington & M. R. Co. v. Schluntz, 14 Neb. 421; Same v. Beebe, 14 Neb. 463; Fremont, etc. R. Co. v. Marley, 25 Neb. 138, 13 Am. St. 482.

In Hargreaves v. Kimberly, 26 W. Va. 787, 53 Am. Rep. 121, it was held that a non-expert witness might state from the facts within his own knowledge the amount of damages caused by the diversion of water; but he could not testify as to future damages caused thereby.

In Carter v. Thurston, 58 N. H. 104, 42 Am. Rep. 584, the damage done to land by hauling logs over it was properly shown by a witness familiar with the land and its value.

The admission of opinions as to the amount of damages will not be cause for reversing a judgment if it is clear that the jury were not governed by them. Huling v. Henderson, 161 Pa. 553.

⁴⁵ Dougherty v. Stewart, 43 Iowa 648; Silva v. Souza, 14 Hawaii 46, quoting the text; Power v. Turner, 37 Mont. 521; Mauldin v. Seaboard A. L. R., 73 S. C. 9; McGuire v. Post Falls L. & Mfg. Co., 23 Idaho 608.

While a witness may not estimate damages in a lump sum where many articles have been injured, he may

ages result from an injury complicated in its circumstances and difficult of description a witness acquainted personally with all the facts may be permitted to give his opinion of the total or aggregate loss or value as some evidence of the fact.⁴⁶ Thus, competent witnesses may testify as to the amount of damage done to a garden, nursery, trees and hedges by smoke, heat and gas,⁴⁷ and as to the extent of the shrinkage in weight and loss of growth of animals;⁴⁸ and an experienced shipper of cattle may give his opinion as to the damage they sustained during delayed shipment.⁴⁹ The plaintiff in a personal injury action has been permitted to state the damages he sustained.⁵⁰ The amount of damage resulting from an aggravated trespass has been held to be a proper subject for the opinion of a competent witness.⁵¹ The general rule as it is stated has been said to be correct, but it does not extend so far as to preclude the plaintiff in an action for the breach of a contract to furnish telephone service from testifying to what the service would have been

give details and amounts and state their aggregate. *Neal v. Davis F. & M. Works*, 131 Ga. 701.

⁴⁶ *St. Louis, etc. R. Co. v. Magness*, 93 Ark. 46 (by diversion of natural watercourse); *Iowa-M. L. Co. v. Conner*, 136 Iowa 674; *Stone v. St. Louis, etc. R. Co.*, 146 Mo. App. 298; *McCrary v. Chicago & A. R. Co.*, 109 Mo. App. 567 (loss of weight of cattle); *Watson v. Colusa-P. M. & S. Co.*, 31 Mont. 513; *Harper v. Lenoir*, 152 N. C. 723 (removal of lateral support); *Whitfield v. Rowland*, 152 N. C. 211 (resulting from cutting trees); *McCartney v. Philadelphia*, 22 Pa. Super. 257; *St. Louis, etc. R. Co. v. Rogers*, 49 Tex. Civ. App. 304; *Red River, etc. R. Co. v. Eastin*, 39 Tex. Civ. App. 579; *Webb v. Daggett*, 39 Tex. Civ. App. 390; *Hutchinson v. Mt. Vernon W. & P. Co.*, 49 Wash. 469; *Close v. Ann Arbor R. Co.*, 169 Mich. 392; *Bishop v. Reads-*

boro C. Mfg. Co., 85 Vt. 141, 36 L.R.A.(N.S.) 1171; *White Deer Creek I. Co. v. Sassaman*, 67 Pa. 415; *Haymaker v. Adams*, 61 Mo. App. 581; *Eyerma v. Sheehan*, 52 Mo. 223; *Dent v. South Bound R. Co.*, 61 S. C. 329 (damage to land by fire).

⁴⁷ *Vandine v. Burpee*, 13 Metc. (Mass.) 288; *Chicago, etc. R. Co. v. Mosher*, 76 Kan. 599; *Hart v. Chicago & N. R. Co.*, 83 Neb. 652; *Compare Baltimore B. R. Co. v. Sattler*, 102 Md. 595.

⁴⁸ *Enlow v. Hawkins*, 71 Kan. 633.

⁴⁹ *St. Louis, etc. R. Co. v. Edwards*, 78 Fed. 745, 24 C. C. A. 300.

⁵⁰ *Roundtree v. Charleston, etc. R. Co.*, 72 S. C. 474; *Jackson v. Southern R. Co.*, 73 S. C. 557; *Neeley v. Cameron*, 71 W. Va. 144.

⁵¹ *Razzo v. Varni*, 81 Cal. 289; *Chicago, etc. R. Co. v. Schaffer*, 26 Ill. App. 280.

worth to him.⁵² Qualified witnesses may testify as to the damage done a fire-proof safe by reason of having holes punched in it.⁵³ A witness who is familiar with the use and value of a wagon and harness may testify as to the damage done them, the inquiry being directed as to the cost of making repairs.⁵⁴ The value of land or of a chattel before and after injury was done may be shown by opinions,⁵⁵ and if the only damages involved are measurable by the difference in the value of property before and after the act or neglect complained of opinions as to the amount thereof are competent.⁵⁶ If damages are measurable by lessened rental value the same kind of testimony is admissible.⁵⁷ The cost of doing work and the profits to be derived from it may be shown by opinions.⁵⁸ In some jurisdictions witnesses are not permitted to give opinions as to the amount of damage sustained by taking or damaging land under condemnation proceedings; they are restricted to giving estimates of its value before and after it was taken or injured;⁵⁹ in

⁵² *Zabel v. New State Tel. Co.*, 127 Mich. 402.

⁵³ *Diebold S. & L. Co. v. Holt*, 4 Okla. 479; *Ingram v. Wishkah B. Co.*, 35 Wash. 191.

⁵⁴ *Sallee v. St. Louis*, 152 Mo. 615.

⁵⁵ *Tennessee C., I. & R. Co. v. McMillion*, 161 Ala. 130; *Davis v. Blue Ridge R. Co.*, 81 S. C. 466; *Louisville, etc. R. Co. v. Peck*, 99 Ind. 68.

⁵⁶ *St. Louis, etc. R. Co. v. Cash G. Co.*, 161 Ala. 332; *Montgomery St. R. Co. v. Hastings*, 138 Ala. 432; *Central R. Co. v. Barnett*, 151 Ala. 407; *St. Louis S. R. Co. v. Brooksher*, 86 Ark. 91.

⁵⁷ *Pickens v. Boom Co.*, 58 W. Va. 11; *Hurxthal v. St. Lawrence B. & M. Co.*, 65 W. Va. 346.

⁵⁸ *Wilkinson v. Dunbar*, 149 N. C. 20.

⁵⁹ *Mandery v. Mississippi, etc. B. Co.*, 105 Minn. 3; *Topeka v. Martineau*, 48 Kan. 387; *Clark v. Elli-*

thorpe, 7 Kan. App. 337; *International, etc. R. Co. v. Fickey* (Tex. Civ. App.), 125 S. W. 327; *Union E. Co. v. Kansas City S. B. R. Co.*, 135 Mo. 353; *Doyle v. Manhattan R. Co.*, 128 N. Y. 488; *Charman v. Hibbler*, 31 App. Div. (N. Y.) 477; *Richardson v. Webster City*, 111 Iowa 427; *Roberts v. New York E. R. Co.*, 128 N. Y. 455, 13 L.R.A. 499; *Alabama, etc. R. Co. v. Burkett*, 42 Ala. 83; *Brunswick, etc. R. Co. v. McLaren*, 47 Ga. 546; *Hagaman v. Moore*, 84 Ind. 496; *Harrison v. Iowa, etc. R. Co.*, 36 Iowa 323; *Ottawa, etc. R. Co. v. Adolph*, 41 Kan. 600; *Grand Rapids v. Grand Rapids & I. R. Co.*, 58 Mich. 641; *Atlantic, etc. R. Co. v. Campbell*, 4 Ohio St. 583, 64 Am. Dec. 607; *Brown v. Providence, etc. R. Co.*, 12 R. I. 238; *Goodwine v. Evans*, 134 Ind. 262; *Elwood P. M. Co. v. Harting*, 21 Ind. App. 408.

A witness who testified to the

others such opinions are received.⁶⁰ A recent work on Evidence says that the weight of authority sanctions the more reasonable rule that opinions as to damages in condemnation cases should be received in evidence. These decisions are based upon the reasoning that, inasmuch as the amount of damages in such proceedings depends entirely upon opinions as to the value before and after the condemnation, and as these opinions are competent, it can make no material difference whether the witness gives his opinion as to the amount of damages at once or whether he is allowed simply to state to the jury his opinion as to values from which the opinion as to damages must necessarily follow by the process of subtraction. The tendency of the later decisions seems to be in favor of this rule.⁶¹ Expert evidence is not competent to show the damages resulting to a horse from its having run away, no wound or physical injury following;⁶² but such evidence has been held proper to show the

value of land before and after an injury was done it may give his opinion as to the *quantum* of damages. *Railway Co. v. Combs*, 51 Ark. 324.

A witness may, however, be asked generally, whether the property has been damaged or benefited, without reference to the amount. *City of Huntsville v. Pulley*, 187 Ala. 367.

⁶⁰ *Ft. Collins D. R. Co. v. France*, 41 Colo. 512; *Schmoe v. Cotton*, 167 Ind. 364 (before and after a nuisance); *Minnesota Belt Line R. & T. Co. v. Gluck*, 46 Minn. 463; *Ironton L. Co. v. Butchart*, 73 Minn. 39; *Schuler v. Board of Supervisors*, 12 S. D. 460; *Texas & St. Louis R. Co. v. Kirby*, 44 Ark. 103; *Washburn v. Milwaukee, etc. R. Co.*, 59 Wis. 364; *Dawson v. Pittsburgh*, 159 Pa. 317; *Tucker v. Massachusetts Cent. R.*, 118 Mass. 546; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290; *Spear v. Drainage Com'rs*, 113 id. 632; *Portland & R.*

R. Co. v. Deering, 78 Me. 61, 57 Am. Rep. 784; *Sherman v. St. Paul, etc. R. Co.*, 30 Minn. 227; *Telephone & T. Co. v. Forke*, 2 Tex. App. Civil Cas. 318; *Railroad Co. v. Foreman*, 24 W. Va. 662; *Snyder v. Western Union R. Co.*, 25 Wis. 60; *White Deer Creek I. Co. v. Sassaman*, 67 Pa. 415; *Rochester & S. R. Co. v. Budlong*, 6 How. Pr. 467, 10 id. 289; *Hine v. New York E. R. Co.*, 36 Hun 293.

⁶¹ 1 Jones § 390.

⁶² *Van Wagoner v. New York C. Co.*, 36 Hun 552. Compare *Donnelly v. Fitch*, 136 Mass. 558. *Contra*, *Montgomery St. R. Co. v. Hastings*, 138 Ala. 432.

The qualities of a horse are as much matter of value as his strength or action, and if they are impaired by the wrongful conduct of a party the owner is entitled to compensation therefor. *English v. Missouri Pac. R. Co.*, 73 Mo. App. 232.

damage done a horse by poisoning.⁶³ In an action to recover for personal injuries the question for the jury is the sum which will compensate the plaintiff therefor, which question depends upon the severity and extent of such injuries. Hence, unless the nature of the case requires it, physicians cannot characterize the injuries as serious or trivial, but must give the facts and opinions based thereon.⁶⁴ Uncontroverted opinions are not binding on the jury in actions to recover unliquidated damages.⁶⁵

§ 445. Proof of value.⁶⁶ Proof of value is important in the great majority of cases. If the value in question is general, and there is a market value, the latter governs.⁶⁷ The proof of it is not altogether by opinions; it is capable of proof as a fact in many cases. Many staple commodities and articles of merchandise are very definitely classified, and a multitude of transactions fix a standard of values every day, which are the prices paid and received for them. When the value of such property is in question a witness must exercise judgment and give his opinion as to the class to which the property belongs; but the current or market price of that class at a given time and place is a matter of fact. A witness who can by his special knowledge classify the property, and who is also acquainted with the current market price, may be asked in a single ques-

⁶³ *Coyle v. Baum*, 3 Okla. 695.

⁶⁴ *Stoothoff v. Brooklyn Heights R. Co.*, 50 App. Div. (N. Y.) 585.

⁶⁵ *Nelson v. Mississippi, etc. B. Co.*, 99 Minn. 484.

⁶⁶ The subject is also considered in §§ 654 (vendor and vendee); 933 (actions against carriers); 1113, 1117 (conversion); 680 (value of services); 1089 (condemnation proceedings); 565 (notes and bills); 1132 (conversion of securities); 843 (value of use and occupation); and less fully in other sections referred to in the index.

⁶⁷ *Beaty v. Johnston*, 66 Ark. 529; *Watson v. Loughran*, 112 Ga. 837, 6 Am. Neg. Rep. 484; *Chicago, C.*,

C., etc. R. Co. v. McKelvey, 12 Ohio C.C. 436; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Graham v. Maitland*, 6 Abb. Pr. (N. S.) 327; *Berry v. Dwinel*, 44 Me. 255; *Muller v. Eno*, 14 N. Y. 597; *McCarty v. Quimby*, 12 Kan. 494; *Smith v. Griffith*, 3 Hill 333, 38 Am. Dec. 639; *Pfeil v. Kemper*, 3 Wis. 315; *Stevens v. Springer*, 23 Mo. App. 375.

Before proof of actual value may be offered it must be shown that there is no market value. *Continental Oil & Cotton Co. v. Wristen & Johnson*, — Tex. Civ. App. —, 168 S. W. 395.

tion what in his opinion is its market value; or he may testify alone to the market value, or alone to its quality, and how it should be classified.⁶⁸ In such cases the market price is so precise that witnesses may be allowed to give their opinion of the value of an article described, though not seen. And so in any case when the subject to be valued can be stated hypothetically.⁶⁹ A witness may testify to market prices from hearsay, for in the nature of things a knowledge of them must be so gained.⁷⁰ In some cases the information on which testimony is based must be obtained from reliable market reports, and not from individuals.⁷¹ As between bailor and bailee the agreed value is binding on the latter.⁷²

Where the question is, what was the value at a particular place, and there was no market value there proof may be given of such value at other places, with the cost of transportation, or other facts which will enable the jury to deduce the value at the place in question.⁷³ Evidence of the value at other

⁶⁸ *Washington I. Co. v. Webster*, 68 Me. 449; *Whitbeck v. New York Cent. R. Co.*, 36 Barb. 644; *Miller v. Smith*, 112 Mass. 470; *Beecher v. Denniston*, 13 Gray 354; *McCollum v. Seward*, 62 N. Y. 316; *Mercer v. Vose*, 67 N. Y. 56; *Browne v. Moore*, 32 Mich. 254; *Shepherd v. Willis*, 19 Ohio 142; *Todd v. Warner*, 48 How. Pr. 234.

⁶⁹ *Id.*; *Whiton v. Snyder*, 88 N. Y. 299. See *Toledo, etc. R. Co. v. Smith*, 25 Ind. 288.

Where damages are based on depreciation in value the latter is to be fixed as of the time the injury was done. *The Marpessa*, (1906) Prob. Div. 95.

⁷⁰ *Burr's Ferry, B. & C. Ry. Co. v. Allen*, — Tex. Civ. App. —, 164 S. W. 878; *American B. Co. v. Regents*, 11 Idaho 163; *Cochrane v. National E. Co.*, 20 N. D. 169; *McCrary v. Chicago & A. R. Co.*, 109 Mo. App. 567; *Whitney v. Thacher*, 117 Mass. 523; *Whelan v. Lynch*,

60 N. Y. 469, 19 Am. Rep. 202; *Lush v. Druse*, 4 Wend. 313; *Stone v. Covell*, 29 Mich. 359; *Cliquot's Champagne*, 3 Wall. 114, 18 L. ed. 116; *Sisson v. Cleveland, etc. R. Co.*, 14 Mich. 489; *Cleveland, etc. R. Co. v. Perkins*, 17 Mich. 296; *Savercool v. Farwell*, *id.* 308; 1 Whart. on Ev., § 449; *Thatcher v. Kaucher*, 2 Colo. 698; *Texas & P. R. Co. v. Donovan*, 86 Tex. 378; *Gulf, etc. R. Co. v. Patterson*, 5 Tex. Civ. App. 523. *Contra*, *Henderson v. Wabash R. Co.*, 126 Mo. App. 610.

⁷¹ *St. Louis, etc. R. Co. v. Gunter*, 39 Tex. Civ. App. 129; *Texas & P. R. Co. v. Arnett*, 40 Tex. Civ. App. 76.

⁷² *Drew v. King*, 76 N. H. 184.

⁷³ *Evans v. Moseley*, 84 Kan. 322; *Ford v. Lawson*, 133 Ga. 237 (the nearest market); *Pennsylvania R. Co. v. Anda*, 131 Ill. App. 426; *Mt. Vernon B. Co. v. Teschner*, 108 Md. 158, 16 L.R.A.(N.S.) 758; *National W. & S. Co. v. Toomey*, 144 Mo.

places than that in question is inadmissible where the evidence is clear that there is a value at that place.⁷⁴ But to exclude evidence of the price elsewhere it should appear that like property had been bought and sold at the place in question in the way of trade in sufficient quantity or often enough to show a market value.⁷⁵ To some extent the proof of values at other places is within the discretion of the court,⁷⁶ though the value

App. 516; *Laubaugh v. Pennsylvania R. Co.*, 28 Pa. Super. 247; § 933; *Rothrock v. Hunter*, 66 Wash. 543; *Wertheim v. Chicoutini*, [1911] App. Cas. 301; *Eddy v. Lafayette*, 1 C. C. A. 441, 49 Fed. 807; *Harris v. Panama R. Co.*, 58 N. Y. 660; *Washington I. Co. v. Webster*, 68 Me. 449; *Berry v. Dwinel*, 44 Me. 255; *Hanson v. Lawson*, 19 Kan. 201; *Young v. Lloyd*, 65 Pa. 199; *Eaton v. Mellus*, 7 Gray 566; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Wemple v. Stewart*, 22 Barb. 154; *Sellar v. Clelland*, 2 Colo. 532; *Gregory v. McDowel*, 8 Wend. 435; *Dubois v. Glaub*, 52 Pa. 238; *Williamson v. Dillon*, 1 Har. & G. 444; *Cleveland, etc. R. Co. v. Perkins*, 17 Mich. 296; *Marshall v. New York Cent. R. Co.*, 45 Barb. 502; *Savercool v. Farwell*, 17 Mich. 308; *Diefendorff v. Gage*, 7 Barb. 18; *Kansas S. Y. Co. v. Couch*, 12 Kan. 612; *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71; *Coxe v. England*, 65 Pa. 212; *Toledo, etc. R. Co. v. Kickler*, 51 Ill. 157; *Hill v. Canfield*, 56 Pa. 454; *Henry v. Western U. Tel. Co.*, 73 Wash. 260, 46 L.R.A. (N.S.) 412.

⁷⁴ *Gregory v. McDowel*, 8 Wend. 435; *Wemple v. Stewart*, 22 Barb. 154; *McCarty v. Quimby*, 12 Kan. 494; *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 428; *Frost v. Powell*, 10 Ga. App. 95, seems to be in opposition, and in *Corey v. Penney*, 165 Ala. 234, evidence of value was re-

ceived in the absence of proof of a difference in the value at the two places.

⁷⁵ *Kerr v. Blair*, 47 Tex. Civ. App. 406; *Harris v. Panama R. Co.*, 58 N. Y. 660; *Pacific Exp. Co. v. Lathrop*, 20 Tex. Civ. App. 339, quoting the text.

⁷⁶ *Tri-State M. Co. v. Breisch*, 145 Mich. 232; *Kibler v. Caplis*, 140 Mich. 28, 112 Am. St. 388; *St. Louis, etc. R. Co. v. Cash G. Co.*, 161 Ala. 332. See *Jaquith v. Morrill*, 204 Mass. 181.

Durst v. Burton, *supra*, was an action for fraud in the sale of cheese, which, by the terms of the contract, was purchased to be forwarded to and sold in New York. After the plaintiffs had proven its value in New York the defendants offered to prove that cheese was shipped and sold by plaintiffs in the London market at a certain price, and that the cheese market in New York was regulated and controlled mainly by the prices in London and Liverpool. The trial court having excluded this evidence, the decision was affirmed. *Church, C. J.*, said: "Where the evidence is clear and explicit that there is a market at the place of delivery, the value at other places is not strictly competent. 8 Wend. 435. Nor was it material whether the plaintiff actually realized more or less, because the result of his final disposition of it might be produced by contingen-

is to be fixed at a particular time; yet, where the damages depend upon the market value of merchandise, such, for instance, as cotton, the law contemplates the range of the entire market and the average of prices thus found running through a reasonable period of time,⁷⁷ so that sudden, unnatural and spasmodic values, not indicating the real state of the market, may not prevail.⁷⁸ Where the price or value at the time in question cannot be directly proved it may be inferred from circumstances; and among those which may be proved are sales at other times near that date, especially if the property is such as bears a stable, rather than a fluctuating, price.⁷⁹ Where the property

is entirely foreign to the principle upon which the rule rests. The only possible relevancy of the proposed proof was its legitimate bearing upon the value of the cheese in New York on the 11th day of August; and a majority of the court think it was properly rejected for the reasons: First, that there was explicit proof of the value of the cheese in New York. Second, the evidence offered tended not to prove the value at that time, but a considerable period afterwards. Third, the offer should have negatived any material change in the price up to the time of the sale in London, and should have embraced the circumstances, if they existed, which, presumptively at least, would repel the idea of any claim for reclamation." *Lowell v. County Com'rs*, 146 Mass. 403; *Raridan v. Central Iowa R. Co.*, 69 Iowa 527.

⁷⁷ *Graham v. Maitland*, 6 Abb. Pr. (N. S.) 327; *Smith v. Griffith*, 3 Hill, 333, 38 Am. Dec. 639; *Jackson v. Western U. Tel. Co.*, 174 Mo. App. 70, 5 N. C. C. A. 669.

⁷⁸ *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 428; *Kansas S. Y. Co. v. Couch*, 12 Kan. 612; *Cronouse v. Fitch*, 14 Abb. Pr. 346. See *Wilson v. Holden*, 16 Abb. Pr. 133; § 642.

In *Trout v. Kennedy*, 47 Pa. 387, the court held it not erroneous to instruct the jury that "it is not allowable for one to trespass upon the rights of another, and in his defense allege that there was no market for the property taken or destroyed, or that it was of less value on this account than it had been before or was subsequently." The language must be taken with the context. So far as any rule for the measurement of damages was stated it was that the plaintiff was entitled to the just and full value of the property. If, at the time of the trespass, the market was depressed the jury were told that too much importance was not to be given to that fact. The owner might have intended to keep the property for a better market or have designed it for his own use. And a trespasser is to have meted out to him in damages an assessment commensurate with the injury he has done. If, at any particular time, there be no market demand for an article, it is not, of course, on that account, of no value. What a thing will bring in the market at a given time is, perhaps, the measure of its value then, but it is not the only one."

⁷⁹ *Denton v. Smith*, 61 Mich. 431;

to be valued cannot be definitely graded and, therefore, is not susceptible of valuation by a precise market standard, but being property which is frequently bought and sold, has, in some sort, a market value, there is more scope for testimony which is matter of opinion in the proof of value.⁸⁰ The market value of city lots is established by showing the price at which they were sold, though at the time of sale there was an unusual local flurry in real estate.⁸¹ If an article has a market value, fixed by the trade, as between a retailer and his customers testimony as to the cost price between the manufacturer or wholesale dealer and the retailer is not competent on the question of its retail value; that must be measured by the retail market price.⁸² If property was bought a short time before its injury or loss the price paid may be shown as tending to fix its market value.⁸³ The price paid for property at a recent sheriff's sale may be shown as a circumstance.⁸⁴ If land sold

Griffin v. Martel, 77 Vt. 19; *McKenzie v. Boutwell*, 79 Vt. 383; *Parmenter v. Fitzpatrick*, 135 N. Y. 190; *Singer v. Pearson-P. Co.* 58 Ore. 526 (value prior and subsequent to conversion); *White v. Concord R. Co.*, 30 N. H. 188; *Benham v. Dunbar*, 103 Mass. 365; *Abell v. Munson*, 18 Mich. 306; *Roberts v. Dunn*, 71 Ill. 46; *Columbia B. Co. v. Geisse*, 38 N. J. L. 39; *French v. Piper*, 43 N. H. 439; *Waterson v. Seat*, 10 Fla. 326; *Campbell v. United States*, 8 Ct. of Cls. 240; *Cohen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, quoting the text.

Courts will notice the usual manner in which general commercial business is carried on, and that in the purchase of grain the purchaser, as a rule, is governed by the last available quotations. *Nash v. Clasen*, 163 Ill. 409.

⁸⁰ *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 626, 645, quoting the

text. In the case cited it was held incompetent to prove the value of gravel taken from the plaintiff's land by offers made to buy it; that testimony of prices paid for gravel spread upon the streets, it not appearing what it cost to put it there, was incompetent, but that it would be otherwise if the cost of putting it there was shown. *Contra*, *Burdick v. Valerius*, 172 Ill. App. 267.

⁸¹ *Johnson v. McMullin*, 3 Wyo. 237, 4 L.R.A. 670. See *First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. D. 319.

In some cases prior or subsequent events have been permitted to have a bearing on the issue of value. See *Meighan v. Birmingham T. Co.*, 165 Ala. 591; *St. Louis, etc. R. Co. v. Yarborough*, 56 Ark. 612.

⁸² *Kittle v. Huntley*, 67 Hun 617.

⁸³ *Georgia R. & E. Co. v. Wallace*, 122 Ga. 547; *Southern R. Co. v. Tharp*, 104 Ga. 560; *Luse v. Jones*, 39 N. J. L. 707.

⁸⁴ *Corey v. Penney*, 165 Ala. 234.

at a remote time has been largely improved evidence of the price paid for it is not admissible.⁸⁵ The last tax return made by the plaintiff as to the value of personal property is admissible as a circumstance for the jury to consider;⁸⁶ and so of an assessment reduced on application of the owner of the property.⁸⁷ Generally the valuation put upon land by an assessing officer for the purpose of taxation is not evidence of its value.⁸⁸ This view has special force if the assessment is made at less than the real value of the land.⁸⁹ The valuation at which the owner of real estate renders it for taxation is admissible in evidence as an admission against interest but is not conclusive as to its true value.⁹⁰ The value of a large tract of land cannot be proven by evidence as to what it will bring when cut up into small farms. The sale in small quantities involves expense, and does not afford a sufficiently accurate basis for determining the value of the whole tract.⁹¹ A compromise agreement between the owner and the insurer of a chattel is not evidence of its value as against a third party.⁹² The price a responsible party authorized another to bid for land may not be proved.⁹³ A non-contractual recital of the value of land in a bond is not final.⁹⁴ Where the element of the cost of pro-

⁸⁵ *Beans v. Denny*, 141 Iowa 52.

⁸⁶ *Jacksonville, etc. R. Co. v. Jones*, 34 Fla. 286; *Western & A. R. Co. v. Tate*, 129 Ga. 526; *Indiana U. T. Co. v. Benadum*, 42 Ind. App. 121 (if the return is verified as to the value of the property listed); *Turnpike Co. v. County*, 15 Pa. Dist. 703.

The valuation put upon land by assessing officers is evidence, though not controlling of its value. *Porter v. International B. Co.* (N. Y. Misc.), 137 N. Y. Supp. 214.

The official appraisal of real property is admissible to show its value. *Citizens Sav. Bank & T. Co. v. Fitchburg Mut. F. Ins. Co.*, 86 Vt. 267.

⁸⁷ *Gossage v. Philadelphia, etc. R. Co.*, 101 Md. 698.

⁸⁸ *St. Louis, etc. R. Co. v. Magness*, 93 Ark. 46; *Sirk v. Emery*, 184 Mass. 22; *Ft. Collins D. R. Co. v. France*, 41 Colo. 512; *Spink v. New York, etc. R. Co.*, 26 R. I. 115; *Hamilton v. Seaboard A. L. R. Co.*, 150 N. C. 193; *Denver, etc. R. Co. v. Heckman*, 45 Colo. 470, 21 Am. Neg. Rep. 481.

⁸⁹ *Louisiana R. & N. Co. v. Morere*, 116 La. 997.

⁹⁰ *Missouri, K. & T. Ry. Co. of Texas v. Mitchell*, — Tex. Civ. App. —, 166 S. W. 126.

⁹¹ *Silliman v. Gano*, 90 Tex. 637.

⁹² *Burdick v. Valerius*, *supra*.

⁹³ *First Nat. Bank v. Hockett*, 2 Neb. (Unof.) 512, 89 N. W. 412.

⁹⁴ *Haffke v. Coffin*, 89 Neb. 134.

duction is involved there must be taken into account, besides the cost of labor, taxes, insurance, repairs, or depreciation in the value of the plant involved.⁹⁵ The value a damaged crop might have attained may be shown by the character of the season and the usual local yield and value of like crops.⁹⁶ The daily sales made by the plaintiff after the defendant violated his contract not to continue his business may be shown as an aid to determine the value of the former's business, and such proof may cover the time after the suit was brought.⁹⁷ The value of a cause of action may be shown in part by proof of the result of previous trials and the general history of the case.⁹⁸ The price paid for stocks is *prima facie* the equivalent of their value if they were as represented.⁹⁹ The cost of entering a colt for "futures stakes" and their value cannot be shown even if the fact of entry may be.¹ The value of an article may not be established by the average prices like articles sold for.² It is not necessary to prove the separate value of the articles involved.³ Though property has a market value the party sought to be made liable for it may show that it is valueless.⁴ The value of an exclusive agency in a limited territory for the sale of machines may be shown by the sales made there by the plaintiff's and other agencies established after the breach of the contract in question. The court said such evidence would have shown the market for the machines and the facility with which they could be sold, and would have had some tendency to show the extent of business the plaintiffs could have done there and the value of their agreement.⁵ Substantially the same rules govern in actions for the breach of partnership agree-

⁹⁵ Chicago, etc. R. Co. v. Risley, 55 Tex. Civ. App. 66.

⁹⁶ Jefferis v. Chicago & N. R. Co., 147 Iowa 124.

⁹⁷ Galucha v. Naso, 147 Iowa 309.

⁹⁸ Curtis v. Curtis, 134 Mich. 220.

⁹⁹ McConnell v. Wright, (1903) 1 Ch. 546.

¹ Nashville, etc. R. Co. v. Garth, 155 Ala. 311.

² Hallwood C. R. Co. v. Prouty, 196 Mass. 313.

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³ Hammond v. Lusk, 150 Ala. 487 (yoke of oxen in detinue); Keegan v. Harlan, 134 Ill. App. 363; Koosa v. Warten, 158 Ala. 496.

In condemnation proceedings the value of the buildings and of the land may be separately shown. Cleveland, etc. R. v. Gorsuch, 28 Ohio C. C. 468.

⁴ Hazelton v. Carodus, 132 Ill. App. 512.

⁵ Wakeman v. Wheeler, & W.

ments.⁶ Actual rental paid for land injured may be shown by the defendant after the plaintiff has introduced testimony as to rental value.⁷

§ 446. **Same subject; opinions.** It is competent to prove the value of property by the opinions of witnesses who have the requisite knowledge.⁸ A witness who swears to a knowledge of horses from having kept and dealt in them for a number of years and that he is acquainted with the horse in question is competent to give an opinion of its value.⁹ So one acquainted

Manuf. Co., 101 N. Y. 205, 54 Am. Rep. 676; Pittsburg G. Co. v. Ashton V. Co., 184 Pa. 36. See § 69.

⁶ See § 68.

⁷ Sloss-Sheffield Steel & Iron Co. v. Webb, 184 Ala. 452.

⁸ Gossage v. Philadelphia, etc. R. Co., 101 Md. 698; Siebolt v. Konatz S. Co., 15 N. D. 87; The Mobila, 147 Fed. 882; Werten v. Koosa, 169 Ala. 258; Southern Indiana R. Co. v. Moore, 34 Ind. App. 154; Phoenix Ins. Co. v. McAtee, 33 Ind. App. 106; Thomson v. Pentecost, 206 Mass. 505; Kilpatrick v. Whitmer, 118 App. Div. (N. Y.) 98; Sykes v. Thornton, 223 Pa. 589; Kean v. Landrum, 72 S. C. 556; Bailey v. Walton, 24 S. D. 118; Berry v. Chicago, etc. R. Co., 24 S. D. 611; Missouri, etc. R. Co. v. Pettit, 54 Tex. Civ. App. 358, 21 Am. Neg. Rep. 509; Sullivan v. Girson, 39 Mont. 274; Paterson v. Chicago, etc. R. Co., 95 Minn. 57; Aldrich v. Bay State C. Co., 186 Mass. 489; Weidner v. Olivit, 108 App. Div. (N. Y.) 122; Mountz v. Apt, 119 Colo. 150; Burns v. Shoemaker, 172 Ill. App. 290; Wood T. Co. v. Shelton, 180 Ind. 273; Pecos, etc. R. Co. v. Porter (Tex. Civ. App.), 156 S. W. 267.

It was formerly otherwise in New Hampshire (Rochester v. Chester, 3 N. H. 349; Peterborough v. Jeffrey, 6 id. 462; Whipple v. Walpole, 10

id. 130; Beard v. Kirk, 11 id. 397; Hoitt v. Moulton, 21 id. 586) but the rule has been changed by statute.

The owner of personal property may testify as to its value (Gross v. Saratoga European Hotel & Restaurant Co., 176 Ill. App. 160; Palmer v. Goldberg, 128 Wis. 103) without other foundation than proof of ownership and knowledge of the value. Seckerson v. Sinclair, 24 N. D. 326.

An expert as to the value of pearls may testify as to the worth of lost pearls after they have been described by their owner, a non-expert. Berney v. Dinsmore, 141 Mass. 42, 55 Am. Rep. 445.

⁹ California D. Co. v. Yuma Valley, etc. Co., 9 Ariz. 366; Rimmer v. Wilson, 42 Colo. 180; Cleveland, etc. R. Co. v. Patton, 203 Ill. 376; Garrett v. Winterich, 44 Ind. App. 322; Rumsey v. Livers, 112 Md. 546; Berry v. Ingalls, 199 Mass. 77; Osmer v. Furey, 32 Mont. 581; Moore v. St. Louis, etc. R. Co. (Tex. Civ. App.), 146 S. W. 1070; Needham v. Halverson, 22 N. D. 594; Bowers v. Horen, 93 Mich. 420, 32 Am. St. 513, 17 L.R.A. 773; McDonald v. Christie, 42 Barb. 36; Haskell v. Mitchell, 53 Me. 468, 89 Am. Dec. 711; Vandine v. Burpee, 13 Metc. (Mass.) 288.

with other kinds of property, the worth of which is in dispute, may give his opinion of its value,¹⁰ or its usable value.¹¹ The market or selling value of land being in question, the opinion of a geological expert, not made known so as to affect people's estimate of its value, that there is valuable stone beneath the surface, is not admissible.¹² The courts are not agreed whether, in cases where the amount of the recovery depends upon the difference in the value of land in its present condition and what it would be worth under different circumstances—such as with the location of a railroad, street or highway over it—the opinions of witnesses qualified to speak upon the subject are admissible as to what the land would be worth in its changed condition. The affirmative is maintained in an Oregon case with considerable ability and reference to numerous authorities.¹³ There are cases elsewhere in harmony with this

¹⁰ *Coons v. McKees Rocks Borough*, 243 Pa. 340; *Alabama Consol. C. & I. Co. v. Turner*, 145 Ala. 639, 117 Am. St. 61 (opinion may be based on hearsay in case of necessity); *Enterprise L. Co. v. Porter*, 165 Ala. 579; *Aken v. Clark*, 146 Iowa 436; *Robbins v. Selby*, 144 Iowa 407; *Howerton v. Augustine*, 130 Iowa 389 (knowledge may be derived from others); *Horner v. Beasley*, 105 Md. 193; *Steele v. Kellogg*, 163 Mich. 132; *Yore v. Meshew*, 146 Mich. 80; *Anderson v. Chicago*, etc. R. Co., 84 Neb. 311; 133 Am. St. 626; *Hespen v. Union Pac. R. Co.*, 82 Neb. 495; *Jensen v. Palatine Ins. Co.*, 81 Neb. 523; *South Omaha v. Ruthjen*, 71 Neb. 545; *Connecticut River P. Co. v. Dickinson*, 75 N. H. 353; *McGroarty v. Lehigh Valley C. Co.*, 212 Pa. 53; *Watkins' L. M. Co. v. Campbell*, 98 Tex. 372; *Texas Cent. R. Co. v. Qualls* (Tex. Civ. App.), 124 S. W. 140; *Shaw v. Charlestown*, 2 Gray 107; *Clark v. Baird*, 9 N. Y. 183; *Whitman v. Boston*, etc. R. Co., 7

Allen 313; *Kellogg v. Krauser*, 14 S. & R. 137, 16 Am. Dec. 480; *Snow v. Boston*, etc. R. Co., 65 Me. 230; *Ohio*, etc. R. Co. v. *Taylor*, 27 Ill. 207; *La Fayette*, etc. R. Co. v. *Winslow*, 66 Ill. 219; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288; *Consolidated Lower Boulder R. & D. Co. v. Alaux*, 24 Colo. App. 377; *Fire Ass'n v. Farmers' G. Co.*, 39 Okla. 162; *Davis v. Fain* (Tex. Civ. App.), 152 S. W. 218; *Ft. Worth*, etc. R. Co. v. *Ayers* (Tex. Civ. App.), 149 S. W. 1068; *Citizens' Sav. Bank & T. Co. v. Fitchburg Mut. F. Ins. Co.*, 86 Vt. 267.

The values of the different parts of a farm may be shown to prove the worth of the whole. *Sveiven v. Thompson*, 110 Minn. 484. Evidence as to the value of lands not involved is not admissible. *Sirk v. Emery*, 184 Mass. 22.

¹¹ *Combs v. Lake*, 91 Ark. 128.

¹² *Roussain v. Norton*, 53 Minn. 560.

¹³ *Blagen v. Thompson*, 23 Ore. 239, 18 L.R.A. 315.

view.¹⁴ The opposing view is held by a majority of the New York court of appeals.¹⁵ Any person knowing the real estate in question and its value may testify thereto. The witness is not required to be, or to have been, engaged in buying and selling such property.¹⁶ Every one is supposed to have some idea of the value of such property as is in general use; as was said, it is not necessary to have been a butcher or drover to prove the value of a cow.¹⁷ An operator in coal mines who knows the thickness of a vein of coal, its convenience to transportation facilities and market may approximately estimate the value of a lease of the land for mining purposes.¹⁸ A farmer may give his opinion as to the value of a crop at the time it was destroyed, and state the facts upon which it was based,¹⁹ and testify as to

¹⁴ *Rosenstein v. Fair Haven & W. R. Co.*, 78 Conn. 29, 19 Am. Neg. Rep. 517; *Miller v. Luckey*, 132 Ga. 581; *Missouri, etc. R. Co. v. Neiser*, 54 Tex. Civ. App. 460; *Ozark O. Co. v. Kansas City S. R. Co.*, 173 Mo. App. 450; *Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156, disproving *Hagaman v. Moore*, 84 Mo. 497, and *Baltimore, etc. R. Co. v. Johnson*, 59 id. 480; *Snow v. Boston & M. R.*, 65 Me. 230.

¹⁵ *Roberts v. New York E. R. Co.*, 148 N. Y. 455, 13 L.R.A. 499, following local cases.

¹⁶ *Tennessee C., I. & R. Co. v. McMillion*, 161 Ala. 130; *St. Louis, etc. R. Co. v. Shore*, 89 Ark. 418; *Whitney v. Thacher*, 117 Mass. 523; *Matthews v. Missouri Pac. R. Co.*, 142 Mo. 645, 3 Am. Neg. Rep. 699; *Cooley v. Kansas City, etc. R. Co.*, 149 Mo. 487; *Gorman v. Park*, 40 C. C. A. 537, 100 Fed. 553; *Lafayette v. Nagle*, 113 Ind. 425; *White v. Hermann*, 51 Ill. 243, 99 Am. Dec. 543; *Browne v. Moore*, 32 Mich. 254.

A person who has frequently priced and bought articles similar to those whose value is in question and knows, in a general way, what

their value is, may testify respecting it. *Langdon v. Wintersteen*, 58 Neb. 278.

An expert may testify in answer to a hypothetical question as to the value of a crop. *Huber v. Beck*, 6 Ind. App. 484; *Gulf, etc. R. Co. v. Simonton*, 2 Tex. Civ. App. 558; *Sullivan v. Girson*, 39 Mont. 274; *Ross v. Schrieves*, 199 Mass. 401. And that a diseased stallion may transmit his disease. *Fitzgerald v. Evans*, 49 Minn. 541.

¹⁷ *Parmelee v. Raymond*, 43 Ill. App. 609; *Ohio, etc. R. Co. v. Irvin*, 27 Ill. 178; *Brill v. Flagler*, 23 Wend. 354; *Pennsylvania, etc. R. Co. v. Bunnell*, 81 Pa. 414; *Montgomery-Moore Mfg. Co. v. Leith*, 162 Ala. 246; *Birmingham R., L. & P. Co. v. Hinton*, 157 Ala. 630; *Chandler v. Higgins*, 156 Ala. 511; *Southern R. Co. v. Morris*, 143 Ala. 628; *McKissick v. Oregon S. L. R. Co.*, 13 Idaho 195; *Hay v. Hawkins*, 120 Ill. App. 483.

¹⁸ *Chambers v. Brown*, 69 Iowa 213; *Carter v. Cairo, etc. R. Co.*, 240 Ill. 152.

¹⁹ *Ryall v. Allen*, 143 Ala. 222; *Colorado F. & L. S. Co. v. York*, 38

the value of a crop before and after it was damaged,²⁰ and as to the value of a crop that would have been raised but for the wrong done.²¹ He may also testify of the value of domestic animals.²² To a large extent value in a business sense consists of the opinions of persons familiar with the market, and these are based upon what is said and reported by others. Hence if a person shows that his business is such that, by commercial reports or like means, he is familiar with the current market prices he is competent to testify on the subject although he may not have actual personal knowledge of any particular sales.²³ The value of a stock of goods may be shown by gen-

Colo. 239; *Warrick v. Reinhard*, 136 Iowa 27; *Baltimore B. R. Co. v. Sattler*, 102 Md. 595; *Deal v. St. Louis, etc. R. Co.*, 144 Mo. App. 684; *Anderson v. Same*, 129 Mo. App. 384; *Anderson v. Chicago, etc. R. Co.*, 84 Neb. 311, 133 Am. St. 626; *Chicago etc. R. Co. v. Johnson*, 25 Okla. 760, 27 L.R.A.(N.S.) 879; *Pacific L. Co. v. Murray*, 45 Ore. 103; *Railway Co. v. Lyman*, 57 Ark. 512; *Fremont, etc. R. Co. v. Marley*, 25 Neb. 138, 13 Am. St. 482.

²⁰ *Jefferis v. Chicago & N. R. Co.*, 147 Iowa 124.

²¹ *Davenport v. Norfolk & S. R. Co.*, 148 N. C. 287, 128 Am. St. 599.

²² *Choctaw, etc. R. Co. v. Deparade*, 12 Okla. 367, 13 Am. Neg. Rep. 599.

²³ *Sylvester v. Ammons*, 126 Iowa 140; *Fountain v. Wabash R. Co.*, 114 Mo. App. 676; *Texas & P. R. Co. v. Eisenhower* (Tex. Civ. App.), 131 S. W. 297; *Rich v. Utah Com. & S. Bank*, 30 Utah 334; *Carle v. Nelson*, 145 Wis. 593; *St. Paul B. Co. v. Kemp*, 125 Wis. 138; *Ellis v. Casey*, 4 Ala. App. 650; *Jackson v. New York Cent., etc. R. Co.*, 167 Ill. App. 461; *Hudson v. Northern*

Pac. R. Co., 92 Iowa 231, 54 Am. St. 550; *Peter v. Thicksun*, 51 Mich. 589; *Texas Cent. R. Co. v. Fisher*, 18 Tex. Civ. App. 78; *Hoxsie v. Empire L. Co.*, 41 Minn. 548.

In Massachusetts whenever the value of any particular kind of property, which may not be presumed to be within the actual knowledge of all juries, is in issue the testimony of witnesses acquainted with the value of similar property is admissible although they have never seen the property in question. *Miller v. Smith*, 112 Mass. 475; *Beecher v. Denniston*, 13 Gray 354; *Fitchburg R. Co. v. Freeman*, 12 Gray 401, 74 Am. Dec. 600; *Brady v. Brady*, 8 Allen 101; *Cornell v. Dean*, 105 Mass. 435; *Lawton v. Chase*, 108 Mass. 238. But see *Westlake v. St. Lawrence Ins. Co.*, 14 Barb. 206.

It is held in *Fairley v. Smith*, 87 N. C. 367, 42 Am. Rep. 522, that a witness cannot be permitted to testify to knowledge of the market value of a commodity in a distant city if his information is solely derived from reading the market reports in a paper published at a point remote from such city.

eral testimony if the means of particularizing or enumerating them are not available.²⁴

In an action to recover compensation for services witnesses acquainted with their value in the vicinity in which they were rendered may give their opinions thereof,²⁵ and so in action by a husband to recover for the injury or death of his wife.²⁶ The probable cost of performing a contract may be shown by competent witnesses.²⁷ The value of services requiring the exercise of professional or artistic skill may be proved by common usage; that is, what is the usual or customary rate of compensation.²⁸ Attorneys and solicitors are entitled to have allowed them for their professional services what they reasonably deserve, having due reference to the nature of the service and their standing in the profession for learning, skill and proficiency; and for the purpose of aiding the jury in determining the matter it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession practicing in the same court,²⁹ and the opinions of those in the same profession as to their value.³⁰ A

²⁴ *Russell v. Little*, 22 Idaho 429, 42 L.R.A. (N.S.) 363.

²⁵ *Green v. Green*, 119 Ky. 103; *International, etc. R. Co. v. Lane* (Tex. Civ. App.), 127 S. W. 1066; *Nickerson v. Spindell*, 164 Mass. 25; *Lewis v. Trickey*, 20 Barb. 387; *Hough v. Cook*, 69 Ill. 581; *Parker v. Parker*, 33 Ala. 459; *Kendall v. May*, 10 Allen 59. See, generally, § 680.

²⁶ *Nelson v. Lake Shore, etc. R. Co.*, 104 Mich. 582; *Croft v. Chicago, etc. R. Co.*, 134 Iowa 411.

²⁷ *Bogart v. Pitchless L. Co.*, 72 Wash. 417.

²⁸ *Pfeil v. Kemper*, 3 Wis. 315; *Tibbetts v. Haskins*, 16 Me. 283; *Elfelt v. Smith*, 1 Minn. 125; *Best v. McAuslan*, 27 R. I. 107.

²⁹ *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983; *Vilas v. Downer*, 21 Vt. 419.

When a lawyer is employed professionally to take entire charge of matters involving at the same time professional and non-professional services, it is not possible to draw a line and say that his whole employment is not professional. *Kelley v. Richardson*, 69 Mich. 430. See *Turnbull v. Richardson*, 69 Mich. 400.

³⁰ *Graham v. Dillon*, 144 Iowa 82 (they are not binding; the jurors may consider the question in the light of their knowledge and experience); *Morehead v. Anderson*, 125 Ky. 77; *State v. Seavey*, 137 Mo. App. 1; *Thompson v. Boyle*, 85 Pa. 477; *Williams v. Brown*, 28 Ohio St. 547; *Covey v. Campbell*, 52 Ind. 157; *Lamoure v. Carol*, 4 Denio 370; *Hart v. Vidal*, 6 Cal. 56; *Cate v. Hutchinson*, 58 Neb. 232.

Opinions as to the value of an

plaintiff seeking to recover the value of his professional services may state the facts and circumstances concerning his employment and services and his opinion as to their value.³¹ A witness who is an attorney and knows the service performed by another is competent to testify as to its value. It is proper, in such a case, to take into consideration the amount in controversy, the legal questions involved and the general importance of the case. But what one attorney receives is no criterion of the value of the services of another attorney in the same case in the absence of any showing that the services were similar, the skill equal and the time spent the same.³² Proof of what was paid or agreed to be paid for professional services is no evidence of their value as against a third person.³³ An injured person may testify to the value of his services prior to his injury.³⁴ In an action to recover the value of work and material under a contract partially performed that instrument is admissible as evidence of such value.³⁵ The value of an exclusive

attorney's services are not to preclude the jury from exercising their "own knowledge and ideas" on the subject. *Head v. Hargrave*, 105 U. S. 45, 26 L. ed. 1028; *Forsyth v. Doolittle*, 120 U. S. 73, 30 L. ed. 586; *The Conqueror*, 166 U. S. 110, 131, 133, 41 L. ed. 937, 947; *Davis v. School Dist.*, 84 Neb. 858 (though uncontradicted).

Courts are not bound by the opinions of witnesses as to the value of professional services; they may form and exercise an independent judgment. *Lee v. Lomax*, 219 Ill. 218; *Dinkelspiel v. Pons*, 119 La. 236; (if the court has knowledge of the services performed); *Healy v. Protection Mut. F. Ins. Co.*, 213 Ill. 99. Knowledge by the court of the services rendered dispenses with the need of evidence to show their value. *State v. Porter*, 76 Kan. 411; *Hall v. Wabash R. Co.*, 133 Iowa 714.

Expert or other opinions as to

the value of anything not having a fixed or established market value are not conclusive. *Porier Mfg. Co. v. Griffin*, 104 Minn. 239; *Jennings v. Stripling*, 127 Ga. 778. The jury may apply their own experience or knowledge of the facts to the case. *Denison v. Shawmut M. Co.*, 135 Fed. 864; *Head v. Hargrave*, 105 U. S. 45, 26 L. ed. 1028.

³¹ *Mutual L. Ins. Co. v. Chambliss*, 131 Ga. 60.

³² *Ottawa University v. Parkinson*, 14 Kan. 159; *Same v. Welsh*, 14 Kan. 164.

³³ *Allen v. Harris*, 113 Ga. 107; *Hoover v. Baltimore, etc. R. Co.*, 158 Ill. App. 292; *Johnson v. San Juan F. & P. Co.*, 31 Wash. 238. But see *Curtley v. Security Sav. Soc.*, 51 Wash. 242.

³⁴ *Barnes v. Danville St. R. & L. Co.*, 143 Ill. App. 259.

³⁵ *St. Charles v. Stookey*, 154 Fed. 772 (C. C. A.).

agency for the sale of an article in a given territory may not be shown by opinions if no certain basis of facts was proved or assumed for opinions to rest upon.³⁶ The probable profits which would have resulted from the performance of a contract cannot be estimated on an unaccepted bid for performing it.³⁷ In the absence of a definite market price for work of a special character the best bid obtained for doing it is *prima facie* the value of it and of the material to be produced thereby. A person suing for the breach of a contract to let him do the work at the market price must show that his offer met that price; he could not make another market price than was represented by the bid referred to by submitting a high bid and insisting that the price should be based on an average of the bids.³⁸ Opinions as to value are not binding on the jury; they may use their own judgment in connection with the evidence.³⁹

§ 447. Same subject; actual sales; offers for property; market quotations. Evidence of the price for which the property in question or other like property sold at a sale made under normal conditions is usually competent to show its value; in connection with such evidence proof may be made of the conditions governing the sale, including the time and place thereof and of other circumstances connected with it.⁴⁰ It is competent

³⁶ *Wakeman v. Wheeler & W. Mfg. Co.*, 101 N. Y. 205, 54 Am. Rep. 676.

³⁷ *Hartman v. Dobar*, 80 N. J. L. 250.

³⁸ *Carey L. Co. v. Magazine & B. Co.*, 70 N. Y. Misc. 541.

³⁹ *Hunter v. Empire State S. Co.*, 159 Iowa 114; *Maas v. Chicago & N. W. R. Co.*, 156 Wis. 44; *The Conqueror*, 166 U. S. 110, 41 L. ed. 937; *Moore v. Ellis*, 89 Wis. 108.

⁴⁰ *Ommen v. Talcott*, 175 Fed. 261 (it is the best evidence if the sale was made under normal conditions); *Gross v. Heckert*, 120 Wis. 314 (if made within a reasonable time after the rights of the parties accrued); *Monture v. Regling*, 140 Wis. 407 (if it does not tend to

show specific contracts with others concerning similar property); *Ives v. Freisinger*, 70 N. J. L. 257; *Bartram v. Ohio, etc. R. Co.*, 141 Ky. 100 (when the sale was made); *State v. Dickson*, 213 Mo. 66; *Hasler v. Griffing Florida O. Co.*, 133 Ill. App. 635; *Southern R. Co. v. Branch*, 9 Ga. App. 310; *Dodge v. The King*, 38 Can. Sup. Ct. 149; *Cleveland, etc. R. Co. v. Gorsuch*, 28 Ohio C. C. 468 (the price paid for land one year before the time in question); *Lyon v. Katten*, 80 Conn. 718 (value of equity of redemption); *Parmenter v. Fitzpatrick*, 135 N. Y. 190 (whether at voluntary auction or private sale); *The Marie Palmer*, 173 Fed. 569; *Tennessee C., I. & R. Co. v. State*,

to prove the value of other like property with which that in

141 Ala. 103; *Massey v. Fain*, 1 Ala. App. 424, citing the text; *Atlanta B. & C. Co. v. Mizo*, 4 Ga. App. 407; *Dady v. Condit*, 209 Ill. 488; *Louisville, etc. R. Co. v. Whipps*, 118 Ky. 121; *Sirk v. Emery*, 184 Mass. 22; *O'Malley v. Commonwealth*, 182 Mass. 196 (though made to a body authorized to condemn as well as to purchase, and the land sold was vacant, while that in question was improved); *Cunningham v. O'Connor*, 136 Mich. 293; *Wolff v. Meyer*, 75 N. J. L. 181; *Allen v. Gray*, 63 N. Y. Misc. 219; *Rathbone v. Ayer*, 121 App. Div. (N. Y.) 355; *Cleveland, etc. R. Co. v. Gorsuch*, 28 Ohio C. C. 468; *Reed v. Holloway* (Tex. Civ. App.), 127 S. W. 1189; *Garlington v. Ft. Worth, etc. R. Co.*, 34 Tex. Civ. App. 274, citing the text; *Munson v. McGregor*, 49 Wash. 276; *Finn v. Young*, 46 Wash. 74; *Balkwill v. Spencer*, 45 Wash. 600; *Lincoln v. Alshuler Mfg. Co.*, 142 Wis. 475, 28 L.R.A.(N.S.) 780; *Cherry v. Christian County*, 146 Ky. 330; *Ft. Worth, etc. R. Co. v. Montgomery* (Tex. Civ. App.), 141 S. W. 813; *Mullen v. Eastern T. & B. Co.*, 108 Me. 498; *Bowdish v. Page*, 81 Hun 170; *Paine v. Boston*, 4 Allen 168; *Gilpin v. Consequa*, 3 Wash. C. C. 184; *Truitt v. Baird*, 12 Kan. 420, *Contra*, *Blanchard v. New Jersey S. Co.*, 59 N. Y. 292; *The Oceanica*, 156 Fed. 306; *Union Pac. R. Co. v. Stanwood*, 71 Neb. 150, 158. Other cases to the contrary are cited in § 1089.

Where opinion evidence as to the value of property, having no specific market value has been introduced by the plaintiff the defendant may show what it was purchased

for shortly before the cause of action arose. *Maas v. Chicago & N. W. R. Co.*, 156 Wis. 44.

A contract of sale has been held inadmissible against a third person. *Gresham v. Harcourt*, 33 Tex. Civ. App. 196.

Whether the price paid for a chattel is evidence of its value is a question for the reviewable discretion of the trial court. It may ordinarily be gone into on the cross-examination of a witness who has testified of its value. *Rosenstein v. Fair Haven & W. R. Co.*, 78 Conn. 29.

The price paid for an article in a remote place, at a distant time is not evidence of its value after it has been damaged by use. *Hensley v. Orendorff*, 152 Ala. 599.

The sum paid for lost goods by some of the parties liable for their loss is evidence of their value against others similarly liable. *Western Assur. Co. v. Chesapeake L. & T. Co.*, 105 Md. 232.

A warranty deed of the land in question executed shortly before the damage sued for was done is *prima facie* evidence that the grantee paid the recited consideration. *Sanitary Dist. v. Pearce*, 110 Ill. App. 592.

The price at which the vendee of the property in question had resold it on condition that he obtained title may be shown on cross-examination. *Kuhlman v. Wieben*, 129 Iowa 188, 2 L.R.A.(N.S.) 666.

The price obtained for property subsequent to the time the wrong was done may be shown as corroborative evidence. *Fishel v. Goddard*, 30 Colo. 147.

If property has been used evidence of its cost should be followed by

question may be compared.⁴¹ The value of crops raised upon land like that in question may be shown to prove what the yield upon the latter would have been.⁴² It was held in an Illinois case,⁴³ an action to recover damages for the breach of a contract to convey land, that the plaintiff in order to show the value of the premises in controversy might prove, not only the worth of other adjacent property at or near the date of such contract, but even the value of land of a different quality lying in the immediate vicinity, leaving it to the jury to determine the difference in value.⁴⁴ No hard and fast rule can be laid down determining just what degree of similarity must exist in order to make proof of sales of land competent. If there is a general similarity in location, character and adaptability to use, and the sales occurred about the time the value is to be fixed the proof is admissible, and it is for the jury to determine from all the facts surrounding such other property and sales how far

proof of its condition or the extent of the use made of it. *Behm v. Damm* (N. Y. Misc.), 91 (N. Y.) Supp. 735.

A pledgee who has sold goods in an unauthorized way must answer for the price obtained. *Hagan v. Continental Nat. Bank*, 182 Mo. 319.

The price at which property sold five years after the time in question may not be shown. *Pitman v. Ball*, 140 Mo. App. 389.

As between the owner and a third party the price paid for goods is not conclusive as to their value. *Laird v. Piedmont Mut. F. Ins. Co.*, 82 S. C. 424.

Proof of the prices obtained for second-hand furniture by persons who were forced to sell or were about to change their place of residence does not show its market value. *Lincoln v. Packard*, 25 Tex. Civ. App. 22.

The price obtained at a sale will

not conclude a party interested in the property if he was prevented by those in charge of the sale from bidding for it. *Industrial & G. T. Co. v. Tod*, 52 App. Div. (N. Y.) 195.

⁴¹ *The Laura Lee*, 24 Fed. 483; *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 626, 645, quoting the text; *Simmons v. Carvill*, 68 Mo. 416. But see *Gouge v. Roberts*, 53 N. Y. 616.

⁴² *Erie City I. Works v. Noble* (Tex. Civ. App.), 124 S. W. 172; *Smith v. Hicks*, 14 N. M. 560, 19 L.R.A. (N.S.) 938.

⁴³ *White v. Hermann*, 51 Ill. 243; *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339.

⁴⁴ It is not competent for a defendant in condemnation proceedings to show what other persons have been allowed for their property in order to establish the value of his by comparison. *Springfield v. Schmook*, 68 Mo. 394.

these tend to show the value of the property in question.⁴⁵ An offer made for similar adjacent land is not competent to prove the value of that in question.⁴⁶ Offers for property by persons who are not dealers are regarded with grave suspicion, and are generally inadmissible.⁴⁷ The price at which the owner will sell property is not evidence of its value;⁴⁸ but is evidence that it is not worth more.⁴⁹ The price paid for the use of property for a term immediately preceding that in question is in the nature of an explainable admission by the lessee.⁵⁰

The market value of a commercial commodity may be determined by offers to sell, made by dealers in the ordinary course of business, as well as by actual sales,⁵¹ and the statements of dealers in answer to inquiries as to price are competent evidence.⁵² An offer of sale made by the owner of property, otherwise than by way of compromise, may be considered as evidence of value.⁵³ The value at which a stock of

⁴⁵ *Maxon v. Gates*, 136 Wis. 270; *Dady v. Condit*, 104 Ill. App. 507, citing *Culbertson & Blair P. & P. Co. v. Chicago*, 111 Ill. 651.

⁴⁶ *Tennessee C., R. & I. Co. v. State*, 141 Ala. 103.

⁴⁷ *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. 971; *White v. Kiggins*, 130 Ill. App. 404; *Horner v. Beasley*, 105 Md. 193, and cases cited; *King v. Hudson River Realty Co.*, 210 N. Y. 467, holding such evidence inadmissible; *Otten v. Spreckels*, 24 Cal. App. 251, holding such evidence admissible though not the true, or even an approximately satisfactory, test of value; *Thompson v. Moiles*, 46 Mich. 42 (improper cross-examination of witness who has testified to value); *Winside State Bank v. Lound*, 52 Neb. 469 (witness' declaration as to what he would give); *Castenholz v. Heller*, 82 Wis. 30 (more than one year after it was bought); *Texas & P. R. Co. v. Randle*, 18 Tex. Civ. App. 348.

The price at which the purchaser of land offered to reconvey it to the vendor is competent on the issue of damages in an action for fraud. *Dalrymple v. Hannum*, 54 N. Y. 654.

⁴⁸ *Conant v. Jones*, 120 Ga. 568.

⁴⁹ *Hersey v. Merrimack County Mut. F. Ins. Co.*, 27 N. H. 149.

⁵⁰ *Weaver v. Mississippi & R. R. B. Co.*, 28 Minn. 534.

⁵¹ *Lehigh v. Standard T. Co.*, 149 Mich. 102; *National Bank v. New Bedford*, 155 Mass. 313.

⁵² *Republican N. Co. v. Northwestern Associated Press*, 2 C. C. A. 282, 51 Fed. 377; *Harrison v. Glover*, 72 N. Y. 451; *Stevens v. Springer*, 23 Mo. App. 375.

⁵³ *Springfield v. Schmook*, 68 Mo. 394.

An offer to compromise a claim for the use of chattels is not to be considered in determining the fair value of their use. *Sipp v. Siegel-Cooper Co.*, 23 N. Y. Misc. 141.

The value put upon a chattel by

goods may be sold at retail, standing alone, does not afford a basis for fixing their market value, which is what they could have been promptly sold for in bulk or in convenient lots. Between the prices at which goods may be obtained in a market and at which they may be sold at retail in the same place, intervene time, expense and profit, unknown quantities, in the absence of proof.⁵⁴ This principle applies where the value of a large tract of unimproved land is involved.⁵⁵ The market reports of such publications as are relied upon by the commercial world may be given in evidence.⁵⁶ The credit to be given to them depends upon extrinsic evidence; in some states they are not admissible without proof as to the sources from which the information they purport to give is derived.⁵⁷ The

the parties to an exchange of properties is presumptively correct. *Kleeb v. McInturff*, 71 Wash. 419.

As against the holder of collaterals, who may sell them at private sale without notice, an offer for them is evidence of their value. *German-Am. State Bank v. Spokane*, etc. R. Co., 49 Wash. 359.

As against a third party the amount paid to be released from an executory contract to buy goods does not establish that their value at a previous time was the difference between the contract and such sum. *Gross v. Heckert*, 120 Wis. 314.

⁵⁴ *Needham P. & O. Co. v. Hollingsworth*, 91 Tex. 49; *State v. Parsons*, 109 Mo. App. 432; *Cerny v. Paxton*, 83 Neb. 88; *Cruver Mfg. Co. v. Spooner*, 147 App. Div. (N. Y.) 471.

⁵⁵ *Maxon v. Gates*, 136 Wis. 270.

⁵⁶ *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489; *Peter v. Thickstun*, 51 id. 589; *Fairley v. Smith*, 87 N. C. 367, 42 Am. Rep. 522; *Nash v. Classon*, 163 Ill. 409, aff'g 55 Ill. App. 356; *Henkle v. Smith*, 21 Ill. 238; *St. Louis, etc. R. Co. v. Pearce*, 82 Ark. 353, 118 Am. St. 75; *Haf-*

ner Mfg. Co. v. Lieber L. & S. Co., 127 La. 348; *Jones v. Ortel*, 114 Md. 205; *Mt. Vernon B. Co. v. Teschner*, 108 Md. 158, 16 L.R.A. (N.S.) 758; *Tri-State M. Co. v. Breisch*, 145 Mich. 232 (quotations on wheat competent to show the price of flour); *Kibler v. Caplis*, 140 Mich. 28; *Chicago, etc. R. Co. v. Todd*, 74 Neb. 712; *Texas & P. R. Co. v. Isenhower* (Tex. Civ. App.), 131 S. W. 297. Compare *State v. Dickson*, 213 Mo. 66; *Ray v. Missouri, etc. R. Co.*, 90 Kan. 244.

The price list of an individual is not admissible unless it is shown to have been acted upon by dealers. *Merchants' G. Co. v. Ladogac Co.*, 89 Ark. 591. "Prices current" sent by one party to the other are admissible as between them. *Weidner v. Olivit*, 108 App. Div. (N. Y.) 122.

⁵⁷ *Fountain v. Wabash R. Co.*, 114 Mo. App. 676; *Bunte v. Schumann*, 46 N. Y. Misc. 593; *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202.

In *Wildes v. Robinson*, 50 App. Div. (N. Y.) 192, the breach of a contract for the purchase of stock

prices obtained for goods sold at auction may be proved as tending to show their fair actual value. The competency of such testimony does not depend upon the form, mode or particular terms of the contract of sale, though these may have a material bearing on the weight to be given it as affecting the price and as indicating the value of the property.⁵⁸ But prices so obtained will not be conclusive evidence as to the value of the goods.⁵⁹ The net proceeds of the sale of an article made at a distance from the place of its manufacture may be shown, it appearing that it was manufactured to be sold there.⁶⁰ The price fixed by the parties to an exchange of properties is *prima facie* the value thereof.⁶¹ But the price at which property is offered for trade is not evidence of its value.⁶² The value of a note which depends upon the value of the property mortgaged to secure it may be shown by proof of the amount realized for the property at a public sale.⁶³ It is evident from what has appeared from the cases cited, which are illustrative of the

took place in New York city. It did not appear that any dealings in the stock in question were had there between the time of the making of the contract and the time fixed for its performance. It was shown that seventy-one, was bid for the stock in Philadelphia on the day the contract was made. It was held by a majority of the court that such bid was not evidence of the value of the stock, there being no testimony to show the circumstances under which the bid was made, or whether it was made in the open market on the floor of the stock exchange under conditions warranting the conclusion that the person to whom the bid was made had the stock for sale, or that the bidder was in a situation to buy it.

⁵⁸ Sanford v. Peck, 63 Conn. 486; Kent v. Whitney, 9 Allen 62, 85 Am. Dec. 739; Campbell v. Woodworth, 20 N. Y. 499; Hutchinson v. Poyer, 78 Mich. 340; Baker v. Sea-

vey, 163 Mass. 522, 47 Am. St. 475; Ford v. Smith, 27 Wis. 261; Roberts v. Dunn, 71 Ill. 46 (execution sale); Guiterman v. Liverpool, etc. S. Co., 83 N. Y. 358; McIlhargy v. Chambers, 117 id. 532; White v. Pease, 15 Utah 170 (execution sale); Clews v. Jamieson, 182 U. S. 461, 45 L. ed. 1183.

Contra, as against a mortgagor unlawfully deprived of possession. Rector-W. Co. v. Nissen, 35 Neb. 716.

⁵⁹ George v. Lane, 80 Kan. 94; State v. Parsons, 109 Mo. App. 432 (sheriff's sale); Ives v. Freisinger, 70 N. J. L. 257; Carey v. Dyer, 97 Wis. 554.

⁶⁰ French v. Piper, 45 N. H. 439.

⁶¹ Norton v. Hinecker, 137 Iowa 750.

⁶² Sveiven v. Thompson, 110 Minn. 484.

⁶³ Freeman v. Harbaugh, 114 Minn. 283.

trend of judicial views, and are not intended to be exhaustive of the subject, that evidence concerning value may take a very wide range.⁶⁴ The prices obtained for shares of stock after a severe financial panic or at private sale more than one year after the time at which their value would determine the rights of the parties are not competent to prove value at such time.⁶⁵ Where a contract provides that it may be assigned the price paid for it by a third party is competent to show its value as between the original parties to it; if the assignee made profits under it the presumption is he would have continued to do so; it may, however, be shown that they arose from the peculiar situation of the assignee.⁶⁶

§ 448. Same subject; elements of value. Property concerning which no proof of value in the market can be given, because it is not brought into the course of trade and is incapable of any estimate in that mode, is often the subject of legal valuation. In such cases the value is to be ascertained from such elements of value as the property represents, among which may be the cost of producing an article.⁶⁷ Among the essential

⁶⁴ *Morrow T. Co. v. Robinson*, 8 Ga. App. 409; *Atlanta & B. A. L. R. v. Wood*, 160 Ala. 657.

⁶⁵ *Smith v. Appleton*, 155 App. Div. (N. Y.) 520.

⁶⁶ *Pennsylvania S. Co. v. New York City R. Co.*, 198 Fed. 721, 117 C. C. A. 503.

⁶⁷ *Ruppel v. Adrian F. Mfg. Co.*, 96 Mich. 455; *Perlberger v. Grell*, 77 App. Div. (N. Y.) 128; *Bacigalupi v. Phoenix B. & C. Co.*, 14 Cal. App. 632; *Pittsburg, etc. R. Co. v. Chicago*, 242 Ill. 178, 134 Am. St. 316; *Austin v. Millspaugh*, 90 Miss. 354, 122 Am. St. 315; *Connor v. Missouri Pac. R. Co.*, 181 Mo. 397; *Golden v. Herman C. Co.*, 100 Mo. App. 20; *Osmers v. Furèy*, 32 Mont. 581; *Palestine H. W. Co. v. Terminal W. Co.*, 67 N. Y. Misc. 456; *Jelalian v. New York, etc. R. Co.*, 134 App. Div. (N. Y.) 381; *Jennings v. Oregon L. Co.*, 48 Ore. 287;

McGroarty v. Lehigh Valley C. Co., 212 Pa. 53 (present or proximate use to which land is likely to be put); *Smith v. Mine & S. S. Co.*, 32 Utah 21; *Griffin v. Martel*, 77 Vt. 19; *Allen v. Chicago & N. W. R. Co.*, 145 Wis. 263, citing the text; *Goodman v. Lehigh Valley R. Co.*, 82 N. J. L. 450; *Dowling L. Co. v. King*, 62 Fla. 151; *Kilgore v. Lyle*, 30 Okla. 596; *Pacific Tel. & T. Co. v. Huetter*, 68 Wash. 442; *Hicks v. Monarch C. Mfg. Co.*, 176 N. Y. 111; *Rogers v. Interurban St. R. Co.* (N. Y. Misc.), 84 (N. Y.) Supp. 974; *Kates T. & W. Co. v. Klassen*, 6 Ala. App. 301. See §§ 1113, 1117, 919.

If the purchase was made recently and the property has not been subsequently damaged to an unusual extent. *Allen v. R. Co.*, *supra*. And in case the goods are second-hand, what they will cost in the

features involved in showing the cost of an article is the reasonableness of the cost of the labor performed in producing it.⁶⁸ Where there was a breach of contract to convey a plant for the manufacture of rubber, consisting of a lot, buildings and machinery, and the plant was without a market value because like property had not been bought and sold to such an extent as to establish a price for it, and the value depended largely upon its location and condition, regard must be had to its nature, kind, original cost, earning value and condition at the time when its value is to be fixed. Evidence on these points may be supplemented by the testimony of experts familiar with the value of the property and accustomed to form judgments as to its value. The question of value is not to be determined by considering the separate elements of which the property is composed, but by taking it as a whole, where it is, regard being had for the purpose for which it was intended and for which it is to be used.⁶⁹

In an action by the assignee against the assignor of a claim upon the United States, assigned to the plaintiff in payment for goods sold in California just before its annexation to the United States, and which the plaintiff had been prevented by the defendant's acts from collecting, evidence of the first cost of the goods in the United States, the expense of transporting

open market. *Souther v. Hunt* (Tex. Civ. App.), 141 S. W. 359.

The cost of completing an article partially prepared for market may be shown. *Emmons v. Westfield Bank*, 97 Mass. 230.

The extent of the demand for the products of a mill may be shown as bearing on its value. *King v. Danville*, 128 Ky. 321.

The value of a plant is affected by the fact that it has been operated and has a franchise. *Galena W. Co. v. Galena*, 74 Kan. 644.

The cost of property does not show its cash or market value at a time subsequent to its sale. *Orr T. & F. Co. v. Metropolitan S. Co.*,

77 N. J. L. 749; *Lincoln v. Packard*, 25 Tex. Civ. App. 22 (unless it is shown that no more than its value was paid for it).

The value of manure put on land may be shown as bearing on the value of the land. *Champlin v. Baltimore & O. S. R. Co.*, 140 Ill. App. 94.

⁶⁸ *Schaeffer P. Mfg. Co. v. National F. E. Co.*, 148 Fed. 159, 78 C. C. A. 293.

⁶⁹ *Sloan v. Baird*, 12 App. Div. (N. Y.) 481 affirmed, 162 N. Y. 327. See *California D. Co. v. Yuma Valley, etc. Co.*, 9 Ariz. 366.

them to California, the duties there, and the usual and proper addition for profits, and also of sales of like articles for cash during three or four months before and after the sale, and that the plaintiff within two months afterwards repurchased some of the same goods for cash at advanced rates, was held admissible in connection with other evidence of the market value of the goods at that time and place.⁷⁰ In this case Dewey, J., said: "We are to remember that these sales were made in California in 1847, when the state of things was very different from that of the present time, and when the market value of merchandise could not be settled as easily and satisfactorily as it could in New York and Boston. Under the circumstances of this case, we think the verdict should not be set aside on account of the admission of this evidence. It might have some tendency to aid in settling the market value of such property at that distant and uncertain market. * * * Such evidence as was admitted in the present case could only be used in aid of the other evidence in the case, or resorted to from peculiar circumstances, as in a case where no market value could be shown directly. It might be of very little weight, but we do not think that the verdict should be set aside for its admission." When the property has no market value proof may be made of such facts as exist tending to show value or to aid the jury in estimating it. The cost of manufacturing a raw article for and transporting it to market may properly be inquired into.⁷¹ When, however, it appears that a manufactured article has an established market value evidence as to the cost of the material and of the manufacture is irrelevant and inadmissible.⁷² In an action for the conversion of forty of the San Francisco W. W. Co.'s bonds of \$500 each, claimed by plaintiff to have been purchased by the defendant as agent for him, which bonds did not express in what kind of money they were to be paid, and which were purchased by the defendant with his own funds

⁷⁰ *Eaton v. Mellus*, 7 Gray 566.

⁷¹ *Brizsee v. Maybee*, 21 Wend. 144; *Masterton v. Mayor*, 7 Hill 61.

⁷² *Althouse v. Alvord*, 28 Wis.

⁵⁷⁷. Such evidence will not support a verdict. *St. Louis S. R. Co. v.*

Moss, 37 Tex. Civ. App. 461.

at more than their face in currency, it appeared that the company received gold for its water dues; that gold continued in use in California during the period involved, and that payments and contracts were made in and on the basis of gold; that bonds of this issue were not bought and sold in the market, but that money was borrowed upon them as collateral at par in gold. The plaintiff offered to show that they were paid in gold; this evidence was rejected. The court directed a verdict for nominal damages, stating, in substance, that the legal tender acts substantially made \$100 in greenbacks worth \$100 in gold. Held error, that said acts did not affect the question as to the value of chattels in an action for their conversion; nor did they forbid the recognition of the difference between gold and currency in fixing the damages in such an action; the evidence was sufficient to require the submission of that question to the jury.⁷³

Witnesses qualified by knowledge may testify to the state of the market with reference to the property in question, the large or small supply and the price at which sales were made; these are all proper subjects for the consideration of the jury.⁷⁴ Where there have been no actual sales of an article a witness may give his opinion of its value;⁷⁵ and so if there is no near market.⁷⁶ Where a span of horses was sold with a warranty that they were all right for a livery team and it appeared that one was with foal, evidence was offered in respect to its difference in value on that account; and the court held that, there being no market value, a witness could not be asked to give his

⁷³ *Simpkins v. Low*, 54 N. Y. 179.

⁷⁴ *Washington I. Co. v. Webster*, 68 Me. 449.

⁷⁵ *Missouri, etc. R. Co. v. Neiser*, 54 Tex. Civ. App. 460; *Same v. Pettit*, 54 Tex. Civ. App. 358, 21 Am. Neg. Rep. 509; *Ft. Worth, etc. R. Co. v. Brown*, 45 Tex. Civ. App. 376; *The Harmonides*, (1903) Prob. Div. 1; *Simpkins v. Low*, 49 Barb. 382; *Erd v. Chicago, etc. R. Co.*, 41 Wis. 65; *Whitfield v. Whitfield*, 40 Miss. 352; *Anson v. Suth. Dam. Vol. II.*—14.

Dwight, 18 Iowa 241; *Rogers v. Ackerman*, 22 Barb. 134; *Watson v. Bauer*, 4 Abb. Pr. (N. S.) 273; *Derby v. Gallup*, 5 Minn. 119; *Nellis v. McCarn*, 35 Barb. 115; *Robertson v. Knapp*, 35 N. Y. 91; *Lanning v. Chicago, etc. R. Co.*, 68 Iowa 502; *St. Louis, etc. R. Co. v. Chapman*, 38 Kan. 307, 5 Am. St. 744; *St. Louis, etc. R. Co. v. Dunham*, 36 Okla. 724.

⁷⁶ *Burger v. Northern Pac. R. Co.*, 22 Minn. 343.

opinion of a mare in that condition for livery purposes and her value if not in that condition, and then give his opinion as to the difference in value.⁷⁷ The cost of property may be shown, though the market value was higher when it was bought than when the loss occurred. The difference in the cost and the depreciation in value by use and natural causes may be established by the defendant.⁷⁸ The pedigree of an animal may be shown as an aid in fixing its value,⁷⁹ as may its productivity if it has a value for a special use,⁸⁰ and its record as a winner of prizes.⁸¹ If stocks have no market value their value may be proved by showing the value of the property and business of the corporation as compared with its liabilities at the time in question.⁸² Evidence of this character does not preclude testimony showing other elements of value.⁸³ If evidence of the sale of stock is offered it must be given effect as of the time it was made and according to the situation then existing.⁸⁴

It is presumed that a judgment is worth its face value,⁸⁵ and the same presumption is made as to a bill or draft against

⁷⁷ *Whitney v. Taylor*, 54 Barb. 536.

⁷⁸ *The Lucille*, 169 Fed. 719; *Colorado M. R. Co. v. Snider*, 38 Colo. 351; *Mouat L. Co. v. Wilmore*, 15 Colo. 136; *Matthews v. Missouri Pac. R. Co.*, 142 Mo. 645, 666, 3 Am. Neg. Rep. 699. *Contra*, *Houston, etc. R. Co. v. Red Cross Stock Farm*, 22 Tex. Civ. App. 114; *Nagy v. Manitoba Free Press Co.*, 16 Manitoba 619.

⁷⁹ *Cleveland, etc. R. Co. v. Van Natta*, 44 Ind. App. 608; *Warrick v. Reinhard*, 136 Iowa 27; *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339; *Richmond & D. R. Co. v. Chandler (Miss.)*, 13 So. 267. See § 449.

The value of the offspring from such stock as the animal in question sprang from may also be shown. *Parker v. Lake Shore, etc. R. Co.*, 93 Mich. 607.

⁸⁰ *Taylor v. Spokane Falls & N.*

R. Co., 32 Wash. 450, 15 Am. Neg. Rep. 216.

⁸¹ *Council v. St. Louis, etc. R. Co.*, 123 Mo. App. 432.

⁸² *Crichfield v. Julia*, 147 Fed. 65, 77 C. C. A. 297; *Redding v. Godwin*, 44 Minn. 355; *Tevis v. Ryan*, 13 Ariz. 120; *McDonough v. Williams*, 86 Ark. 600; *Vail v. Reynolds*, 118 N. Y. 297; *Harlow v. Haines*, 63 N. Y. Misc. 98; *Beaty v. Johnston*, 66 Ark. 529; *Chandler v. Andrews*, 192 Fed. 543, 113 C. C. A. 15; *White v. Jouett*, 147 Ky. 197. In such cases the evidence may take a wide range. *Moffitt v. Hereford*, 132 Mo. 513; *Peek v. Steinberg*, 163 Cal. 127.

⁸³ *Henry v. North American R. C. Co.*, 158 Fed. 79, 85 C. C. A. 409.

⁸⁴ *Lemly v. Ellis*, 143 N. C. 200.

⁸⁵ *Bryant v. Robinson*, 97 Minn. 533.

a person who has been negligent in the collection of either.⁸⁶ As against one who has breached his contract to assign a mortgage which is a first lien it will be assumed to be worth the sum secured by it.⁸⁷ The value of the use of business property is provable by the amount of business done on it and the profits made prior to the time the wrong was done.⁸⁸ The purchase price paid for a newspaper route and the profits derived therefrom may be shown.⁸⁹ Among the elements which may enter into the question of the value of the good will of a business are the length of time the firm has existed, the nature and character of the business, its success or lack of it, the average profits, the probability of its continuance under the same name without competition by a retiring member of the firm.⁹⁰ Its value at a previous time may be shown by the business done at a later period.⁹¹ The amount for which property is insured is not direct evidence of its value.⁹² The rents paid for the use of property are relevant to show the value of an equity in it.⁹³

§ 449. **Proof of the value of dogs.** Courts generally favor the view that there is such a species of property in dogs as will support a civil action for their injury or loss.⁹⁴ Farmers who have knowledge of the characteristics and qualities of a

⁸⁶ *Second Nat. Bank v. Bank*, 99 Ark. 386.

⁸⁷ *Wilson v. Clark*, 63 Wash. 136.

⁸⁸ *Probst v. Hinesley*, 133 Ky. 64; *Bates v. Holbrook*, 89 App. Div. (N. Y.) 548.

⁸⁹ *Otten v. Spreckels*, 24 Cal. App. 251.

⁹⁰ *Moore v. Rawson*, 185 Mass. 264; *Von Au v. Magenheimer*, 115 App. Div. (N. Y.) 84 (the value of the good will of a corporation may be shown by its average net profits for a suitable number of years).

⁹¹ *Von Au v. Magenheimer*, *supra*.

⁹² *Holmes v. Rivers*, 145 Iowa 702.

⁹³ *Lyon v. Katten*, 80 Conn. 718.

⁹⁴ *Salley v. Manchester & A. R. Co.*, 54 S. C. 481, 71 Am. St. 810,

and cases cited, and note to *Graham v. Smith*, 40 L.R.A. 503; *Johnson v. McConnell*, 80 Cal. 545; *State v. McDuffie*, 34 N. H. 523, 69 Am. Dec. 516; *Rowan v. Sussdorff*, 147 App. Div. (N. Y.) 673; *El Dorado & B. R. Co. v. Knox*, 90 Ark. 1, 134 Am. St. 17; *Columbus R. Co. v. Woolfolk*, 128 Ga. 631, 10 L.R.A. (N.S.) 1136 (if killing or injury malicious) *Contra*, if dog is not registered as required by statute as against a person who negligently causes its death. *Dickerman v. Consolidated R. Co.*, 79 Conn. 427. See *Sentell v. New Orleans & C. R. Co.*, 166 U. S. 698, 41 L. ed. 1169, 1 Am. Neg. Rep. 773; *Hamby v. Samson*, 105 Iowa 112, 67 Am. St. 285, 40 L.R.A. 508, and note.

shepherd dog, chiefly valuable for his ability to herd cattle and horses, may testify to the value of such an animal to a farmer who keeps stock, though the dog has no market value.⁹⁵ This is contrary to the view several times declared by the supreme court of New York, which limits the proof concerning value to testimony as to the particular qualities and properties of the animal.⁹⁶ It is said that dogs in general have no market value, and their price is fanciful, depending on the taste of the owner; that in order to justify opinions as to their value they must be such in particular as have a market value.⁹⁷ But it has been held in trespass for killing a dog that it could not be assumed as matter of law that dogs have no commercial value; that it was a question of fact; that an instruction was wrong that the jury should find the value of the dog from its qualities, rather than from the opinions of witnesses who placed their estimate on the loss of services of the dog for a given time; the jury have a right to consider both in fixing its value.⁹⁸ In determining the value of a dog a jury may take into account common knowledge and observation about the habits and qualities of dogs, and evidence of pedigree may be received, though based on hearsay.⁹⁹ The value of a dog for breeding purposes may be proved by the breeding and characteristics of her dam, the elements constituting her value and the value of her sire and dam.¹ In the absence of a local market value, testimony as to the value of blooded dogs in another state is competent.² An

⁹⁵ *Bowers v. Horen*, 93 Mich. 420, 32 Am. St. 513, 17 L.R.A. 773; *McNair v. Collins*, 27 Ont. L. R. 44.

⁹⁶ *Dunlap v. Snyder*, 17 Barb. 561, overruling *Brill v. Flager*, 23 Wend. 354; *Brown v. Hoberger*, 52 Barb. 15; *Smith v. Griswold*, 15 Hun 273.

⁹⁷ *Brown v. Hoberger*, 52 Barb. 15. See *Cantling v. Hannibal*, etc. R. Co., 54 Mo. 385, 14 Am. Rep. 476; *Mobile & O. R. Co. v. Holliday*, 79 Miss. 294.

⁹⁸ *Spray v. Ammerman*, 66 Ill. 309, 1 Am. Neg. Cas. 410.

The value of a dog may be proved

as that of any other property—by evidence that he was of a particular breed, and had certain qualities, and by witnesses who knew his market value, if such value be shown. *Columbus R. Co. v. Woolfolk*, 128 Ga. 631, 119 Am. St. 404, 10 L.R.A. (N.S.) 1136.

⁹⁹ *Citizens' R. T. Co. v. Dew*, 100 Tenn. 317, 66 Am. St. 754, 40 L.R.A. 518; *Hodges v. Causey*, 77 Miss. 353, 40 L.R.A. 95.

¹ *Winchell v. National Exp. Co.*, 64 Vt. 15.

² *St. Louis, etc. R. Co. v. Philpot*, 72 Ark. 23.

offer made for a dog two years before its death is not competent evidence of its value.³ The fact that a dog was not assessed for taxation is not evidence that it was valueless.⁴

§ 450. Witnesses to value may be asked grounds of opinions.

A witness who has given his opinion of value, or upon any other matter of common experience and observation may be asked in his examination in chief to state the grounds of his opinion.⁵ If the party calling a witness to testify as to the damages does not ask for the grounds or reasons of his opinion and the cross-examination does not cover that ground the appellate court will not heed an objection on that account.⁶

§ 451. Physical examination of plaintiff. A large majority of the courts which have passed upon the question hold that in a suit to recover for personal injuries the trial court may exercise its discretion by making an order requiring the plaintiff to submit to a physical examination by disinterested surgeons or physicians for the purpose of enabling them to testify concerning the nature and extent of the injuries sustained.⁷ This

³ Southern R. Co. v. Parnell, 142 Ala. 146.

⁴ El Dorado & B. R. Co. v. Knox, *supra*.

⁵ New Jersey, etc. R. Co. v. Tutt, 168 Ind. 205; Neppach v. Oregon & C. R. Co., 26 Ore. 374, citing the text; Dickinson v. Fitchburg, 13 Gray 546; Hatton v. Board of Com'rs, 55 Ind. 194; Tate v. Missouri, etc. R. Co., 64 Mo. 149; Carpenter v. Robinson, 1 Holmes 67; Jones v. Merrimack R. L. Co., 31 N. H. 381; Clark v. State, 12 Ohio 483, 40 Am. Dec. 481; Mahoney v. Ashton, 4 Har. & McH. 63; Goodwyn v. Goodwyn, 20 Ga. 600; Dickinson v. Barber, 9 Mass. 225; Doe v. Reagan, 5 Blackf. 217, 33 Am. Dec. 466; Wilson v. McClean, 1 Cranch C. C. 465; Bank v. McKenny, 3 id. 361; Gentry v. McMinnis, 3 Dana 382; Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349; Crawford v. Andrews, 6 Ga.

244; Royall v. McKenzie, 25 Ala. 363; Sherman v. Blodgett, 28 Vt. 149; Riggins v. Brown, 12 Ga. 271; Dunham's App., 27 Conn. 192; Choice v. State, 31 Ga. 424.

⁶ Razzo v. Varni, 81 Cal. 289.

⁷ Graham v. Sly, 177 Mo. App. 348; Rief v. Great Northern R. Co., 126 Minn. 430; Johnson v. Southern Pac. Co., 150 Cal. 535; Denver City Tramway Co. v. Roberts, 43 Colo. 522; Western G. Mfg. Co. v. Schoeninger, 42 Colo. 357, 15 L.R.A. (N.S.) 663, 126 Am. St. 165; Macon B. & R. Co. v. Ross, 133 Ga. 83; Cedartown v. Brooks, 2 Ga. App. 583; Aspy v. Botkins, 160 Ind. 170; Dickinson v. Kansas City E. R. Co., 74 Kan. 863; Lexington R. Co. v. Cropper, 142 Ky. 39; United R. & E. Co. v. Cloman, 107 Md. 681; Logan v. Agricultural Soc., 156 Mich. 537; Dean v. Wabash R. Co., 229 Mo. 425; Shamp v. Lambert, 142 Mo. App. 567; Murphy v.

rule has been thus vindicated: We are aware that there are some eminent authorities to the contrary, but with all due deference to them, we cannot avoid thinking that they base their conclusion upon a fallacious and somewhat sentimental line of argument as to the inviolability and sacredness of a man's own person, and his right to its possession and control free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice. When a man appeals to the state for justice, tendering an issue as to his own physical condition, he impliedly consents in advance to the doing justice to the other party, and to make any disclosure which is necessary to be made in order that justice may be done. No one claims that he can be compelled to submit to such an examination; but he must either do so or have his action dismissed.⁸ A party will not however be ordered to submit to the taking of X-ray photographs.⁹ If a complete

Southern Pac. Co., 31 Nev. 120; Belt E. Line Co. v. Allen, 102 Ky. 551; Wanek v. Winona, 78 Minn. 98, 46 L.R.A. 448; Demenstein v. Richardson, 2 Pa. Dist. 825 (1893); *contra*, Kunsman v. Harris, 6 Northampton Co. Rep. 230 (1896); Lawrence v. Keim, 19 Phila. 351 (1887); Atchison, etc. R. Co. v. Thul, 29 Kan. 466, 15 Am. Neg. Cas. 131, 44 Am. Rep. 659; Schroeder v. Chicago, etc. R. Co., 47 Iowa 375, 14 Am. Neg. Cas. 643; White v. Milwaukee City R. Co., 61 Wis. 536, 50 Am. Rep. 154; Miami & M. T. Co. v. Baily, 37 Ohio St. 104; Shepard v. Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390, qualifying Lloyd v. Railroad, 53 Mo. 629; Alabama, etc. R. Co. v. Hill, 90 Ala. 71, 9 L.R.A. 442, 24 Am. St. 764, 93 Ala. 515, 30 Am. St. 61; Owens v. Kansas City, etc. R. Co., 95 Mo. 169, 4 Am. Neg. Cas. 590, 6 Am. St. 39; Stuart v. Havens, 17 Neb. 211; Richmond

& D. R. Co. v. Childress, 82 Ga. 719, 14 Am. St. 189, 3 L.R.A. 808; Ottawa v. Gilliland, 63 Kan. 165, 38 Am. St. 232; Aske v. Duluth & I. R. R. Co., 83 Minn. 197; Lane v. Spokane Falls & N. R. Co., 21 Wash. 119, 46 L.R.A. 153, 75 Am. St. 821; Brown v. Chicago, etc. R. Co., 12 N. D. 61.

An exhibition will not be ordered in an action to which the person injured is not a party. McKnight v. Detroit & M. R. Co., 135 Mich. 307.

⁸ Wanek v. Winona, 78 Minn. 98, 46 L.R.A. 448; Brown v. Chicago, etc. R. Co., *supra*.

⁹ Lasher v. S. Bolton's Sons, 161 App. Div. (N. Y.) 381.

A party will not be compelled to submit to the taking of an X-ray photograph by one who is objectionable to him after having offered to allow one to be taken by a party whose competency and disinterestedness is not called in question. In-

examination of the plaintiff will require the administration of anæsthetics the order may be refused.¹⁰ In Arkansas the defendant has a right to such examination if the expert evidence is not abundant, in which case the exercise of the court's discretion will not be reviewed.¹¹ If a male plaintiff alleges that his injuries are permanent there is no abuse of discretion in requiring him to submit to an examination of his person by medical experts at his home.¹² It was at first held in Texas that, if the right exists, the courts will not enforce it unless it is shown to be essential to the accomplishment of justice between the parties.¹³ In later cases there is a more distinct recognition of the right. Where the plaintiff exhibited her injured limbs to the jury and offered testimony to the effect that she would never be able to wear artificial limbs it was error to refuse the defendant's request to allow experts of its own choice to examine the plaintiff and give their opinions as to the practicability of the use of artificial limbs.¹⁴ The existence of the power, in the absence of some such waiver of immunity, has finally been denied by the supreme court in an opinion worthy of careful examination.¹⁵ In Nebraska if the application is made during the trial and it is sought to have the

ternational & G. N. Ry. Co. v. Bartek, — Tex. Civ. App. —, 177 S. W. 137.

Under the Florida statute the physician appointed by the court to make an examination may use the X-ray if that is necessary; but may not take X-ray photographs of the person of the injured party, nor appoint another to do so. If the plaintiff refuses to permit the use of the X-ray the case may be continued. *State v. Call*, 64 Fla. 144, 44 L.R.A.(N.S.) 1071.

¹⁰ *Chicago, R. I. & G. Ry. Co. v. Pemberton*, — Tex. Civ. App. —, 170 S. W. 108; *Strudgeon v. Sand Beach*, 107 Mich. 496.

¹¹ *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584.

¹² *Railway Co. v. Dobbins*, 60 Ark. 481.

¹³ *International & G. N. R. v. Underwood*, 64 Tex. 463; *Gulf, etc. R. Co. v. Gibbs*, 33 Tex. Civ. App. 214⁶ (symptoms subjective and nothing to indicate malingering).

The existence of the power seems to be denied in *Gulf, etc. R. Co. v. Pendery*, 14 Tex. Civ. App. 60.

¹⁴ *Galveston, H. & S. A. Ry. Co. v. Chojnacky*, — Tex. Civ. App. —, 163 S. W. 1011; *Chicago, etc. R. Co. v. Langston*, 19 Tex. Civ. App. 568, 92 Tex. 709; *Haynes v. Trenton*, 108 Mo. 123; *St. Louis S. R. Co. v. Browning*, 54 Tex. Civ. App. 521.

¹⁵ *Austin & N. R. Co. v. Cluck*, 97 Tex. 172, 64 L.R.A. 494. The

examination made by experts called by the defendant alone, and not by those which may be mutually agreed upon or selected by the court, it may be denied,¹⁶ but if the plaintiff in an action for malpractice on two portions of the body by separate operations exhibits a portion of the body to the court and jury, an examination may be ordered by a limited number of reputable surgeons of the defendant's selection and of his school of practice of all portions of the body affected by the operations complained of.¹⁷ The plaintiff in an action for the breach of a promise of marriage may be required to submit to a physical examination if her physical incapacity to enter into the contract is alleged, she knowing the fact and the defendant being ignorant of it.¹⁸

The Illinois supreme court denies the existence of the power to order such an examination,¹⁹ at least where it is not shown that the examination was to obtain evidence for use upon the trial, the statement being that it was desired for the purpose of ascertaining the facts. It must also be shown that there was a necessity for such examination.²⁰ The existence of the right has been negatived by the New York court of appeals, the courts of Massachusetts, Montana, South Carolina, Oklahoma, Louisiana, Delaware,²¹ and the United States supreme

unconditional assent of the plaintiff must be given. *San Antonio, etc. R. Co. v. Spencer*, 55 Tex. Civ. App. 456. See *International, etc. R. Co. v. Lane* (Tex. Civ. App.), 127 S. W. 1066, which holds that an examination by more than one reputable physician will not be ordered.

¹⁶ *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 16 Am. Neg. Cas. 530; *Stuart v. Havens*, 17 Neb. 211.

¹⁷ *Booth v. Andrus*, 91 Neb. 810.

¹⁸ *Lucher v. Burger*, 13 Ohio N. P. (N. S.) 161.

¹⁹ *Parker v. Enslow*, 102 Ill. 272; *Peoria, etc. R. Co. v. Rice*, 144 Ill. 227, 14 Am. Neg. Cas. 390; *Pronskévitch v. Chicago & A. R. Co.*, 232 Ill. 136; *Chicago v. Mc-*

Nally, 227 Ill. 14 (it is improper to ask the plaintiff in the presence of the jury as to his willingness to submit to an examination); *Richardson v. Nelson*, 221 Ill. 254, 20 Am. Neg. Rep. 297, aff'g 123 Ill. App. 550; *Schlecte v. Chicago E. T. Co.*, 157 Ill. App. 181; *Wheeler v. Chicago & W. I. R. Co.*, 182 Ill. App. 194; *Kane v. W. M. Hoyt Co.*, 182 Ill. App. 371; *Schuerger v. City Water Co.*, 183 Ill. App. 469, holding a requested instruction that the jury should consider plaintiff's failure to exhibit her injury to them properly refused.

²⁰ *St. Louis B. Co. v. Miller*, 138 Ill. 465.

²¹ *McGuigan v. Delaware, etc. R. Co.*, 129 N. Y. 50, 26 Am. St. 507,

court, the question being considered by the latter solely from the view-point of the power of the federal courts under the federal constitution and laws.²² The Indiana court was in

14 L.R.A. 466; *Stack v. New York*, etc. R. Co., 177 Mass. 155, 52 L.R.A. 328, 83 Am. St. 269; *Mills v. Wilmington City R. Co.*, 1 Marvel 269; *May v. Northern Pac. R. Co.*, 32 Mont. 522, 70 L.R.A. 111 (the opinion reviews the cases generally); *Best v. Columbia St. R., L. & P. Co.*, 85 S. C. 422; *Brackett v. Southern R. Co.*, 88 S. C. 447; *Kingfisher v. Altizer*, 13 Okla. 121; *Atchison, etc. R. Co. v. Melson*, 40 Okla. 1; *Yazoo & M. Val. R. Co. v. Robinson*, — Miss. —, 65 So. 241.

Previous to the decision by the court of appeals the New York authorities were in conflict; the existence of the power was affirmed in *Walsh v. Sayre*, 58 How. Pr. 334 (the original case on the subject), and denied in *Newman v. Third Ave. R. Co.*, 50 N. Y. Sup. Ct. 412, and in *Roberts v. Ogdensburgh R. Co.*, 29 Hun 155.

A statute enacted in 1893 provides for such examinations. It has been held valid, but does not authorize an order directing an examination apart from or independent of an examination of the plaintiff as a witness before trial. *Lyon v. Manhattan R. Co.*, 142 N. Y. 298, 25 L.R.A. 402; *Neill v. Brooklyn E. R. Co.*, 13 N. Y. Misc. 403. See *Goldenberg v. Zirinsky*, 114 App. Div. (N. Y.) 827.

Compare *Strom v. American Dist. Steam Co.*, 84 Misc. (N. Y.) 197, where the examination was confined to the nature and extent of the plaintiff's injuries to the exclusion of matters bearing on the question of plaintiff's contributory negligence the burden of proof of which

is by statute thrown on the defendant.

An examination will not be ordered in an action for assault, the gravamen of which is the indignity to which the plaintiff was subjected, for the purpose of inquiring into her previous history and physical condition. *Smyth v. Lichtenstein*, 137 App. Div. (N. Y.) 335.

While a second examination will not be ordered unless for cause (*Orlando v. Syracuse R. T. Co.*, 109 App. Div. (N. Y.) 356), it should be ordered where, in the first examination, the plaintiff led the defendant's physicians to believe that he suffered from no injuries other than those then under examination. *Rief v. Great Northern R. Co.*, 126 Minn. 430.

The right to an examination does not authorize disreputable or objectionable handling. A woman is not bound to submit to an examination by a man. *Potter v. Hammondsport*, 112 App. Div. (N. Y.) 91. If the use of anæsthetics or of atropine in the eye may endanger the health of the plaintiff the examination will not be ordered against his objection. *Mizak v. Carborundum Co.*, 132 N. Y. Supp. 1104.

²² *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734; *Illinois Cent. R. Co. v. Griffin*, 25 C. C. A. 413, 80 Fed. 278 (whether application is made before or during trial); *Brace v. Central R. Co. of New Jersey*, 216 Fed. 718.

A federal court sitting in a state in which a statute provides for the examination of plaintiffs will compel compliance with it. *Camden &*

harmony with the courts last referred to in its first conclusion,²³ but has changed its position.²⁴ In the province of Ontario a statute regulates the compulsory examination of plaintiffs in personal injury actions. Prior to its enactment there was no power to order such examination.²⁵ In Kansas it is said that inasmuch as the exercise of the power to order an examination trenches closely upon an invasion of private rights it should be exercised with great caution and only where it is necessary to the ends of justice. The application for the order should be timely made and be granted upon a proper showing, and the examination should be had under the control and direction of the court by persons of its selection.²⁶ And in Washington that the discretion of the trial court in acting upon applications for examinations is wide and will not be interfered with when the sense of delicacy of the plaintiff may be offended by the exhibition or where the testimony would be merely cumulative, or the necessities of the case do not demand it.²⁷ The application may be denied if it is first made during the progress of the trial.²⁸ The examination cannot be compelled by any court; the plaintiff may submit to it if he is ordered to do so; if he refuses the court may dismiss his action.²⁹ If the plaintiff has been examined by physicians representing the defendant and they concur with other physicians in the opinion that he is badly injured the discretion of the court in denying an application

S. R. Co. v. Stetson, 177 U. S. 172, 44 L. ed. 721. And an examination may be ordered where the plaintiff voluntarily exhibits his wound for inspection by the jury. *Chicago, etc. R. v. Kendall*, 167 Fed. 62, 93 C. C. A. 422.

²³ *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401.

²⁴ *South Bend v. Turner*, 156 Ind. 418, 83 Am. St. 200, 54 L.R.A. 396.

²⁵ *Reily v. London*, 14 Prac. Rep. 171; *Sornberger v. Canadian Pac. R. Co.*, 24 Ont. App. 263.

²⁶ *Southern Kansas R. Co. v. Michaels*, 57 Kan. 474, 15 Am. Neg.

Cas. 52; *Marler v. Springfield*, 65 Mo. App. 301; *Western G. Co. v. Schoeninger*, 42 Colo. 357, 126 Am. St. 165, 15 L.R.A.(N.S.) 665.

²⁷ *Smith v. Spokane*, 16 Wash. 403, 1 Am. Neg. Rep. 386; *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. 561, 19 L.R.A. 641; *Dunkin v. Hoquiam*, 56 Wash. 47; *Helbig v. Grays Harbor E. Co.*, 37 Wash. 130.

²⁸ *Myrberg v. Baltimore & S. M. & R. Co.*, 25 Wash. 364; *Macon R. & L. Co. v. Vining*, 120 Ga. 511.

²⁹ *Miami & M. T. Co. v. Baily*, 37 Ohio St. 104.

for a further examination will not be interfered with.³⁰ Where two examinations had been made by the defendant's physicians a request for a third was denied because not limited to the injured part of the plaintiff's body.³¹ If the plaintiff terminates the examination before it is concluded his consent thereto will not justify a further or other examination.³² It is not cause for denying an application that it may be necessary to use drugs for dilating the pupils of the eyes if serious discomfort or deleterious results will not probably follow.³³ It is proper to ask the plaintiff, whether an examination may be compelled or not, as to his willingness to submit thereto in a proper manner and at a convenient place; his refusal to do so is a matter for the jury to weigh in arriving at a conclusion concerning the extent, character and permanency of his injuries.³⁴ The results of tests made by a physician may be shown on the issue of simulation.³⁵

§ 452. Exhibition of injured parts, and means of injury.

In order to show the extent of their disability or suffering plaintiffs in suits to recover for personal injuries may exhibit to the jury their wounds or injured limbs;³⁶ but this will not

³⁰ *Louisville & N. R. Co. v. McClain*, 23 Ky. L. Rep. 1878.

It may be shown that the plaintiff refused to submit to an examination. *Junget v. Aurora*, etc. R. Co., 177 Ill. App. 435; *Simpson v. Peoria R. Co.*, 179 id. 307.

³¹ *Murphy v. Southern Pac. Co.*, 31 Nev. 120; *Benson v. Altoona*, etc. R. Co., 228 Pa. 290.

³² *International*, etc. R. Co. v. Gready, 36 Tex. Civ. App. 536.

³³ *Atchison*, etc. R. Co. v. *Palmore*, 68 Kan. 545, 64 L.R.A. 90, citing *Alabama*, etc. R. Co. v. *Hill*, 90 Ala. 71, 9 L.R.A. 442, 24 Am. St. 764; *Brown v. Chicago*, etc. R. Co., 12 N. D. 61, 14 Am. Neg. Rep. 169, 102 Am. St. 564.

³⁴ *Union Pac. R. Co. v. Botsford*, 141 U. S. 255, 35 L. ed. 739; *Stack v. New York*, etc. R. Co., 177 Mass.

155, 52 L.R.A. 328, 83 Am. St. 269; *Elfers v. Wooley*, 116 N. Y. 294; *Austin & N. R. Co. v. Cluck*, 97 Tex. 172, 64 L.R.A. 494; *Schlechte v. Chicago El. T. Co.*, 157 Ill. App. 181; *Cedartown v. Brooks*, 2 Ga. App. 583; *Atchison*, etc. R. Co. v. *Melson*, 40 Okla. 1.

³⁵ *McGrew v. St. Louis, S. F. & T. R. Co.*, 32 Tex. Civ. App. 265, 14 Am. Neg. Rep. 658.

³⁶ *Chicago, R. I. & G. Ry. Co. v. Pemberton*, — Tex. Civ. App. —, 170 S. W. 108; *Southern R. Co. v. McGowan*, 149 Ala. 440 (in the discretion of the court); *Same v. Brock*, 132 Ga. 858; *Pronskévitch v. Chicago & A. R. Co.*, 232 Ill. 136; *Pittsburgh*, etc. R. Co. v. *Lightheiser*, 168 Ind. 438; *Ford v. Providence C. Co.*, 124 Ky. 517; *Clay v. Chicago*, etc. R. Co., 104 Minn. 1;

be permitted if a disclosure of the private part of the body is necessary.³⁷ In such a case examination should be made by experts and testimony given by them concerning it.³⁸ If it is claimed that an incurable disease of the hip joint and curvature of the spine were caused by the injuries a physician may exhibit the plaintiff to the jury and place him in different attitudes in order to enable them to determine the extent of his disability.³⁹ Allowing the plaintiff to exhibit her actual condition to the jury by lying on a lounge, with her physician attending her, when her testimony was taken, and allowing

Sampson v. St. Louis, etc. R. Co., 156 Mo. App. 419; Houston v. Chicago, etc. R. Co., 118 Mo. App. 464; Stephens v. Elliott, 36 Mont. 92; Felsch v. Babb, 72 Neb. 736; Chicago, etc. R. Co. v. Krayenbuhl, 70 Neb. 766; Crete v. Hendricks, 2 Neb. (Unof.) 847; Humphries v. Union, etc. R. Co., 84 S. C. 202; O'Neill Mfg. Co. v. Pruitt, 110 Ga. 577; Swift v. O'Neill, 88 Ill. App. 162; Citizens' St. R. Co. v. Willooby, 134 Ind. 563, 8 Am. Neg. Cas. 224; Laes v. Everard's Breweries, 61 App. Div. (N. Y.) 431; Union Pac. R. Co. v. Botsford, 141 U. S. 250, 255, 35 L. ed. 734, 739; Mulhado v. Brooklyn City R. Co., 30 N. Y. 370, 5 Am. Neg. Cas. 83; Packet Co. v. Hobbs, 105 Tenn. 29; Jackson v. Wells, 13 Tex. Civ. App. 275; Carrico v. West Virginia, etc. R. Co., 39 W. Va. 86, 10 Am. Neg. Cas. 435, 24 L.R.A. 50; Lanark v. Dougherty, 153 Ill. 163; Graves v. Battle Creek, 95 Mich. 266, 19 L.R.A. 641, 35 Am. St. 561; King v. State, 100 Ala. 851; Hall v. Manson, 99 Iowa 698, 34 L.R.A. 207; Schroeder v. Chicago, etc. R. Co., 47 Iowa 375, 382; Barker v. Perry, 67 id. 146; 14 Am. Neg. Cas. 643; Osborne v. Detroit, 32 Fed. 36; Jordan v. Bowen, 46 N. Y. Super. Ct. 355; Hiller v. Sharon Springs, 28

Hun 344; Hatfield v. St. Paul & D. R. Co., 33 Minn. 130, 53 Am. Rep. 14; Faivre v. Manderscheid, 117 Iowa 724 (exhibition of husband's injuries in suit by wife under civil damage law); Perry v. Metropolitan St. R. Co., 68 App. Div. (N. Y.) 351; Orscheln v. Scott, 90 Mo. App. 352, 365; Kingfisher v. Altizer, 13 Okla. 121; Johnson v. Wasson C. Co., 173 Ill. App. 414 (must not be moved).

³⁷ Aspy v. Botkins, 160 Ind. 170 (*quasi* exposure by showing woman's knee); Garvick v. Burlington, etc. R. Co., 124 Iowa 691. See § 454.

³⁸ Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582.

But indecent exposure is not a fatal error if within the *res gestae*. Cook v. Danaher L. Co., 61 Wash. 118. It is said in a later case that the exhibition of any part of the body may be proper if it is so connected with the *res gestae* as to be necessary to the administration of justice. "Indecency depends upon the purpose of the utterance or act." Dunkin v. Hoquiam, 56 Wash. 47.

³⁹ Citizens' St. R. Co. v. Willooby, 134 Ind. 563, 8 Am. Neg. Cas. 224; Birmingham R. L. & P. Co. v. Rutledge, 142 Ala. 195.

her daughter to weep are not grounds for reversing a judgment in her favor.⁴⁰ The right to exhibit an injured limb is not to be denied the plaintiff because she was young, handsome and attractive.⁴¹ In the absence of visible wounds or injuries it is improper to permit the exhibition of the person of the plaintiff for the purpose of conducting experiments to prove that he will cry out with pain, or that his muscles will grow rigid when his limbs are manipulated.⁴²

The Ontario court of appeal has followed the courts of the states on this subject, saying that in England there is a strange silence upon it; only one case is to be found, which is merely noted in the Times newspaper of the 15th of February, 1891, and not reported, wherein Mr. Justice Wright refused at *nisi prius* to permit a wound to be shown to the jury. But the exhibition of injuries which had happened to another person, for the purpose of contradicting evidence given on behalf of the plaintiff in an action for bodily injuries, was held improper unless their nature was shown, and even then the reviewing court doubted whether it would be otherwise, "for the breaking and healing of one man's leg cannot afford much evidential light upon the breaking and healing of another man's, *i. e.* the plaintiff's, which is the real subject of investigation." In this case the plaintiff was permitted to show the injured part for the purpose of having it examined by a jury, the court directing that no conclusion was to be drawn from its appearance.⁴³ In an action to recover damages for malpractice the plaintiff was allowed to exhibit his leg, apparently for another purpose than that the jury might see it, quite unconnected with the medical evidence of its condition, which was undisputed; the jury were not warned not to draw any inference of negligence from its appearance. It seemed to the court that this was a course which the defendant might well complain of, and that it was cal-

⁴⁰ *Selleck v. Janesville*, 100 Wis. 157, 4 Am. Neg. Rep. 352, 41 L.R.A. 563, 69 Am. St. 906; *Sherwood v. Sioux Falls*, 10 S. D. 405.

⁴¹ *Omaha St. R. Co. v. Emminger*, 57 Neb. 240.

⁴² *Landro v. Great Northern R. Co.*, 117 Minn. 306.

⁴³ *Sornberger v. Canadian Pac. R. Co.*, 24 Ont. App. 263.

culated to prejudice him extremely with the jury. "The difference between a deliberate and studied exhibition of this kind, and the casual and necessary view which a jury must have of parts of the body always exposed to view hardly needs to be emphasized."⁴⁴

In an action by a father to recover damages resulting from an injury to his child from the discharge of a pistol there was no error in permitting the physician who operated on the child to exhibit to the jury an eye which was removed as the result of the injury, the bullet which inflicted the injury, and a piece of bone which was removed in extracting the bullet.⁴⁵ Though the rule permits the exhibition of an amputated foot, it will not be given effect when the legitimate purpose for which it may be done is slight and the strong tendency is to work improper and illegitimate results.⁴⁶ A court is not bound to make a personal inspection of the plaintiff in order to determine a dispute between the opposing medical experts.⁴⁷ If an injury to the kidneys is claimed to have been sustained by the plaintiff he may be required to produce a specimen of his urine for examination and analysis.⁴⁸ An unreasonable refusal to show the injured member may be considered by the jury as

⁴⁴ Laughlin v. Harvey, 24 Ont. App. 438.

⁴⁵ Seltzer v. Saxton, 71 Ill. App. 229.

A garment worn when a battery was sustained and showing damage at or near the place where the plaintiff was injured may be received. Morris v. Miller, 83 Neb. 218, 20 L.R.A.(N.S.) 907, 131 Am. St. 636; Keen v. St. Louis, etc. R. Co., 129 Mo. App. 301 (for the purpose of proving by the blood spots on it the severity of the assault made upon the plaintiff).

If there is no contention as to the fact that the plaintiff was injured it seems questionable to permit an exhibition of the injured member. Turon v. Chicago City R. Co., 152 Ill. App. 351.

⁴⁶ Rost v. Brooklyn Heights R. Co., 10 App. Div. (N. Y.) 477.

A dramatic exhibition of the plaintiff's condition has been condemned. Hatfield v. St. Paul & D. R. Co., 33 Minn. 130, 53 Am. Rep. 14; Felsch v. Babb, 72 Neb. 736. It has been held proper to make a demonstration to show the extent to which an injured member has been affected, as by the use of a hypodermic needle. Stephens v. Elliott, 36 Mont. 92; Osborne v. Detroit, 32 Fed. 36.

⁴⁷ French v. Brooklyn Heights R. Co., 57 App. Div. (N. Y.) 204, 9 Am. Neg. Rep. 353.

⁴⁸ Cleveland, etc. R. Co. v. Huddleston, 151 Ind. 540, 2 Am. Neg. Rep. 116, 36 L.R.A. 681.

bearing on the plaintiff's good faith, as in other cases of a party declining to produce the best evidence in his power.⁴⁹

§ 453. **Expressions, conduct and religious belief of sufferer.** Subject to limitations, the natural utterances and expressions made by an injured person concerning his feelings, either to his attending physicians or others, are proper matters for proof whenever the physical or mental condition of such person is a pertinent subject of inquiry.⁵⁰ But such declarations, made

⁴⁹ *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734.

⁵⁰ *Seeley v. Central Vermont R. Co.*, 88 Vt. 178; *Birmingham Railway, Light & Power Co. v. Roach*, — Ala. —, 66 So. 82; *Frederick v. Morse*, 88 Vt. 126; *Grasselli C. Co. v. Davis*, 166 Ala. 471; *Western U. Tel. Co. v. Rowell*, 153 Ala. 295; *Birmingham R. L. & P. Co. v. Enslen*, 144 Ala. 343; *Kansas City, etc. R. Co. v. Butler*, 143 Ala. 262; *Same v. Matthews*, 142 Ala. 298; *Birmingham R. L. & P. Co. v. Rutledge*, 142 Ala. 195; *St. Louis S. R. Co. v. Jackson*, 93 Ark. 119; *Denver City T. Co. v. Martin*, 44 Colo. 324; *Gilmore v. American T. & S. Co.*, 79 Conn. 498 (made during treatment by physician); *Georgia R. & E. Co. v. Gilleland*, 33 Ga. 621; *Atlanta, etc. R. Co. v. Gardner*, 122 Ga. 82, 18 Am. Neg. Rep. 325 (must be spontaneous and involuntary exclamations or outcries, convulsive movements or other physical manifestations of existing pain); *Cedartown v. Brooks*, 2 Ga. App. 583; *Indiana U. T. Co. v. Jacobs*, 167 Ind. 85; *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360; *Indianapolis & M. T. Co. v. Reeder*, 37 Ind. App. 262; *Indianapolis St. R. Co. v. Haverstick*, 35 Ind. App. 281, 111 Am. St. 163; *Duffey v. Consolidated B. C. Co.*, 147 Iowa 225, 30 L.R.A.(N.S.) 1067; *Patton v. Sanborn*, 133 Iowa 650; *Fish-*

burn v. Burlington & N. R. Co., 127 Iowa 483 (manifestations of suffering by young child); *Buce v. Eldon*, 122 Iowa 92; *Federal B. Co. v. Reeves*, 77 Kan. 111; *Chesapeake & O. R. Co. v. Wiley*, 134 Ky. 461; *Geiselman v. Schmidt*, 106 Md. 580; *Weeks v. Boston E. R. Co.*, 190 Mass. 563; *Marshall v. Saginaw Valley T. Co.*, 157 Mich. 541; *O'Dea v. Michigan Cent. R. Co.*, 142 Mich. 265; *Mississippi Cent. R. Co. v. Turnage*, 95 Miss. 854, 21 Am. Neg. Rep. 595, 24 L.R.A.(N.S.) 253; *Lindsay v. Kansas City*, 195 Mo. 166; *De Courcey v. Prendergast C. Co.*, 140 Mo. App. 169; *Heiberger v. Missouri & K. Tel. Co.*, 133 Mo. App. 452; *Estes v. Missouri Pac. Co.*, 110 Mo. App. 725; *Nixon v. Omaha, etc. St. R. Co.*, 79 Neb. 550; *Orlando v. Syracuse R. T. Co.*, 109 App. Div. (N. Y.) 356; *Gosa v. Southern R. Co.*, 67 S. C. 347; *Texas Cent. R. Co. v. Wheeler*, 52 Tex. Civ. App. 603; *South Texas Tel. Co. v. Tabb*, 52 Tex. Civ. App. 213; *Gulf, etc. R. Co. v. Luther*, 40 Tex. Civ. App. 517; *Stevens v. Friedman*, 58 W. Va. 78; *Missouri, etc. R. Co. v. Linton* (Tex. Civ. App.), 141 S. W. 129; *Southern R. Co. v. Parham*, 10 Ga. App. 531 (moans and groans while asleep); *Broyles v. Prisock*, 97 Ga. 643, 11 Am. Neg. Cas. 333; *West Chicago St. R. Co. v. Carr*, 170 Ill. 478, 483; *Island C. Co. v.*

some time after the injury, to the effect that he suffers, if not made to a physician in professional attendance cannot be proven in some states.⁵¹ The general rule does not extend to the mere

Risher, 13 Ind. App. 98, 14 Am. Neg. Cas. 480; *Huntington v. Burke*, 21 Ind. App. 655 (including declarations of existing pain made long after the injury, which was claimed to be permanent); *Lacas v. Detroit City R. Co.*, 92 Mich. 412, 4 Am. Neg. Cas. 138; *Will v. Mendon*, 108 Mich. 251; *Williams v. Great Northern R. Co.*, 68 Minn. 55, 37 L.R.A. 199, 2 Am. Neg. Rep. 385; *Edlund v. St. Paul City R. Co.*, 78 Minn. 434; *Omaha St. R. Co. v. Emminger*, 57 Neb. 240; *Link v. Sheldon*, 136 N. Y. 1; *McCready v. Staten Island E. R. Co.*, 51 App. Div. (N. Y.) 338; *Bennett v. Northern Pac. R. Co.*, 2 N. D. 112, 17 Am. Neg. Cas. 158, 13 L.R.A. 465; *Bagley v. Mason*, 69 Vt. 175 (complaints made to physicians are not inadmissible because they were consulted with a view to their becoming witnesses in the suit brought to recover for the injuries sustained; but in Wisconsin it is otherwise if the physician to whom the complaints were made examined the plaintiff solely for the purpose of testifying as an expert, *Abbot v. Heath*, 84 Wis. 314); *Cicero*, etc. *St. R. Co. v. Priest*, 190 Ill. 592; *Northern Pac. R. Co. v. Umlin*, 158 U. S. 271, 39 L. ed. 977; *Western U. Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. 148; *Carthage T. Co. v. Andrews*, 102 Ind. 138, 52 Am. Rep. 653; *McKeigue v. Janesville*, 68 Wis. 50; *Bridge v. Oshkosh*, 71 Wis. 363; *Bacon v. Charlton*, 7 Cush. 586; *Hatch v. Fuller*, 131 Mass. 574; *Insurance Co. v. Mosley*, 8 Wall. 397, 405, 19 L. ed. 437, 440;

Martin v. Sherwood, 74 Conn. 475; *State v. Dart*, 29 Conn. 153, 76 Am. Dec. 596; *McCambridge v. Chicago*, 178 Ill. App. 513; *Shock v. Cooling* (Mich.), 141 N. W. 675.

Evidence of complaints of existing pain are admissible though the declarant was under a delusion at the time of making them. *Knox v. Robbins* (Tex. Civ. App.), 151 S. W. 1134.

Whether the expressions of pain are real or feigned is a question for the jury. *Houston & T. C. R. Co. v. Shafer*, 54 Tex. 641; *Missouri, K. & T. Ry. Co. of Texas v. Graham*, — Tex. Civ. App. —, 168 S. W. 55.

⁵¹ *Roche v. Brooklyn City & N. R. Co.*, 105 N. Y. 294, 59 Am. Rep. 506; *Atlanta St. R. Co. v. Walker*, 93 Ga. 462; *Donohue v. Brooklyn*, etc. *R. Co.*, 53 App. Div. (N. Y.) 348; *Union Pac. R. Co. v. McMican*, 194 Fed. 393, 114 C. C. A. 311; *Casey v. Chicago City R. Co.*, 237 Ill. 140; *Lake St. E. R. Co. v. Shaw*, 203 Ill. 39; *Etzkorn v. Oelwein*, 142 Iowa 107; *Comstock v. Georgetown*, 137 Mich. 541; *Gibler v. Quincy*, etc., *R. Co.*, 129 Mo. App. 93. *Contra*, *McCormick v. Detroit*, etc. *R. Co.*, 141 Mich. 17, 18 Am. Neg. Rep. 484; *International*, etc. *R. Co. v. Lane* (Tex. Civ. App.), 127 S. W. 1066; *Western Steel C. & F. Co. v. Bean*, 163 Ala. 255 (may be made at any time if they relate to existing pain); *Shearer v. Buckley*, 31 Wash. 370, 14 Am. Neg. Rep. 218, citing cases; *Colorado Springs & I. R. Co. v. Allen*, 48 Colo. 4; *Missouri, K. & T. Ry. Co. of Texas v. Graham*, — Tex. Civ. App. —, 168 S. W. 55.

narration of past symptoms or descriptive statements which furnish no evidence of the existence of suffering except the assertion of the party.⁵² Neither is it to be extended so as to include statements which are not part of the *res gestæ*, or are not made to a physician during treatment, or upon an examination prior to and without reference to the bringing of an action to recover damages for the injury complained of, unless the examination should be made at the instance of the defendant with a view to the trial. Hence, where a physician who made an examination shortly before the trial was asked whether the plaintiff then suffered, his answer that she told him she did was mere hearsay.⁵³ This is scarcely harmonizable with the rule in Massachusetts, in which the attending physician testified that the plaintiff had told him he could not get his arm up. This testimony was held to be properly admitted. "The statement made by the plaintiff purported to be a description of his symptoms at the time it was made, and not a narration of something that was past, and it may fairly be inferred that it was made for the purpose of medical advice and treatment. At any rate, it was only a day or two before, or possibly during, the trial. It does not appear that such is not the case."⁵⁴ This case has been quoted from with approval and its rule applied by the supreme court of the United States.⁵⁵ The rule is also in effect in Mississippi.⁵⁶

⁵² Williams v. Great Northern R. Co., 68 Minn. 55, 2 Am. Neg. Rep. 385, 37 L.R.A. 199; Edlund v. St. Paul City R. Co., 78 Minn. 434; Keller v. Gilman, 93 Wis. 9; Martin v. Sherwood, 74 Conn. 475; Brady v. Springfield T. Co., 140 Mo. App. 421. See St. Louis, etc. R. Co. v. Chaney, 77 Kan. 276, modifying Atchison, etc. R. Co. v. Johns, 36 Kan. 769, 59 Am. Rep. 609; Empire Coal Co. v. Gravlee, 9 Ala. App. 657.

⁵³ West Chicago St. R. Co. v. Carr, 170 Ill. 478; Chicago v. McNally, 227 Ill. 14; Chesapeake & O. R. Co. v. Wiley, 134 Ky. 461; O'Dea v. Michigan Cent. R. Co., 142 Mich. Suth. Dam. Vol. II.—15.

265; Kath v. Wisconsin Cent. R. Co., 121 Wis. 503, 16 Am. Neg. Rep. 152. See McCullough v. Aurora, etc. R. Co., 154 Ill. App. 208; Frick v. Same, id. 277; Smith v. Chicago City R. Co., 165 Ill. App. 190.

⁵⁴ Fleming v. Springfield, 154 Mass. 529, 26 Am. St. 268; Dow v. Oroville, 22 Cal. App. 215; St. Louis S. R. Co. v. Pruitt (Tex. Civ. App.), 157 S. W. 236. See Martin v. Sherwood, *supra*. *Contra*, Acme C. P. Co. v. Westman, 20 Wyo. 143.

⁵⁵ Northern Pac. R. Co. v. Urlin, 158 U. S. 271, 39 L. ed. 977.

⁵⁶ Mississippi Cent. R. Co. v. Turnage, 95 Miss. 854, 24 L.R.A.

The physical manifestations of a nervous derangement and its effect upon the sufferer may be testified to by a witness who has observed him.⁵⁷ The mental difference observed in the plaintiff in an action for the breach of a marriage promise after the cessation of the defendant's visits may be shown.⁵⁸ The extent of the mental suffering caused by a libel may be determined from a consideration of the susceptibility, in general, of the average person to such suffering; no aid is to be derived from the history of the plaintiff.⁵⁹ In an action to recover for physical and mental suffering it may be shown on cross-examination that the plaintiff's religious belief gave her such control of her feelings, or she believed it did, as to render her insensible to pain when she willed it to be so.⁶⁰ It is competent to show in support of the contention that plaintiff was permanently injured that he took medicine because of his suffering.⁶¹

§ 454. **Photographs.** Stereoscopic views and photographs of damaged premises and injured persons, if taken soon after or shortly before the injury complained of occurred and properly verified as to their correctness, are admissible to show their condition.⁶² They are also admissible to illustrate a defect in a

(N.S.) 253; *Mobile & O. R. Co. v. Carpenter*, 104 Miss. 706.

⁵⁷ *Bowen v. Seaboard A. L. R. (N. C.)*, 60 S. E. 898.

⁵⁸ *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547.

⁵⁹ *Tingley v. Times Mirror Co.*, 151 Cal. 1.

⁶⁰ *Ft. Worth & D. City R. Co. v. Travis*, 45 Tex. Civ. App. 117.

⁶¹ *Southern R. Co. v. Cunningham*, 152 Ala. 147.

⁶² *Bonnet v. Foote*, 47 Colo. 282, 28 L.R.A. (N.S.) 136 (photograph of injured limb taken five years after injury, competent); *Raab v. Roberts*, 30 Ind. App. 6; *Elzig v. Bales*, 135 Iowa 208; *McKarren v. Boston & N. St. R. Co.*, 194 Mass. 179 (may be verified by medical expert under whose direction and in whose presence photograph was taken); *Davis*

v. Adrian, 147 Mich. 300; *Galveston, etc. R. Co. v. Harper*, 53 Tex. Civ. App. 614; *Chicago & A. R. Co. v. Myers*, 86 Ill. App. 401; *People's G. L. & C. Co. v. Amphlett*, 93 id. 194; *Dorsey v. Habersack*, 84 Md. 117; *Alberti v. New York, etc. R. Co.*, 118 N. Y. 77, 9 Am. Neg. Cas. 664, 6 L.R.A. 765; *Cooper v. St. Paul City R. Co.*, 54 Minn. 379, 4 Am. Neg. Cas. 257; *Machine Co. v. Compress Co.*, 105 Tenn. 187, 53 L.R.A. 482; *German Theological School v. Dubuque*, 64 Iowa 736; *Cozzens v. Higgins*, 1 Abb. App. Dec. 451; *Reddin v. Gates*, 52 Iowa 210.

Verification is essential, and is a question for the court. *Goldsboro v. Central R. Co.*, 60 N. J. L. 49, 2 Am. Neg. Rep. 408; *Blair v. Pelham*, 118 Mass. 420; *Baustian v. Young*, 152 Mo. 317; *Ryan v. City of Chicago*,

highway.⁶³ Photographic negatives taken by the Roentgen process are competent in actions to recover for personal injuries generally.⁶⁴ A plaintiff will not be required to submit his neck to be photographed by the use of the Roentgen or X-rays in order to ascertain the nature of his injuries unless the application is seasonably made, and it is shown that the person by whom it was proposed the photograph should be taken had the requisite skill to use the rays properly,⁶⁵ nor if the court is advised that danger may attend the taking of a photograph.⁶⁶ In an action to recover for the death of a child a photograph taken two years prior thereto, the child then being five years old, was admissible to show its physical development at the time of death and the probabilities of future growth and development.⁶⁷ Photographs are inadmissible if the original can be exhibited to the jury unless they are used to aid in identifying some writing or in detecting a forgery. It has been held, with some hesitation,

181 Ill. App. 642. It should include care and accuracy in taking the photograph offered, and its relevancy to the issue. Error in permitting reference to a photograph which has not been properly verified is cured by a subsequent verification made on its being formally introduced in evidence. *Beardslee v. Columbia*, 188 Pa. 496, 68 Am. St. 883. It need not be made by the photographer; it may be made by any one competent to speak from personal observation. *McGar v. Bristol*, 71 Conn. 652.

⁶³ *Baustian v. Young*, 152 Mo. 317; *Lake Erie & W. R. Co. v. Wilson*, 189 Ill. 89; *Blair v. Pelham*, 118 Mass. 420; *Barker v. Perry*, 67 Iowa 146; *Krauss v. Ballinger*, 171 Ill. App. 534.

A photograph of the place of an accident is admissible although not taken until after changes have been made in the highway if proof of the nature of the changes between the time of the accident and the time of photographing be made. *Beardslee*

v. Columbia, 188 Pa. 496, 68 Am. St. 883.

⁶⁴ *Kimball v. Northern E. Co.*, 159 Cal. 225; *Miller v. Mintun*, 73 Ark. 183; *Chicago City R. Co. v. Smith*, 226 Ill. 178; *Chicago & J. E. R. Co. v. Spence*, 213 Ill. 220, 104 Am. St. 213; *Dean v. Wabash R. Co.*, 229 Mo. 425; *Carlson v. Benton*, 66 Neb. 486; *Houston & T. Cent. R. Co. v. Shapard*, 54 Tex. Civ. App. 596; *Tish v. Welker*, 5 Ohio Dec. 725; *Bruce v. Beall*, 99 Tenn. 303; *De Forge v. New York, etc. R. Co.*, 178 Mass. 59, 9 Am. Neg. Rep. 501; *Mauch v. Hartford*, 112 Wis. 40, 11 Am. Neg. Rep. 63; *Jameson v. Weld*, 93 Me. 345; *Bruce v. Beall*, 99 Tenn. 303; *Geneva v. Burnett*, 65 Neb. 464, 58 L.R.A. 287.

⁶⁵ *Wittenberg v. Onsgard*, 78 Minn. 342, 47 L.R.A. 141.

⁶⁶ *Dean v. Wabash R. Co.*, 229 Mo. 425.

⁶⁷ *Taylor, etc. R. Co. v. Warner*, 88 Tex. 642; *Davis v. Railroad Co.*, 136 N. C. 115 (taken just before and after the injury).

that a photograph of an injured limb, the plaintiff being in court, was not improperly allowed to be taken to the jury room, the condition of the limb being described substantially as shown by the photograph, and no request being made to permit a view of the original.⁶⁸ This ruling was followed by another to the effect that there must be a substantial, legitimate reason for the use of photographs in order to show the degree of physical disablement. If they are not substantially necessary or instructive to show material facts or conditions, and are of such a character as to arouse sympathy or indignation, or divert the minds of the jury to improper or irrelevant considerations, they should be excluded.⁶⁹ It is "grossly improper" and a "defilement of the proceedings in a court of justice" to receive in evidence photographs showing rear views of the person of a young female, nude from below the shoulders to mid-thigh.⁷⁰

§ 455. **Life and annuity tables.** Standard life and annuity tables are generally admissible in evidence to show the probable duration of life. They are not to be accepted as forming a legal basis for a calculation, but as evidence to be considered in connection with all the other evidence upon the question.⁷¹

⁶⁸ *Baxter v. Chicago, etc. R. Co.*, 104 Wis. 307, 6 Am. Neg. Rep. 746.

⁶⁹ *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. 892, 47 L.R.A. 691.

⁷⁰ *Guhl v. Whitcomb*, 109 Wis. 69.

⁷¹ *Broz v. Omaha Maternity & General Hospital Ass'n*, 96 Neb. 648, L.R.A. 1915D, 334; *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419; *O'Dell v. James Stewart & Co.*, 96 Neb. 147; *Ranta v. Newport Min. Co.*, 180 Mich. 459; *Oliver v. Pettacconsett Const. Co.*, 36 R. I. 477; *Gulf, C. & S. F. Ry. Co. v. Stewart*, — Tex. Civ. App. —, 164 S. W. 1059; *Missouri, K. & T. Ry. Co. of Texas v. Graham*, — Tex. Civ. App. —, 168 S. W. 55; *Colusa Parrot M. & S. Co. v. Monahan*, 162 Fed. 276, 89 C. C. A. 256; *Birmingham R., L. & P. Co. v. Wright*, 153 Ala. 99; *Southern R. Co. v. Cunningham*, 152

Ala. 147; *Nevers L. Co. v. Fields*, 151 Ala. 367; *Northern Alabama R. Co. v. Key*, 150 Ala. 641; *St. Louis, etc. R. Co. v. Hitt*, 76 Ark. 227; *Valente v. Sierra R. Co.*, 151 Cal. 534; *Southern R. Co. v. Brock*, 132 Ga. 858; *Western & A. R. Co. v. Clark*, 117 Ga. 548; *Central R. Co. v. Minor*, 2 Ga. App. 804; *Calvert v. Springfield E. L. & P. Co.*, 231 Ill. 290, 14 L.R.A.(N.S.) 782; *Springfield E. L. & P. Co. v. Calvert*, 134 Ill. App. 285; *Winn v. Cleveland, etc. R. Co.*, 143 Ill. App. 71; *Pittsburgh, etc. R. Co. v. Ross*, 169 Ind. 3; *Same v. Lightheiser*, 168 Ind. 438; *Peterson v. Brackey*, 143 Iowa 75 (though decedent addicted to the use of intoxicants); *Clark v. Van Vleck*, 135 Iowa 184; *Croft v. Chicago, etc. R. Co.*, 134 Iowa 411 (regardless of the sex of the party

In Georgia such tables are not admissible in an action to recover for permanent personal injury unless evidence has been

whose expectancy is in issue); *Patton v. Sanborn*, 133 Iowa 650 (though earning capacity of the plaintiff is not involved); *Illinois Cent. R. Co. v. Houchins*, 121 Ky. 526, 1 L.R.A.(N.S.) 375; *Banks v. Braman*, 195 Mass. 97; *Merrinane v. Miller*, 157 Mich. 279, 25 L.R.A.(N.S.) 585, 148 Mich. 412; *Haney v. Pinckney*, 155 Mich. 656; *Jones v. McMillan*, 129 Mich. 86; *Moyse v. Northern Pac. R. Co.*, 41 Mont. 272; *Robinson v. Helena L. & R. Co.*, 38 Mont. 222, modifying a remark in *Bourke v. Butte E. P. Co.*, 33 Mont. 267; *Davis v. Borland*, 83 Neb. 281; *South Omaha v. Sutcliffe*, 72 Neb. 746, citing the text; *Horst v. Lewis*, 71 Neb. 370; *Sledge v. Weldon L. Co.*, 140 N. C. 459; *Shawnee v. Slankard*, 29 Okla. 133; *International, etc. R. Co. v. Tisdale*, 36 Tex. Civ. App. 174 (regardless of the extra hazardous nature of the plaintiff's occupation); *Pecos, etc. R. Co. v. Williams*, 34 Tex. Civ. App. 100 (though life in question not insurable); *Norfolk & W. R. Co. v. Spencer*, 104 Va. 657, 20 Am. Neg. Rep. 676; *Virginia & S. R. Co. v. Bailey*, 103 Va. 205, 117 Am. Neg. Rep. 259; *Duskey v. Green Lake S. Co.*, 51 Wash. 145 (though disability partial); *Suell v. Jones*, 49 Wash. 582; *Hackett v. Wisconsin Cent. R. Co.*, 141 Wis. 464; *Kountz v. Toledo, etc. R. Co.*, 189 Fed. 494; *Southern R. Co. v. Adkins*, 133 Ky. 219; *Louisville B. & I. Co. v. Hart*, 122 Ky. 731; *Brenisholtz v. Pennsylvania R. Co.*, 229 Pa. 88; *Emery v. Philadelphia*, 208 Pa. 492, 16 Am. Neg. Rep. 563; *Hyland v. Southern Bell Tel. & T. Co.*, 70 S. C. 315; *Richardson v. Spokane*, 67 Wash. 621; *Southern R. Co. v. Parham*, 10 Ga. App. 531; *St. Louis, etc. R. Co. v. Trotter*, 101 Ark. 183; *Cubbage v. Estate of Youngerman*, 155 Iowa 39; *Huntington v. Burke*, 21 Ind. App. 655; *Allen v. Ames College R. Co.*, 106 Iowa 602; *Greer v. Louisville & N. R. Co.*, 94 Ky. 169, 15 Am. Neg. Cas. 191, 42 Am. St. 345; *Rooney v. New York, etc. R. Co.*, 173 Mass. 222, 6 Am. Neg. Rep. 78 (indicating that the value of such tables in cases of personal injuries is not large); *Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 1 Am. Neg. Rep. 403; *Nelson v. Lake Shore, etc. R. Co.*, 104 Mich. 582; *Friend v. Ingersoll*, 39 Neb. 717; *Camden & A. R. Co. v. Williams*, 61 N. J. L. 646; *Steinbrunner v. Pittsburgh, etc. R. Co.*, 146 Pa. 504, 28 Am. St. 806 (a case which is said in the New Jersey case cited to contain a very satisfactory exposition of the legitimate use of the Carlisle tables as applied to actions for injuries resulting in death); *Morrison v. McAtee*, 23 Ore. 530; *Knapp v. Sioux City & P. R. Co.*, 71 Iowa 41, 14 Am. Neg. Cas. 647, overruling *Simonson v. Chicago, etc. R. Co.*, 49 Iowa 87, 14 Am. Neg. Cas. 674; *Texas M. R. Co. v. Douglass*, 69 Tex. 694; *Lincoln v. Smith*, 28 Neb. 762; *Berg v. Chicago, etc. R. Co.*, 50 Wis. 427, 17 Am. Neg. Cas. 911; *Mulcairns v. Janesville*, 67 Wis. 24, 17 Am. Neg. Cas. 903; *McKeigue v. Janesville*, 68 Wis. 50; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 30 L. ed. 257; *Sauter v. New York Cent. R. Co.*, 66 N. Y. 50, 6 Am. Neg. Cas. 208, 23 Am. Rep. 18; *Central R. v. Crosby*, 74 Ga. 737, 14 Am. Neg. Cas. 140, 58 Am. Rep. 463; *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513,

received as to the capacity of the plaintiff to earn money.⁷² And in Pennsylvania they are not admissible in actions for personal injuries because based on the average anticipation of death without taking account of capacity to work, indolence, vicious habits, or a tendency thereto, perils of employment, prior state of health or diminution of ability to earn.⁷³ The rule is otherwise in Wisconsin.⁷⁴ In some states mortality tables are not admissible in an action for personal injuries unless these are of a permanent character;⁷⁵ neither are they admissible in an action to recover for the breach of a contract

16 Am. Neg. Cas. 119, 134, 7 L.R.A. 500; *Cooper v. Lake Shore, etc. R. Co.*, 66 Mich. 261, 12 Am. Neg. Cas. 130, 11 Am. St. 482; *Galveston, etc. R. Co. v. Johnson*, 24 Tex. Civ. App. 180; *Northern Pac. R. Co. v. Chervenak*, 203 Fed. 884, 122 C. C. A. 178 (testimony as to life expectancy of a man at 19 or 20 years competent to show expectancy of boy of 5 years when injured); *Scott v. Chicago, etc. R. Co.*, 160 Iowa 306; *Speight v. Seaboard A. L. R.* 161 N. C. 80. See § 1251.

They are not to be excluded in case of permanent injury though the person injured is dead and the action is continued by his administrator. *Proctor C. Co. v. Beaver*, 151 Ky. 839.

The value of such tables is not great in certain cases. *The Saginaw and The Hamilton*, 139 Fed. 906; *The William Branfoot*, 48 id. 914.

In *Shippen's App.*, 80 Pa. 391, it was ruled that the Carlisle tables were not to be relied upon in estimating the value of an estate by the curtesy; each case must be determined by its own circumstances. They are only admissible when the age of the person whose rights are in question is within the computation contained in them. *Rajnowski v. Detroit, etc. R. Co.*, 74 Mich. 20.

In Missouri and some other states (*Nelson v. Branford L. & W. Co.*, 75 Conn. 548, 13 Am. Neg. Rep. 490; *Pittsburg, etc. R. Co. v. Sudhoff*, 173 Ind. 314; *Stephens v. Elliott*, 36 Mont. 92), such tables are judicially noticed, and in the former state the jury may be instructed as to the expectancy of life if the age of the person is shown. *Timson v. Manufacturers' C. C. Co.*, 220 Mo. 580, 21 Am. Neg. Rep. 679.

Such tables are admissible in evidence though they do not apply to persons engaged in the same occupation as the party injured. *San Bois Coal Co. v. Resetz*, 43 Okla. 384.

⁷² *Macon, etc. R. Co. v. Moore*, 99 Ga. 229; *Atlanta, etc. R. Co. v. Gardner*, 122 Ga. 82, 18 Am. Neg. Rep. 325.

⁷³ *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. 98; *Pauza v. Lehigh Valley C. Co.*, 231 Pa. 577. See *Rundle v. Slate Belt E. St. R. Co.*, 33 Pa. Super. 233.

⁷⁴ *Crouse v. Chicago, etc. R. Co.*, 102 Wis. 196.

⁷⁵ *Leach v. Detroit E. R.*, 125 Mich. 373; *Foster v. Bellaire*, 127 Mich. 13; *MacGregor v. Rhode Island Co.*, 27 R. I. 85; *Pensacola S. v. Wilkins*, 64 Fla. 407.

of employment, the term of which was during the continuance of the satisfactoriness of the service.⁷⁶ In Mississippi the tables are not admissible unless it is shown that the parties whose life expectancies are involved are of the class upon whose lives the tables are based.⁷⁷ There they are not admissible unless the decedent was in good health;⁷⁸ but this is contrary to the rule in Nebraska.⁷⁹ In Iowa they are not a good basis upon which to estimate prospective damages in favor of one permanently injured to such an extent that his life has been materially shortened.⁸⁰ In Illinois they are competent, in connection with other evidence, to show the value of a life estate.⁸¹ The probable duration of life may be arrived at from evidence as to the age, health, extent of the injury, physical condition and habits of the plaintiff.⁸²

SECTION 5.

VERDICT AND JUDGMENT.

§ 456. Deliberations of the jury; quotient verdicts; impeachment of verdicts by affidavits; itemization of damages. So far as the amount of the verdict depends upon opinion the jurors are to determine it upon their own judgment. They should proceed upon the description of the subject as they find it from the testimony, and avail themselves of such aid as is afforded by the opinions of witnesses allowed to be given them. They are not obliged, however, to yield their own judgment, and should not conform their verdict to such opinions. Their find-

⁷⁶ Sax v. Detroit, etc. R. Co., 125 Mich. 252.

The expectancy of life is usually shown from the date of trial, but the defendant has no right to object if it is shown as from the date of injury. Breen v. Iowa Cent. R. Co., 159 Iowa 537.

⁷⁷ Vicksburg R. P. & Mfg. Co. v. White, 82 Miss. 468.

⁷⁸ Mississippi O. Co. v. Smith, 95

Miss. 528; Colbert v. Rhode Island Co. (R. I.).

⁷⁹ Acken v. Tinglehoff, 83 Neb. 296; Broz v. Omaha Maternity & General Hospital Ass'n, 96 Neb. 648, L.R.A.1915D, 334.

⁸⁰ Canfield v. Chicago, etc. R. Co., 142 Iowa 658.

⁸¹ Knight v. Collings, 227 Ill. 348.

⁸² Moultrie v. Cook, 11 Ga. App.

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ing may be more or less in amount than that stated by any witness.⁸³

They will not vitiate their verdict by taking an arithmetical average of their several estimates as an expedient to ascertain their present judgments, or as a basis of their further consideration of the case.⁸⁴ But it will be a violation of their duty and afford cause for setting aside their verdict if they agree before taking such average to adopt it as their verdict, and determine the amount accordingly,⁸⁵ or arrive at it by any

⁸³ *Linforth v. San Francisco G. & E. Co.*, 156 Cal. 63, quoting the text; *Thompson v. De Weese-Dye D. & R. Co.*, 25 Colo. 243; *Consolidated I. M. Co. v. Trenton Hygeian I. Co.*, 57 Fed. 898; *Western & A. R. Co. v. Brown*, 58 Ga. 534; *Harvey v. Boswell*, 65 id. 550; *Brewer v. Tyingham*, 12 Pick. 547.

⁸⁴ *Birmingham R. L. & P. Co. v. Clemons*, 142 Ala. 160; *Greeley I. Co. v. Von Trotha*, 48 Colo. 12; *Groves, etc. R. Co. v. Herman*, 206 Ill. 34; *Winn v. Cleveland, etc. R. Co.*, 143 Ill. App. 71; *McElhone v. Wilkinson*, 121 Iowa 429; *Battle Creek v. Haak*, 139 Mich. 514; *Kolb v. St. Louis T. Co.*, 102 Mo. App. 143; *McCormick v. Rochester R. Co.*, 133 App. Div. (N. Y.) 760; *Lorain S. Co. v. Hayes*, 6 Ohio C. C. (N. S.) 353; *Eastern R. Co. v. Montgomery (Tex. Civ. App.)*, 139 S. W. 885; *Chicago, etc. R. Co. v. Trippett*, 50 Tex. Civ. App. 279; *Missouri, etc. R. Co. v. Hawkins*, 50 Tex. Civ. App. 128; *Gulf, etc. R. Co. v. Blue*, 46 Tex. Civ. App. 239; *Pence v. California M. Co.*, 27 Utah 378, 16 Am. Neg. Rep. 141; *Bell v. Butler*, 34 Wash. 131; *Stanley v. Stanley*, 32 Wash. 489; *Wiles v. Northern Pac. R. Co.*, 66 Wash. 337; *Ferguson v. Moore*, 98 Tenn. 342; *Luft v. Lingane*, 17 R. I. 420; *Columbus v. Ogletree*, 102 Ga. 293; *Ponca v. Crawford*, 23 Neb. 662, 8

Am. St. 144; *Parshall v. Minneapolis, etc. R. Co.*, 35 Fed. 649; *McMurdock v. Kimberlin*, 23 Mo. App. 523; *Willey v. Belfast*, 61 Me. 569; *Hunt v. Elliott*, 77 Cal. 588; *Kinsley v. Morse*, 40 Kan. 588; *Deppe v. Chicago, etc. R. Co.*, 38 Iowa 592, 14 Am. Neg. Cas. 632, 634; *Barton v. Holmes*, 16 id. 252; *St. Louis, etc. R. Co. v. Myrtle*, 51 Ind. 566, 8 Am. Neg. Cas. 223; *Guard v. Risk*, 11 id. 156; *Kreider's Est.*, 18 Pa. 374; *White v. White*, 5 Rawle 61; *Harvey v. Rickett*, 15 Johns. 87; *Grinnell v. Phillips*, 1 Mass. 530; *Dorn v. Fenno*, 12 Pick. 521; *Dunn v. Hall*, 8 Blackf. 32; *Pekin v. Winkel*, 77 Ill. 56; *Hendrickson v. Kingsbury*, 21 Iowa 379; *Davis v. Pryor*, 3 Ind. Ty. 396.

⁸⁵ *Id.*; *Haight v. Hoyt*, 50 Conn. 583; *East Tennessee, etc. R. Co. v. Winters*, 85 Tenn. 240, 12 Am. Neg. Cas. 593; *Illinois Cent. R. Co. v. Able*, 59 Ill. 131, 2 Am. Neg. Cas. 591; *Parkham v. Harney*, 6 Sm. & M. 55; *Smith v. Chatham*, 3 Caines 57; *Boynton v. Trumbull*, 45 N. H. 408; *Manix v. Malony*, 7 Iowa 81; *Barton v. Holmes*, 16 id. 252; *Thompson v. Perkins*, 26 id. 486; *Thomas v. Dickinson*, 12 N. Y. 364; *Roberts v. Failis*, 1 Cow. 238; *St. Martin v. Desnoyer*, 1 Minn. 156, 61 Am. Dec. 494; *Forbes v. Howard*, 4 R. I. 364; *Schanler v. Porter*, 7 Iowa 482; *Ellege v. Todd*, 1 Humph.

game or process of chance.⁸⁶ When a verdict is arrived at by such means there is not a concurrence of views by that intelligent discussion and consideration of the merits of the case which the law enjoins. Every verdict should be the result of reflection, and not the effect of chance or lot. Jurors being sworn to determine according to evidence, suitors have a right to expect that they will examine and decide according to the best of their ability and discernment.⁸⁷ A quotient verdict is not invalid if upon a poll of the jury each juror answered that it was his verdict; such assent makes the verdict.⁸⁸

Whether the affidavits of jurors may be read to show that a verdict has been agreed to in such an irregular way is not

43, 34 Am. Dec. 616; *Wilson v. Berryman*, 5 Cal. 44, 63 Am. Dec. 78; *Moses v. Central Park, etc. R. Co.*, 3 N. Y. Misc. 322; *Wright v. Union Pac. R. Co.*, 22 Utah 338; *Ottawa v. Gilliland*, 63 Kan. 165; *Lambourne v. Halfin*, 23 Utah 489; *Dixon v. Pluns*, 98 Cal. 384, 20 L.R.A. 698; *Flood v. McClure* (Idaho); *Pawnee D. & I. Co. v. Adams*, 1 Colo. App. 250; *International Agr. Corp. v. Abercrombie*, 184 Ala. 244, 49 L.R.A. (N.S.) 415; *Birmingham R. L. & P. Co. v. Moore*, 148 Ala. 115; *Milbourne v. Robison*, 132 Mo. App. 198; *Missouri, etc. R. Co. v. Rounds* (Tex. Civ. App.), 136 S. W. 269; *Washington L. P. Co. v. Goodrich*, 110 Va. 692.

⁸⁶ *Mitchell v. Ehle*, 10 Wend. 595; *Ruble v. McDonald*, 7 Iowa 90; *Thompson v. Perkins*, 26 id. 486; *Donner v. Palmer*, 23 Cal. 40; *Birchard v. Booth*, 4 Wis. 67; *Melish v. Arnold*, Bunb. 51; *Hale v. Cove*, 1 Str. 642

⁸⁷ Per *Livingston, J.*, in *Smith v. Chatham*, 3 Caines 57; *Simmons v. Fish*, 210 Mass. 563. See *Wiegand v. Fee*, 73 App. Div. (N. Y.) 139.

It was ruled in a late case (1898)

that "it does not necessarily follow that where a jury reaches its verdict by adopting the average amount which is revealed by taking the amount fixed by each juror and dividing the aggregate sum by twelve, it is for that reason entirely invalid. Unless the result is manifestly wrong and unjust the court is not bound to interfere. *Cowperthwaite v. Jones*, 2 Dall. 55, 1 L. ed. 287." *Cleland v. Carlisle*, 186 Pa. 110.

⁸⁸ *Dana v. Tucker*, 4 Johns. 487; *Wilson v. Berryman*, 5 Cal. 44, 63 Am. Dec. 78; *Bennett v. Baker*, 1 Humph. 399, 34 Am. Dec. 655; *Wiley v. Belfast*, 61 Me. 569; *Moses v. Central Park, etc. R. Co.*, 3 N. Y. Misc. 322.

In *Roy v. Goings*, 112 Ill. 657, the jury in answer to the court's inquiry said their verdict was the result of addition and division. After being reprobated for their conduct they were sent out again. On returning their verdict was in plaintiff's favor for the same sum as before. On being polled each juror said the verdict was his. It was presumed that the admonition of the court was observed by the jury and the verdict was sustained.

settled. In England there are conflicting decisions.⁸⁹ In this country affidavits are rejected,—not in all but in a majority of the states;⁹⁰ the decisions have fluctuated in several states, and, when compared, are not referable to consistent principles.⁹¹

⁸⁹ *Phillips v. Fowler*, Barnes 441; *Mellish v. Arnold*, Bunb. 51; *Prior v. Powers*, 1 Keb. 811; *Vaise v. Delaval*, 1 T. R. 11; *Jackson v. Williamson*, 2 id. 281; *Rex v. Woodfall*, 5 Burr. 2661; *Aylett v. Jewel*, 2 W. Bl. 1299; *Clark v. Stevenson*, id. 803; *Straker v. Graham*, 4 M. & W. 721; *Burgess v. Langley*, 5 M. & G. 722; *Addison v. Williamson*, 5 Jurist 466; *Owen v. Warburton*, 1 B. & P. N. R. 326. See, also, as to general subject of admitting or rejecting affidavits of jurors, *Milson v. Hayward*, 9 Price 134; *Hindle v. Birch*, 1 Moore 455; *Metcalf v. Dean*, Cro. Eliz. 189; *Vicary v. Farthing*, id. 411; *Heyler v. Hall*, Palm. 325; *Harvey v. Hewitt*, 8 Dowl. P. C. 598; *Norman v. Beaumont*, Willes 484; *Cogan v. Ebdon*, 1 Burr. 383; *Rex v. Simmons*, Sayre 34.

⁹⁰ *International Agr. Corp. v. Abercrombie*, 184 Ala. 244, 49 L.R.A.(N.S.) 415; *Birmingham R. L. & P. Co. v. Moore*, 148 Ala. 115; *Foley v. Everett*, 142 Ill. App. 250; *Weil v. Stone*, 33 Ind. App. 112, 104 Am. St. 243; *Rager v. L. & N. R. Co.*, 139 Ky. 760; *Battle Creek v. Haak*, 139 Mich. 514; *Green v. Terminal R. Ass'n*, 211 Mo. 18; *Milbourne v. Robison*, 132 Mo. App. 198; *St. Louis S. R. Co. v. Ricketts*, 96 Tex. 68; *McGrew v. Norris* (Tex. Civ. App.), 140 S. W. 1143; *Washington L. P. Co. v. Goodrich*, 110 Va. 692; *Ralton v. Sherwood L. Co.*, 54 Wash. 254; *Pickens v. Boom Co.*, 58 W. Va. 11; *Montgomery T. Co. v. Knable*, 158 Ala. 458 (no fraud, corruption or misconduct being shown); *Redfearn v. Thompson*

10 Ga. App. 550; *Simmons v. Fish*, 210 Mass. 563; *Peterson v. Chicago*, etc. E. R. Co., 176 Ill. App. 218; *Ritchie v. Steger*, 93 Neb. 63; *Blodgett v. Park*, 76 N. H. 435; *Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544; *Moses v. Central Park*, etc. R. Co., 3 N. Y. Misc. 322; *State v. Gage*, 52 Mo. App. 464; *State v. Fox*, 79 Mo. 109; *Phillips v. Scales Mound*, 195 Ill. 353, 363, and local cases cited; *Missouri*, etc. R. Co. v. *Hawk* (Tex. Civ. App.), 69 S. W. 1037; *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285; *Murphy v. Murphy*, 1 S. D. 316, 9 L.R.A. 820; *Luft v. Lingane*, 17 R. I. 420; *Davis v. Pryor*, 3 Ind. Ty. 396; *McMurray v. Basnett*, 19 Fla. 609, 627; *Reed v. Thompson*, 88 Ill. 245; *Chesapeake & O. R. Co. v. Patton*, 9 W. Va. 648; *Stanley v. Sutherland*, 54 Ind. 339; *Lucas v. Cannon*, 13 Bush 750; *Roy v. Goings*, 112 Ill. 656; *Johnson v. Allen*, 100 N. C. 131; *Dana v. Tucker*, 4 Johns. 487; *Meade v. Smith*, 16 Conn. 346; *State v. Freeman*, 5 id. 348; *Allison v. People*, 45 Ill. 37; *State v. McLeod*, 1 Hawks 344; *O'Barr v. Alexander*, 37 Ga. 195; *Brownell v. McEwen*, 5 Denio 367; *People v. Common Pleas*, 1 Wend. 297; *Knowlton v. McMahon*, 13 Minn. 386, 97 Am. Dec. 236; *Clugage v. Swan*, 4 Bin. 150, 5 Am. Dec. 400; *Willing v. Swazey*, 1 Browne 123; *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. 473, note; *Bladen v. Cockey*, 1 Har. & McHen. 230.

⁹¹ *Smith v. Chatham*, 3 Cai. 56; *Warner v. Robinson*, 1 Port. 194, 26 Am. Dec. 359; *Crawford v. State*,

In Iowa, after some fluctuation, the court lay down this as the true rule: "that affidavits of jurors may be received for the purpose of avoiding a verdict to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict; as that a juror was improperly approached by a party, his agent or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of the jurors; that the verdict was determined by aggregation and average, or by lot or game of chance, or other artifice or improper manner; but that such affidavit, to avoid the verdict, may not be received to show any matter which does essentially inhere in the verdict itself; as that the juror did not assent to it; that he misunderstood the instructions of the court, the statements of the witnesses, or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors; or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast."⁹² This rule seems to be now settled in that state by being repeatedly approved and restated in subsequent cases. It is also the rule in Kansas⁹³ and Tennessee,⁹⁴ and by statute in some states, that affidavits of jurors may be read to show that the verdict was arrived at by "a resort to the deter-

2 Yerg. 60; *Cochran v. Street*, 1 Wash. (Va.) 79; *Little v. Larabee*, 2 Me. 37, 11 Am. Dec. 43; *Howard v. Cobb*, 3 Day 309; *United States v. Freis*, 3 Dall. 515, note, 1 L. ed. 701; *Bradley's Lessees v. Bradley*, 4 Dall. 112, 1 L. ed. 763; *Bucknam v. Greenleaf*, 48 Me. 394; *Tenney v. Evans*, 13 N. H. 462, 40 Am. Dec. 166; *State v. Hascall*, 6 N. H. 352; *Ferrill v. Simpson*, 8 Pick. 359; *Grinnell v. Phillips*, 1 Mass. 530; *Woodward v. Leavitt*, 107 id. 453, 9 Am. Rep. 49; *Price v. Warren*, 1 Hen. & M. 385; *Commonwealth v. Drew*, 4 Mass. 391; *Suttrel v. Dry*, 1 Murphy, 94 *Cochran v. State*, 7 Humph. 544; *Luster v. State*, 11

id. 169; *Hudson v. State*, 9 Yerg. 408.

⁹² *Wright v. Illinois, etc. Tel. Co.*, 20 Iowa 195; *Migliaccio v. Smith F. Co.*, 151 Iowa 705; *Porter v. Whitlock*, 142 Iowa 66; *Clark v. Van Vleck*, 135 Iowa 194.

Jurors' testimony is competent to show that consideration was given evidence not before them. *Brown L. Co. v. Lehman*, 134 Iowa 712, 12 L.R.A.(N.S.) 88.

⁹³ *Johnson v. Husband*, 22 Kan. 277.

⁹⁴ *Crawford v. State*, 2 Yerg. 60; *Cochran v. State*, 7 Humph. 544; *Hudson v. State*, 9 Yerg. 408; *East Tennessee, etc. R. Co. v. Win- ters*, 85 Tenn. 240.

mination of chance.”⁹⁵ In Illinois a juror may be heard to impeach a verdict in which he concurred only when the misconduct of a fellow-juror occurred without the jury room.⁹⁶ In Wisconsin affidavits are competent to show that communications in the jury room, after the verdict was signed and sealed, disclosed that the foreman had communicated with the judge.⁹⁷ The rule excluding jurors’ affidavits extends to cases in which they are offered to show mistake on the part of the jurors in respect to the merits of the action, or irregularity or misconduct, or that there was a misconception of the effect of the verdict.⁹⁸ There are some exceptions which will be noticed hereafter.⁹⁹ Such affidavits are competent to support verdicts.¹ Though juries are not as a rule, bound to itemize their verdicts according to the elements of damage proved,² in some states the practice permits the court to require an itemized verdict to correspond with the damages claimed. There is a decided advantage in so doing wherever the award for any items is in

⁹⁵ *Hoare v. Hindley*, 49 Cal. 274; *Greeley I. Co. v. Von Trotha*, 48 Colo. 12; *Sutton v. Lowry*, 39 Mont. 462; *Foley v. Northrup*, 47 Tex. Civ. App. 277; *Wiles v. Northern Pac. R. Co.*, 66 Wash. 337, or by other improper methods. *San Antonio T. Co. v. Cassanova* (Tex. Civ. App.), 154 S. W. 1190.

⁹⁶ *Chicago v. Saldman*, 129 Ill. App. 282.

⁹⁷ *Dralle v. Reedsburg*, 135 Wis. 293.

Jurors’ affidavits are admissible to show occurrences during the trial outside the jury room. *Peppercorn v. Black River Falls*, 89 Wis. 38.

⁹⁸ *Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544, citing *Clum v. Smith*, 5 Hill 560; *Ex parte Caykendall*, 6 Cow 53; *Jackson v. Williamson*, 2 T. R. 281; *Vaise v. Deleval*, 1 id. 11; *Davis v. Taylor*, 2 Chitty 268. To the same effect are *Rager v. L. & N. R. Co.*, 137 Ky. 811; *Brinsfield v. Howeth*,

110 Md. 520 (agreement in consequence of threats).

⁹⁹ §§ 457, 458.

¹ *Birmingham R. L. & P. Co. v. Clemons*, 142 Ala. 160; *Dana v. Tucker*, 4 Johns. 487; *O’Brien v. Merchants’ F. Ins. Co.*, 38 N. Y. Super. Ct. 482; *Moore v. New York E. R. Co.*, 24 Abb. New Cas. 7; *McMurdock v. Kimberlin*, 23 Mo. App. 523; *Downer v. Baxter*, 30 Vt. 467; *Columbus v. Ogletree*, 102 Ga. 293, 301.

² *Ohio & M. R. Co. v. Judy*, 120 Ind. 397; *Union Pac. R. Co. v. Dunden*, 37 Kan. 1; *Power v. Augusta*, 191 Fed. 647; *Valparaiso L. Co. v. Tyler*, 177 Ind. 278; *Cleveland, etc. R. Co. v. Miller*, 165 Ind. 381; *Southern Indiana R. Co. v. Moore*, 34 Ind. App. 154; *Johnson v. St. Paul & W. C. Co.*, 131 Wis. 627. Compare *Witt v. Latimer*, 139 Iowa 273; *Cleveland, etc. R. Co. v. True*, 53 Ind. App. 156.

excess of the sum demanded because it may be reduced by the court to correspond therewith and a new trial be avoided.⁸

§ 457. **Rendering and amending verdicts.** The jury retire from the presence of the court for consideration of their verdict to be given; and it is subject to their consideration until it has been reported to and accepted by the court, actually or constructively recorded, affirmed by them in open court, and they have separated and thus become accessible to the parties.⁴ Thus, in one case,⁵ by a misconception of legal terms, the jury had returned a verdict the reverse of what they intended and it was affirmed by them in open court; but they had not separated or left their seats, though the writ in the next case had been read to them, when, the error being discovered, the presiding judge explained the terms which had been misunderstood and delivered the papers to the jury again. When a verdict has thus been rendered the duties of the jury have been fully performed and their power exhausted; they cannot afterwards be recalled to alter or amend it.⁶ Any recommendation by the jury for a change of their verdict after they have rendered it and separated is inoperative; and any alteration of it made upon such recommendation is invalid.⁷ A verdict was brought into court in writing for the defendant, handed to the

⁸ *Bentz v. Johnson*, 21 Pa. Dist. 1068; *Mine Hill, etc. R. Co. v. Lippincott*, 86 Pa. 468.

⁴ *Hary v. Speer*, 120 Mo. App. 556; *Olson v. Nebraska Tel. Co.*, 87 Neb. 593; *Kreibohm v. Yancey*, 154 Mo. 67; *Warner v. New York Cent. R. Co.*, 52 N. Y. 437, 11 Am. Rep. 724, 12 Am. Neg. Cas. 362, 395; *Rogan v. Mullins*, 22 App. Div. (N. Y.) 117; *Sanders v. Bagwell*, 37 S. C. 145; *Cole v. Laws*, 104 N. C. 651; *Pepper v. Philadelphia*, 114 Pa. 96, 110; *Nichelson v. Smith*, 15 Ore. 200; *Root v. Sherwood*, 6 Johns. 68, 5 Am. Dec. 191; *Blackley v. Sheldon*, 7 Johns. 32; *Goodwin v. Appleton*, 22 Me. 453; *Lawrence v. Stearns*, 11 Pick. 501.

⁵ *Ward v. Bailey*, 23 Me. 316.

⁶ *Snell v. Bangor Nav. Co.*, 30 Me. 337; *Walter v. Jenkins*, 16 S. & R. 414, 16 Am. Dec. 585; *Sargent v. State Bank*, 11 Ohio 472; *Sasser v. State*, 13 id. 453; *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462; *Miller v. Hoc*, 1 Fla. 189; *Martin v. Morelock*, 32 Ill. 485; *Richards v. Page*, 81 Me. 563; *Union Pac. R. Co. v. Connolly*, 77 Neb. 254; *McGrew v. Norris* (Tex. Civ. App.), 140 S. W. 1143. *Contra*, *Burlingame v. Central R.*, 23 Fed. 706. See *Harrington v. Butte, etc. R. Co.*, 36 Mont. 478.

⁷ *Id.*; *Shelton v. O'Brien*, 76 Ga. 820; *Parker v. Lake Shore, etc. R. Co.*, 93 Mich. 607; *Dyer v. Combs*, 65 Mo. App. 148.

clerk, who read it as a verdict for the plaintiff; as so read it was affirmed by the jury and ordered to be recorded; and thereupon the jury were discharged. Afterwards the wrong reading having been suggested, and it appearing by the written verdict and the affidavit of the jurors that they intended to find for the defendant, the judge ordered the verdict for the defendant to be recorded. This was held erroneous; because the verdict as found and written had not been affirmed in open court, and the order was set aside.⁸ In another case a jury, under instructions from the court, found for the plaintiff on both counts of his declaration and assessed separate damages on each. Thereupon the court instructed them that the plaintiff was not entitled to recover on the second count and ordered them to find for the defendant, which they accordingly did. On the case being brought into the court of last resort on exceptions it was held that the court had no authority to amend the verdict so as to make it conform to the first finding although the first instruction to the jury was right and the last wrong.⁹

The parties may waive the affirmation of the verdict before the separation of the jury after they have agreed. This is frequently done where it is anticipated that the jury will agree upon a verdict during an intermission of the court; they are then directed to reduce it to writing, seal it up and deliver it to their foreman or the clerk of the court.¹⁰ The jury must appear and affirm their verdict after the court convenes; it is not their verdict before; in other words, the functions of the jury continue until they have rendered their verdict in court, affirmed it and been discharged.¹¹ A jury rendered a verdict in writing which had been sealed, and after which they had

⁸ *Bucknam v. Greenleaf*, 48 Me. 394.

⁹ *Roberts v. Rockbottom Co.*, 7 Metc. (Mass.) 46.

¹⁰ In practice this course is generally assented to by the parties; consent is probably not necessary. *Sutleff v. Gilbert*, 8 Ohio 405; *Sargent v. State*, 11 id. 472; *State v. Eagle*, 13 id. 490; *Green v. Bliss*,

12 How. Pr. 428; *Chapman v. Coffin*, 14 Gray 454; *Pritchard v. Hennessy*, 1 id. 294; *Commonwealth v. Carrington*, 116 Mass. 37; *Brown v. Dean*, 123 id. 254; *Commonwealth v. Dorus*, 108 id. 488; *Winslow v. Draper*, 8 Pick. 170.

¹¹ *Bunn v. Hoyt*, 3 Johns. 255; *Douglass v. Tousey*, 2 Wend. 352; *Morgan v. Bell*, 41 Kan. 345.

separated, for the sum of "sixteen and seventy-four dollars." The clerk read it to them \$1,674, and each affirmed it as read. The court say: "Under our practice this last answer by each juror made the verdict. Neither giving an assent in the jury room, nor the signing of a writing there, nor the delivery of it to the clerk absolutely bound the conscience of any juror in this case; all these are revocable acts; until he gave an affirmative answer to this last question by the clerk there was space for change of opinion and of opportunity to recall any previous act or word."¹² In a late case in Maine a jury were allowed to seal up their verdict after the adjournment of the court for the day and then to separate for the night. In the morning it was opened and affirmed by eleven, by consent, the twelfth juror being absent by leave after this consent was obtained. The verdict, as affirmed, was for \$9.31. A few minutes after its affirmation the eleven jurors having retained their seats, they made known to the court that they intended to give a verdict for \$74.31, being \$65 sued for and \$9.31 interest, and that, by mistake, only the latter sum was inserted in the blank. The defendant's counsel would not consent to the correction. After awaiting the return of the twelfth juror and finding that he confirmed the statement of his fellows the court allowed the jury to retire and bring in a new verdict for the sum of \$74.31. This was held to be error, and a new trial was granted. The court say: "Where the error has been committed by the jury, either by returning a verdict for the wrong party or for a larger or smaller sum than they intended, and by the amendment proposed the verdict would be reversed, or the damages increased or diminished, and the substantial rights of the parties thus changed, when the verdict has been affirmed in open court, and the jury separated, and become accessible to the parties, the only remedy for such a mistake is by setting aside the verdict and granting a new trial." But where the finding of the jury, or the record of it, is defective or erroneous in matter of form, having no connection with the merits of the case, nor affecting

¹² Griffin v. Larned, 111 Ill. 438; App., 46 Conn. 230; Ederlen v. Watertown Ecclesiastical Society's Thompson, 2 Har. & Gill, 31.

the rights of the parties, the court may make the correction.¹³ Two New York cases extend the rule as to the power of the court over verdicts after the jury has been discharged. In one of them¹⁴ the foreman mistakenly announced the verdict to be different from what had been agreed to. His statement was recorded by the court. Immediately thereafter and after the jury was discharged the court corrected the error so that the verdict conformed to the action of the jury. Affidavits of the jurors were read to show the mistake. In the other case the action was upon a contract wholly free from all elements of unliquidated damages. The plaintiff, if entitled to a verdict, had a right to a sum certain and *conceded*. The court so charged and stated the precise amount. A verdict was found for the plaintiff and the jury agreed upon the sum stated by the court as the damages, but, being uncertain as to the exact figures, they did not include it or any amount in the verdict, which, pursuant to a stipulation, was returned sealed; the jury were excused from appearing on its being opened. Three days later affidavits of the jurors were presented to show that they all agreed upon a verdict for the full amount, and an amendment was made accordingly. This practice was sustained.¹⁵ A case quite similar in its facts, except as to the juror's affidavits, has recently been otherwise decided in Maryland.¹⁶ A distinction has been made between the means by which a verdict is reached and the result arrived at. The effect of this is to make the affidavits of jurors competent to show that the paper returned did not express their conclusion, though such affidavits

¹³ *Weston v. Gilmore*, 63 Me. 493; *Little v. Larrabee*, 2 id. 37, 11 Am. Dec. 43; *Woodruff v. Webb*, 32 Ark. 612; *Rockfeller v. Donnelly*, 8 Cow. 623, 652; *Beekman v. Bemas*, 7 id. 29; *Petrie v. Hannay*, 3 T. R. 659; *Eddowes v. Hopkins*, 1 Doug. 376; *Feize v. Thompson*, 1 Taunt. 121; *Ernest v. Brown*, 4 Bing. N. C. 162; *Queen v. Fall*, 10 L. J. (Q. B.) 145; *Cunningham v. Ware*, Cro. Jac. 239.

¹⁴ *Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544.

¹⁵ *Hodgkins v. Mead*, 119 N. Y. 166; *Redmond v. Weismann*, 77 Cal. 423.

In *Elliott v. Gilmore*, 145 Fed. 964, the jurors after separation signed an affidavit showing it was their intention to include interest on the sum named in the verdict; a correction was made accordingly.

¹⁶ *Gaither v. Wilmer*, 71 Md. 361, 5 L.R.A. 756.

would not be admissible to show what transpired in the jury room.¹⁷

§ 458. **Same subject.** At a subsequent term an amendment of a general verdict was allowed by the judge's minutes, where there were several counts for the same cause of action, one of which was bad, so as to take the verdict on the good counts only.¹⁸ Where the jury returned a verdict in an action of trover that "the defendant did promise in manner and form as the plaintiff has declared against him," with an assessment of damages, the court at a subsequent term, and after a motion for a new trial, corrected the verdict on the plaintiff's motion by striking out "did promise," and inserting "is guilty," and it was held right.¹⁹ So, in Vermont, where a jury in an action of *assumpsit* rendered a verdict that the defendant is guilty, the court, after their discharge, permitted the verdict to be amended by striking out the words "is guilty," and inserting "did promise."²⁰

If a jury return a verdict which is not such as the issue or the instructions requires to be found the court may send them back to reconsider it with appropriate instructions at any time before the verdict has been recorded and they discharged.²¹

¹⁷ *Wolfgram v. Schoepke*, 123 Wis. 19, and cases cited. *Contra*, *McKinley v. First Nat. Bank*, 118 Ind. 375.

Where the jury awarded the same amount in answer to two separate interrogatories covering in part the same items of damage their affidavits are admissible to show that they intended the verdict to be for the amount represented by either answer and not the sum of the two. *Texas Bldg. Co. v. Reed*, — Tex. Civ. App. —, 169 S. W. 211.

¹⁸ *Barnard v. Whiting*, 7 Mass. 358.

¹⁹ *Hoey v. Candage*, 61 Me. 257.

²⁰ *Foster v. Caldwell's Est.*, 18 Vt. 176.

²¹ *Smith v. Pilcher*, 130 Ga. 350; *Hetland v. Bilstad*, 140 Iowa 411; *Suth. Dam. Vol. II.*—16.

Oxford Junction Sav. Bank v. Cook, 134 Iowa 185; *Urquhart v. Dunham, etc. R. Co.*, 156 N. C. 581; *Hines v. Royce*, 127 Mo. App. 718; *Austin E. R. Co. v. Faust* (Tex. Civ. App.), 133 S. W. 449; *McCormick v. Hawkins*, 169 Mich. 641; *State v. Clementson*, 69 Wis. 628; *Hatch v. Attrill*, 118 N. Y. 383; *Johnson v. Oakes*, 80 Ga. 722; *Higinbotham v. Clayton*, 80 Ala. 194; *Strobridge L. Co. v. Randall*, 78 Mich. 195; *Goodwin v. Appleton*, 22 Me. 453.

In *Woodruff v. Richardson*, 20 Conn. 238, the jury brought in a verdict for \$1,100 as damages for slander; the amount was thought by the judge to be too high and, after expressing his views, sent the jury out to consider the case again,

Before a verdict has been recorded the jury may be required to reconsider it if there appears to be a mistake; and may be sent out for that purpose or to perfect their finding.²² But if the verdict, when returned, settles the rights of the parties and will sustain a judgment it is improper for the judge to send the jury out for further consideration.²³ It may be doubted if this view is not altogether too conservative. The public interest requires that the rights of litigants shall be adjusted at a minimum of expense, and that litigation shall be terminated whenever substantial justice can be administered. The delay and expense attendant upon the retrial of actions may often be avoided by insisting upon a verdict which is in accordance with the substantial rights of the parties. The practice followed in the cases next noticed is more in accord with justice than the rule declared by those last cited. Where the plaintiff was entitled to substantial damages or nothing and a verdict in his favor for six cents was returned, it was proper to call the jury's attention to the inconsistency and request them to reconsider their verdict, which was done; a verdict for substantial damages was sustained.²⁴ In another case the jury in a slander suit assessed the sum of one dollar and costs in favor of the plaintiff; the court properly refused to receive it and sent the jury back after instructing them that their province was to award damages only, that the law disposed of the costs, and that if their verdict should not exceed five dollars the costs would go

the result of which was a verdict of \$800. This was retained.

²² *Kirkbride v. Bartz*, 82 Conn. 615; *Lee v. Humphries*, 124 Ga. 539; *Timson v. Manufacturers' C. & C. Co.*, 220 Mo. 580, 21 Am. Neg. Rep. 679; *Keeling v. Pommer*, 83 Neb. 510; *Blake v. Hunsberger*, 46 Pa. Super. 32; *Di Palma v. Weinman*, 16 N. M. 302; *Brown v. Dean*, 123 Mass. 254; *Root v. Sherwood*, 6 Johns. 68, 5 Am. Dec. 191; *Wolfson v. Eyster*, 7 Watts 38; *Blackley v. Sheldon*, 7 Johns. 32; *Chapman v. Coffin*, 14 Gray 454; *Warner v. New York Cent. R. Co.*, 52 N. Y.

437, 11 Am. Rep. 724, 12 Am. Neg. Cas. 362; *Mason v. Massa*, 122 Mass. 477; *Pritchard v. Hennessey*, 1 Gray 294; *Sutliff v. Gilbert*, 8 Ohio 405; *Chapman v. Salfisberg*, 104 Ill. App. 445.

²³ *Sutliff v. Gilbert*, *supra*; *Marguard v. Wheeler*, 52 Cal. 445. See *Black v. Griggs*, 74 Conn. 582, for the practice under a statute giving the court power to require not more than three considerations of a verdict.

²⁴ *Rogan v. Mullins*, 22 App. Div. (N. Y.) 117.

against the plaintiff. A verdict in his favor for five dollars and ten cents was sustained.²⁵ If the plaintiff is entitled to interest as damages and the jury have not awarded it the court may direct that it be added.²⁶

It is in the discretion of the trial judge to interrogate the jury on their bringing in a verdict to ascertain upon what principle they have found it, when there is reason to suspect they have made some mistake.²⁷ Upon objection to a verdict because it was obscure, uncertain and contradictory the judge put to the jury certain questions intended to remove the uncertainty. In accordance with the answers of the foreman in regard to the intention of the jury and the assent of all his fellows the verdict was amended by inserting words to effectuate such intention. Such practice was approved.²⁸

The court will not alter a verdict unless it appears on its face that the alteration is according to the intention of the jury.²⁹ It has no authority to supply substantial omissions in a verdict, not to reconcile incongruities; but when it is informally expressed the court may and should mould it into form and give it legal effect.³⁰ Where the verdict should have included interest with the value of the property, as the damages sustained to the time of trial, instead of finding separately the value of the property and the interest thereon, without calculation, it was proper for the court to put the verdict in proper

²⁵ Fox v. Boyd, 104 Tenn. 357.

²⁶ Rafel v. McDermott, 30 N. Y. Misc. 208.

²⁷ Dearborn v. Newhall, 63 N. H. 301; Norris v. Haverhill, 65 id. 89; Jackson v. Dickenson, 15 Johns. 309, 8 Am. Dec. 236. See Anderson v. Green, 46 Ga. 361.

²⁸ Lovejoy v. Whitcomb, 174 Mass. 586; Mason v. Massa, 122 Mass. 477, 480; Brown v. Dean, 123 Mass. 254, 266; Buttrton v. Bridell, 228 Mo. 622.

²⁹ Spencer v. Gates, 1 H. Bl. 78.

³⁰ Dempster v. Lansingh, 128 Ill. App. 388; Cox v. High Point, etc. R. Co., 149 N. C. 86 (word "dol-

lars" added); Cookville C. & L. Co. v. Evans (Tex. Civ. App.), 135 S. W. 750; Stewart v. Fitch, 31 N. J. L. 17; Delaware, etc. R. Co. v. Toffey, 38 id. 525; Woodruff v. Webb, 32 Ark. 612; Hawks v. Crofton, 2 Burr. 698; Foster v. Jackson, 110b. 52; Phillips v. Kent, 23 N. J. L. 155; Thompson v. Button, 14 Johns. 84; Hodges v. Raymond, 9 Mass. 316; Burhans v. Tibbitts, 7 How. Pr. 21; Jones v. Kennedy, 11 Pick. 125; Clarke v. Lamb, 6 Pick. 512; Porter v. Rutamery, 10 Mass. 64; Wilderman v. Sandusky, 15 Ill. 59; Hamm v. Culvey, 84 Ill. 56.

form by making the calculation from the *data* it furnished.³¹ Where a verdict was for two sums, one representing damages for which the defendant was liable and the other damages for which he was not liable, the latter was treated as surplusage.³²

§ 459. **Excessive or insufficient verdicts.** If there is a legal measure of damages which the jury have deviated from, by finding either less or more than the plaintiff is entitled to by a preponderance of the evidence, the trial court, in the exercise of discretion, will entertain a motion for a new trial on behalf of the party injured by the finding.³³ So if the jury assess damages not warranted by the declaration, the verdict will be set aside, and the court may do it *ex officio*.³⁴ Where there is

³¹ *Baltimore & O. R. Co. v. Dougherty*, 7 D. C. App. Cas. 378. See *Cope v. Kidney*, 115 Pa. 228.

³² *McGowan v. Lynch*, 151 Ala. 458.

³³ *Hardeman v. Williams*, 157 Ala. 422; *Sanders v. Allen*, 124 Ga. 684; *Holland v. Williams*, 3 Ga. App. 636; *Daniel v. Allen*, 149 Ill. App. 351; *Winningham v. Philbrick*, 56 Wash. 38; *Walker v. Smith*, 1 Wash. C. C. 152; *McDonald v. Walker*, 40 N. Y. 551; *Nutter v. Junction R. Co.*, 13 Ind. 479; *Berry v. Vreeland*, 21 N. J. L. 183.

The action of the trial court in setting aside a verdict because the award is excessive is subject to review. *Loftus v. Metropolitan St. R. Co.*, 220 Mo. 470. And so of the action of the court in directing a *remittitur* of part of the verdict. *Taylor v. Winsor*, 30 R. I. 44.

A verdict for \$750 in an action for personal injuries, plaintiff's jaw being broken and dislocated on both sides and teeth knocked out, is so small as to indicate that the jury were not guided by the rule of compensation given them by the court and justifies the granting of a new

trial. *Doody v. Boston & M. Railroad*, 77 N. H. 161.

A verdict of \$400 for death of a female school teacher 44 years of age was set aside as inadequate in *Clark v. Iowa Cent. R. Co.*, 162 Iowa 630.

An order setting aside as inadequate a verdict of \$1,000 for physical injuries and severe nervous shock sustained by a man 45 years of age was affirmed in *Reuter v. Hickman, Lauson & Diener Co.*, 160 Wis. 284.

It seems to be competent for the legislature to provide that a new trial for personal injuries shall not be granted because of the insufficiency of the award. *Norton v. Lincoln Traction Co.*, 92 Neb. 649; *O'Reilly v. Hoover*, 70 Neb. 357.

In Kentucky, where the matter is regulated by statute, a verdict rendered in an action for damages for pain, suffering and permanent impairment of earning capacity resulting from personal injury may not be set aside for inadequacy. *Rossi v. Jewell Jellico Coal Co.*, 157 Ky. 332.

³⁴ *McCann v. McGuire*, 83 Conn. 445; *Butler v. Hoboken P. & P. Co.*,

not a legal measure of damages, and where they are unliquidated, and the amount thereof is referred to the discretion of the jury, the court will not, ordinarily, interfere with the verdict. It is the peculiar province of the jury to decide such cases under appropriate instructions from the court; and the law does not recognize in the latter the power to substitute its own judgment for that of the jury.³⁵ This rule has been held to

73 N. J. L. 45; *Ft. Worth, etc. R. Co. v. Jones*, 38 Tex. Civ. App. 129, 17 Am. Neg. Rep. 668; *Stewart v. Tevri*, 7 T. B. Mon. 109; *Hall v. Hall*, 42 Ind. 585.

³⁵ *Boyd v. Bangor Ry. & Elec. Co.*, 111 Me. 332; *Burch v. Southern Pac. Co.*, 145 Fed. 443; *Montgomery T. Co. v. Knabe*, 158 Ala. 458; *Linge v. Alaska Treadwell Co.*, 3 Alaska 9; *Harby v. Florida E. C. Hotel Co.*, 59 Fla. 280; *Kleczewski v. Chicago City R. Co.*, 152 Ill. App. 481; *Foley v. Everett*, 142 id. 250; *Southern Indiana R. Co. v. Davis*, 32 Ind. App. 569; *Saindon v. Morrell*, 78 Kan. 53; *Missouri, etc. R. Co. v. Wade*, 73 Kan. 359; *Louisville & N. R. Co. v. Peñigo*, 129 Ky. 661; *Merchants' I. & C. S. Co. v. Bargholt*, 129 Ky. 60; *Starnes v. Pine Woods L. Co.*, 122 La. 284; *Lufkin v. Hitchcock*, 194 Mass. 231; *Schmidt v. Chicago, etc. R. Co.*, 108 Minn. 329; *Lewis v. Northern Pac. R. Co.*, 36 Mont. 207; *Killen v. North Jersey St. R. Co.*, 74 N. J. L. 286; *Silver v. Realty I. & I. Co.*, 15 Pa. Dist. 685; *Houston & T. Cent. R. Co. v. Rutland*, 45 Tex. Civ. App. 621; *Rodgers v. Bailey*, 68 W. Va. 186; *Johnston v. Great Western R. Co.*, (1904) 2 K. B. 250; *Canadian Pac. R. Co. v. Lachance*, 42 Can. Sup. Ct. 205; *Chicago v. Smith*, 48 Ill. 107; *Bourke v. Bulow*, 1 Bay 49; *Waters v. Bristol*, 26 Conn. 398; *North v. Cates*, 2 Bibb 591; *Terre Haute, etc. R.*

Co. v. Vanetta, 21 Ill. 188, 8 Am. Neg. Cas. 150, 74 Am. Dec. 96; *Collins v. Albany, etc. R. Co.*, 12 Barb. 492; *Illinois Cent. R. Co. v. Robinson*, 58 Ill. App. 181; *Same v. Davenport*, 75 id. 579, 584, quoting the text; *Board of Com'rs v. Sappanfield*, 10 Ind. App. 609; *Lee v. Southern Pac. R. Co.*, 101 Cal. 118, 13 Am. Neg. Cas. 334; *Dowd v. Westinghouse A. B. Co.*, 132 Mo. 579; *Brown v. Union R. Co.*, 51 Mo. App. 192; *Lucier v. Larose*, 66 N. H. 141; *McGowan v. Interstate Con. St. R. Co.*, 20 R. I. 264, 3 Am. Neg. Rep. 737; *Turner v. Stevens*, 8 Utah 75; *Thirkfield v. Mountain View C. Ass'n*, 12 Utah 76; *Speck v. Gray*, 14 Wash. 589, quoting the text; *Trice v. Chesapeake & O. R. Co.*, 40 W. Va. 271, 8 Am. Neg. Cas. 663; *Donovan v. Chicago & N. R. Co.*, 93 Wis. 373; *Silber v. Larkin*, 94 Wis. 9; *McKeon v. Chicago, etc. R. Co.*, 94 Wis. 477, 7 Am. Neg. Cas. 290, 35 L.R.A. 252; *Smith v. Pittsburgh & W. R. Co.*, 90 Fed. 783; *Hasie v. Alabama & V. R. Co.*, 79 Miss. 581; *Hill v. Alabama & V. R. Co.*, 79 Miss. 587; *Litchfield v. Whitenack*, 78 Ill. App. 364, quoting the text; *Hoffman v. Shartle*, 113 Va. 262; *Louisville & N. R. Co. v. Setser*, 149 Ky. 162; *Hertzberg v. Pittsburgh Taxicab Co.*, 243 Pa. 540, holding that the power to grant a new trial "will not be exercised except in extreme cases where the injustice of allowing an excessive

govern the award of punitive damages where they are imposed principally for the benefit of the public.³⁶ Although the verdict for compensatory damages may be considerably more or less than in the judgment of the court it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice or gross mistake; or, in other words, that it is the result of accident or perverted judgment, and not of cool and impartial deliberation. When the verdict is thus excessive or deficient the trial court, in its discretion, will interpose and set it aside.³⁷ But, as a party is

verdict to stand is so manifest as to clearly show a failure of the court in which the case was tried to properly exercise its discretion."

Where the second verdict is for a larger sum than the first consideration will be given the fact that the first judgment was reversed upon a technicality. *Fullerton v. Glens Falls G. & E. L. Co.*, 157 App. Div. (N. Y.) 191.

³⁶ *Yazoo, etc. R. Co. v. Williams*, 87 Miss. 344; *Cox v. Birmingham R. L. & P. Co.*, 163 Ala. 170; *McGehee v. Shafer*, 9 Tex. 20; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455.

³⁷ *Boyd v. Bangor Ry. & Elec. Co.*, 111 Me. 332; *De Celles v. Casey*, 48 Mont. 568; *Loftus v. Illinois Midland Coal Co.*, 181 Ill. App. 197; *Waterman v. Minneapolis, St. P. & S. S. M. R. Co.*, 26 N. D. 540; *Southern Pac. Co. v. Fitchett*, 9 Ariz. 128, quoting the text; *Bond v. United R.*, 159 Cal. 270; *Ingraham v. Weidler*, 139 Cal. 588; *Anglin v. Columbus*, 128 Ga. 469; *Nuckolls v. Anderson*, 120 Ga. 677; *Frick v. Aurora, etc. R. Co.*, 154 Ill. App. 277; *Paxson v. Dean*, 31 Ind. App. 46; *Tathwell v. Cedar Rapids*, 122 Iowa 50; *Bressler v. McVey*, 82 Kan. 341; *Miller v. Miller*, 81 Kan. 397; *Palmer T. Co. v. Long*, 140 Ky.

111; *Baries v. Louisville E. L. Co.*, 118 Ky. 830; *Leavitt v. Dow*, 105 Me. 50, 134 Am. St. 534; *Alton v. Chicago, etc. R. Co.*, 107 Minn. 457; *Mohr v. Williams*, 95 Minn. 261, 1 L.R.A.(N.S.) 439, 111 Am. St. 462; *McCarty v. St. Louis T. Co.*, 192 Mo. 396; *Loevenhart v. Lindell R. Co.*, 190 Mo. 342; *Richardson v. Missouri F. B. Co.*, 122 Mo. App. 529; *Isley v. Virginia B. & I. Co.*, 143 N. C. 51; *Toledo R. & L. Co. v. Mason*, 81 Ohio 463, 28 L.R.A. (N.S.) 130; *Henning v. Bartz*, 25 Ohio C. C. 15 (insufficient); *Munich v. Valdez*, 3 Porto Rico Fed. 251; *Barrette v. Carr*, 75 Vt. 425; *Wait v. Robertson M. Co.*, 37 Wash. 282; *Denver, etc. R. Co. v. Heckman*, 45 Colo. 470, 21 Am. Neg. Rep. 481; *Simmons v. Fish*, 210 Mass. 563; *Dunbar v. Cowger*, 68 Ark. 444; *Hamer v. White*, 110 Ga. 300; *Hackett v. Pratt*, 52 Ill. App. 346; *Richardson v. Birmingham C. Mfg. Co.*, 116 Ala. 381; *Georgia S. & F. R. Co. v. Jones*, 90 Ga. 292; *Drumm v. Cessnum*, 58 Kan. 331; *Atchison v. Plunkett*, 61 Kan. 297; *Sturgeon v. Sturgeon*, 4 Ind. App. 232; *Lee v. Knapp*, 137 Mo. 385; *Chouquette v. Southern E. R. Co.*, 152 Mo. 257; *Wilson v. Morgan*, 58 N. J. L. 426; *Miller v. Delaware, etc. R. Co.*, 58

not permitted to complain of errors which are in fact favorable to himself, the court will not set aside a verdict at the

- N. J. L. 428; *Brown v. Foster*, 1 App. Div. (N. Y.) 578; *Benton v. Collins*, 125 N. C. 83, 47 L.R.A. 33; *Kumli v. Southern Pac. Co.*, 21 Ore. 505; *McNeil v. Lyons*, 20 R. I. 672; *May v. Hahn*, 22 Tex. Civ. App. 365; *Nading v. Denison & P. R. Co.*, 22 Tex. Civ. App. 173; *Katz v. Brooklyn Heights R. Co.*, 35 N. Y. Misc. 302; *Bell v. Morse*, 48 Kan. 601; *Barry v. Pennsylvania R. Co.*, 65 N. J. L. 407; *Goodall v. Thurman*, 1 Head 209; *Coleman v. Southwick*, 9 Johns. 44; *Walker v. Smith*, 1 Wash. C. C. 152; *Duncan v. Finnyhorn*, Sneed 262; *M. K. & T. R. Co. v. Weaver*, 16 Kan. 456; *Simpson v. Pitman*, 13 Ohio 365; *Farish v. Reigle*, 11 Gratt. 697, 10 Am. Neg. Cas. 344; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Rep. 757; *Aldrich v. Palmer*, 24 Cal. 513; *Shartle v. Minneapolis*, 17 Minn. 308; *Russell v. Dennison*, 45 Cal. 337; *Wells v. Sanger*, 21 Mo. 354; *Terre Haute, etc. R. Co. v. Vanetta*, 21 Ill. 188, 8 Am. Neg. Cas. 150, 74 Am. Dec. 96; *Beaulieu v. Parsons*, 2 Minn. 37; *Waters v. Bristol*, 26 Conn. 398; *Boyers v. Pratt*, 1 Humph. 90; *Clapp v. Hudson River R. Co.*, 19 Barb. 461; *Moore v. Burchfield*, 1 Heisk. 203; *Union Pac. R. Co. v. Hand*, 7 Kan. 380; *Chicago, etc. R. Co. v. Peacock*, 48 Ill. 253, 8 Am. Neg. Cas. 149; *North v. Cates*, 2 Bibb 591; *Diblin v. Murphy*, 3 Sandf. 19; *Sherry v. Frecking*, 4 Duer 452; *Guard v. Risk*, 11 Ind. 156; *Harris v. Rupel*, 14 Ind. 209; *Tater v. Mullen*, 23 Ind. 462; *Alexander v. Thomas*, 25 Ind. 268; *Birchard v. Booth*, 4 Wis. 67; *Bierbauer v. New York, etc. R. Co.*, 15 Hun 559; *Bass v. Chicago, etc. R. Co.*, 42 Wis. 654, 24 Am. Rep. 437; *Plath v. Braunsdorff*, 40 Wis. 107; *Davis v. Central R. Co.*, 60 Ga. 329; *Cummins v. Crawford*, 88 Ill. 312, 30 Am. Rep. 358; *Solen v. Virginia City, etc. R. Co.*, 13 Nev. 106, 12 Am. Neg. Cas. 240; *Illinois Cent. R. Co. v. Parks*, 88 Ill. 373, 11 Am. Neg. Cas. 360; *Hammond v. Mukwa*, 40 Wis. 35; *Nashville, etc. R. Co. v. Smith*, 6 Heisk. 174; *Goodno v. Oshkosh*, 28 Wis. 300; *Nettles v. Harrison*, 2 McCord 230; *Armitage v. Haley*, 4 Q. B. 917; *Price v. Severn*, 7 Bing. 402; *Tinney v. New Jersey S. Co.*, 5 Lans. 507, 9 Am. Neg. Cas. 585; *Goins v. Western R. Co.*, 59 Ga. 426, 8 Am. Neg. Cas. 135; *Chicago, etc. R. Co. v. Hughes*, 87 Ill. 94; *Chicago, etc. R. Co. v. Payzant*, 87 Ill. 125; *Union Pac. R. Co. v. House*, 1 Wyo. 27, 10 Am. Neg. Cas. 566; *Blunt v. Little*, 3 Mason 102; *Whipple v. Cumberland Mfg. Co.*, 2 Story 661; *Wolford v. Lyon Gravel G. M. Co.*, 63 Cal. 483; *Denver v. Dunsmore*, 7 Colo. 328; *Sanderson v. Frazier*, 8 id. 79, 54 Am. Rep. 544; *Haight v. Hoyt*, 50 Conn. 583; *Larson v. Grand Forks*, 3 Dak. 307; *McMurray v. Basnett*, 18 Fla. 609; *Central R. v. Roach*, 70 Ga. 434, 14 Am. Neg. Cas. 139; *Paul v. Leyenberger*, 17 Ill. App. 107; *Fairgrieve v. Moberly*, 29 Mo. App. 141; *Watson v. Harmon*, 85 Mo. 443; *International, etc. R. Co. v. Telephone & T. Co.*, 69 Tex. 277, 5 Am. St. 45; *Cottrill v. Cramer*, 59 Wis. 231; *Whitney v. Milwaukee*, 65 Wis. 409; *Clear v. Fox*, 26 Fed. 90; *Henderson v. Louisville R. Co.*, 24 Ky. L. Rep. 394; *Nichols v. Camden R. I. Co.*, 62 W. Va. 409, quoting the text.

instance of the defendant on the ground that the damages awarded the plaintiff, whether compensatory or punitive, are

The fact that a verdict for \$2,-865.30 was \$105 in excess of the sum recoverable does not show passion or prejudice. *Omaha F. Ins. Co. v. Thompson*, 50 Neb. 580.

The fact that two prior verdicts were for \$3,000 each does not indicate that a verdict for \$3,500 was influenced by passion or prejudice. *Fitzgerald v. New York, etc. R. Co.*, 37 App. Div. (N. Y.) 127.

It was said by Judge Story in *Thurston v. Martin*, 5 Mason 497, "The damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give; and I should now be better satisfied if the amount had been less. * * * It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury merely because it exceeds that measure. The court, in setting aside a verdict for excessive damages, should clearly see that they are excessive; that there has been a gross error; that there has been a mistake of the principles upon which the damages have been estimated; or some improper motives, or feelings or bias which have influenced the minds of the jury. * * * Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, I, for one, should be disposed to leave the verdict as the jury found it." See remarks to the same effect, by the same judge, in *Whipple v. Cumberland Mfg. Co.*, 2 Story 661, and see *Harris v. Louisville, etc. R. Co.*, 35 Fed. 116.

Where there is a right to a trial by jury and the damages are largely within its discretion a new trial should not be granted unless the award is so excessive as unmistakably to indicate that it is the result of passion or prejudice. *Halness v. Anderson*, 110 Minn. 204.

In some late cases the discretionary right of the trial court to grant a new trial is limited to cases in which the damages found are so glaringly disproportioned to the verdict as to appear at first blush to have resulted from improper motives. *Snyder v. Louisville R. Co.*, 150 Ky. 816, and local cases cited.

Passion, prejudice and caprice on the part of the jury may be inferred by the trial court from the excessiveness of the verdict alone. *Grant v. Louisville & N. R. Co.*, 129 Tenn. 398.

The trial judge may not, on a motion to set aside a verdict, direct that it be reduced to a nominal sum. *Howard v. Bank*, 115 App. Div. (N. Y.) 326. Nor may he alter an insufficient award. *Lorf v. Detroit*, 145 Mich. 265.

Where erroneous evidence tending to produce prejudice on the part of the jury is admitted the judgment should be reversed rather than a new trial refused conditioned on the plaintiff's filing a remittitur. *Stadler v. Chicago City Ry. Co.*, 180 Ill. App. 313.

A verdict in an action under a statute similar to Lord Campbell's act for less than the maximum sum fixed by it is some evidence of the absence of partiality, prejudice or corruption. *Indianapolis T. & T. Co. v. Romans*, 40 Ind. App. 184.

In Utah the trial court may, by statute, set aside a verdict as in-

insufficient.³⁸ If a portion of the sum awarded is remitted in the trial court the appellate court will consider the full amount in determining whether the verdict was excessive.³⁹ It is said⁴⁰ that the first English case in which the recovery of unliquidated damages was sought and in which the verdict was set aside was decided in 1879. The verdict was for 7,000*l.*, and was set aside, not because of misdirection by the judge, but because it appeared upon the facts proved that the jury omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim.⁴¹

In cases where there is no legal standard of damages, if the appellate court does not find error in the admisison or rejection of evidence or in the instructions, the objection that the amount awarded by the jury is excessive or insufficient is not generally

adequate on a finding of passion or prejudice on the part of the jury or where there has been a misapprehension by them of the instructions or a plain disregard thereof. *Hirabelli v. Daniels*, 44 Utah 88; *Jensen v. Denver & R. G. R. Co.*, 44 Utah 100.

A verdict for \$9,250 for severe personal injury to a female nurse 48 years of age has been held so excessive as to indicate passion and prejudice on the part of the jury and a remittitur of \$4,250 ordered. *Guignon v. Campbell*, 80 Wash. 543.

³⁸ *Wrens v. Sammons*, 129 Ga. 755; *Pullman Co. v. Schaffner*, 126 Ga. 609, 9 L.R.A.(N.S.) 407; *Rockefeller v. Lamora*, 106 App. Div. (N. Y.) 345; *Louisville & N. R. Co. v. Street*, 164 Ala. 155; *Reid v. Houston*, 20 Ill. App. 48; *Wolf v. Goodhue F. Ins. Co.*, 43 Barb. 400; *Corcoran v. Harran*, 55 Wis. 120.

³⁹ *Partello v. Missouri Pac. R. Co.*, 217 Mo. 645; *Frantz v. Saylor*, 12 Okla. 39; *Unterberger v. Scharff*, 51 Mo. App. 102.

⁴⁰ *Benton v. Collins*, 125 N. C. 83, 93, 47 L.R.A. 33.

⁴¹ *Phillips v. South Western R. Co.*, 4 Q. B. Div. 406; *Burrows v. London G. O. Co.*, 10 L. T. Rep. 298.

The English rule is thus expressed in *Praed v. Graham*, 24 Q. B. Div. 53: I think that the rule of conduct is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the court, having considered the whole of the circumstances of the case, come to this conclusion only: We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them, then they ought not to interfere with the verdict. *Johnston v. Great Western R. Co.* (1904), 2 K. B. 250; *Rowe v. Australian U. S. N. Co.*, 9 Aust. Com. L. R. 1. See *Hendricks v. Butcher*, 144 Mo. App. 671; *Clark v. New York, etc. R. Co.*, 33 R. I. 83; *Southern R. Co. v. O'Bryan*, 119 Ga. 147.

available⁴² especially in the absence of proof of pecuniary

⁴² *Beaver Hill C. Co. v. Lassilla*, 176 Fed. 725, 100 C. C. A. 283; *Chicago, etc. R. Co. v. Heil*, 154 Fed. 626, 83 C. C. A. 400; *Southern Pac. Co. v. Cavin*, 144 Fed. 348, 75 C. C. A. 350; *Bond v. United R.*, 159 Cal. 270, 48 L.R.A.(N.S.) 287; *Hirsch v. Chicago Con. T. Co.*, 146 Ill. App. 501; *Baker v. Fritts*, 143 id. 465; *Fairbank v. Bahre*, 112 id. 290; *Hall v. Chicago, etc. R. Co.*, 145 Iowa 291; *Palmer v. Cedar Rapids, etc. R. Co.*, 124 Iowa 424; *Dupuis v. Saginaw Valley T. Co.*, 146 Mich. 151; *Gorham v. St. Louis, etc. R. Co.*, 112 Mo. App. 205; *Meyer v. St. Louis & S. R. Co.*, 108 Mo. App. 220; *Choctaw, etc. R. Co. v. Burgess*, 21 Okla. 653; *Welch v. Greene*, 24 R. I. 515; *Mills v. Atlantic C. L. R. Co.*, 85 S. C. 463; *Duke v. Postal-Tel. C. Co.*, 71 S. C. 95; *International, etc. R. Co. v. Goswick*, 98 Tex. 477; *Farley v. Missouri, etc. R. Co.*, 34 Tex. Civ. App. 81; *Ott v. Tri-State Telephone & Telegraph Co.*, 127 Minn. 373; *Ideal Cream Separator Repair Works v. City of Des Moines*, 167 Iowa 517; *Bresslin v. Star Co.*, 85 Misc. (N. Y.) 609, aff'd 166 App. Div. (N. Y.) 89; *Hamilton v. Pacific Drug Co.*, 78 Wash. 689; *Colorado & S. R. Co. v. Jenkins*, 25 Colo. App. 348; *Jensen v. Denver & R. G. R. Co.*, 44 Utah 100; *Fulmele v. Forrest* (Del.), 86 Atl. 733; *Indianapolis & M. R. T. Co. v. Reeder*, 51 Ind. App. 533; *Nichols v. Oregon S. L. R. Co.*, 28 Utah 319; *Southern R. Co. v. Cash*, 100 Va. 282; *Same v. Clarke*, 106 Va. 496; *Goshorn v. Wheeling M. & F. Co.*, 65 W. Va. 250; *Currie v. St. John St. R. Co.*, 36 New Bruns. 194; *Morin v. Ottawa E. R. Co.*, 18

Ont. L. R. 209; *Chicago & E. R. Co. v. Ponn*, 191 Fed. 682 (C. C. A.); *Tuohy v. Columbia S. Co.*, 61 Ore. 527; *Meeks v. St. Paul*, 64 Minn. 220; *Nelson v. West Duluth*, 55 Minn. 497; *Franklin v. Fischer*, 51 Mo. App. 345; *Nelson v. Oregon R. & N. Co.*, 13 Ore. 141; *Pritchard v. Hewitt*, 91 Mo. 547, 60 Am. Rep. 265; *Lancaster v. Providence & S. S. Co.*, 26 Fed. 233; *Brushaber v. Stegemann*, 22 Mich. 266; *Neal v. Singleton*, 26 Ark. 491; *Serano v. New York Cent., etc. R. Co.*, 188 N. Y. 156, 117 Am. St. 833; *Hollinger v. York R. Co.*, 225 Pa. 419 (the supreme court will not ordinarily exercise the power granted it by statute); *Lindsay v. Grande Ronde L. Co.*, 48 Ore. 430.

The verdict in a personal injury case, based in part on the diminished earning capacity of the plaintiff, cannot be reduced because that head of damage is lessened by his subsequent death, nor can a new trial be granted. *Hubbard v. Marine H. & E. Co.*, 105 Me. 384.

"The authorities are believed to be practically unanimous that a verdict may not be set aside simply because the same is excessive, especially in states having code provisions similar to our own." *Colorado & S. R. Co. v. Jenkins*, 25 Colo. App. 348, sustaining the trial court in denying a new trial on condition that the plaintiff remit a designated amount.

Where the instructions, not excepted to, failed to submit certain items of damage it has been held error for the trial court to order a new trial for inadequacy of damage. *Hirabelli v. Daniels*, 44 Utah 88.

loss.⁴³ If, however, on the nature of the case or on a proper return of all the testimony the point can be raised in the appellate court, as under the practice in many states it may, it clearly appears that the damages found are excessive or insufficient the judgment will be reversed on that ground.⁴⁴ In

Where there is no certain measure of damages a verdict will not be disturbed as inadequate in the absence of evidence of prejudice, passion, or other improper motive on the part of the jury in fixing the damages. *Montgomery Light & Traction Co. v. King*, 187 Ala. 619.

Damages for permanent loss of use of a foot were, however, increased from \$2,000 to \$5,052.47 in *Francois v. Maison Blanche Realty Co.*, 134 La. 215.

⁴³ *Kennedy v. Glen Alum C. Co.*, 72 W. Va. 635.

⁴⁴ *Atlanta Con. St. R. Co. v. Beauchamp*, 93 Ga. 6; *Buena Vista Co. v. McCandlish*, 92 Va. 297; *Baker v. Madison*, 62 Wis. 137; *McLimans v. Lancaster*, 63 Wis. 596; *Cuff v. Dorland*, 57 N. Y. 560; *Metcalf v. Baker*, id. 662; *Hayden v. Florence S. M. Co.*, 54 id. 221; *Stickney v. Bronson*, 5 Minn. 215; *Burdick v. Weeden*, 9 R. I. 139; *Wilkins v. Gilmore*, 2 Humph. 140; *Johnson v. Von Kettler*, 66 Ill. 63; *Chicago, etc. R. Co. v. McAra*, 52 Ill. 296, 9 Am. Neg. Cas. 228; *Decatur v. Fisher*, 53 Ill. 407; *Cassell v. Hays*, 51 Ill. 261; *Chicago v. Kelly*, 69 Ill. 475; *Cochrane v. Tuttle*, 75 Ill. 361; *Goetz v. Ambs*, 22 Mo. 170; *Woodson v. Scott*, 20 Mo. 272; *Barth v. Merritt*, 20 Mo. 567; *Ellsworth v. Central R. Co.*, 24 N. J. L. 93; *Patten v. Chicago, etc. R. Co.*, 32 Wis. 524, 7 Am. Neg. Cas. 191; *Metz v. Second Ave. R. Co.*, 2 Robert. 356; *Union Pac. R. Co. v. Milliken*, 8 Kan. 647, 15 Am. Neg. Cas. 42; *Jacksonville v. Lambert*,

62 Ill. 519; *Chicago v. Jones*, 66 Ill. 349; *Chicago, etc. R. Co. v. Garvy*, 58 Ill. 83; *Chicago v. Langlass*, 66 Ill. 361; *Pullman P. C. Co. v. Reed*, 75 Ill. 125, 8 Am. Neg. Cas. 195, 20 Am. Rep. 232; *Huftalin v. Mesner*, 78 Ill. 55, 20 Am. Rep. 259; *Dearlove v. Herrington*, 70 Ill. 251; *Newton v. Locklin*, 77 Ill. 103; *Walker v. Martin*, 52 Ill. 347; *Ross v. Ross*, 5 B. Mon. 20; *Colburn v. Neal*, 4 Dana 121; *Sundgren v. Stevens*, 86 Kan. 154, 39 L.R.A. (N.S.) 487; *Wiles v. Northern Pac. R. Co.*, 66 Wash. 337; *Carroll v. Texarkana G. & E. Co.*, 102 Ark. 137; *Vaulx v. Herman*, 8 Lea 683 (trial judge dissatisfied with verdict); *Usher v. Scranton R. Co.*, 132 Fed. 405; *Fleming v. L. & N. R. Co.*, 148 Ala. 527; *Denver, etc. R. Co. v. Scott*, 34 Colo. 99; *Consolidated G. Co. v. Allman*, 59 Fla. 230; *Silva v. Souza*, 14 Hawaii 46; *Garvey v. Metropolitan, etc. R. Co.*, 155 Ill. App. 601; *Migliaccio v. Smith F. Co.*, 151 Iowa 705; *Indianapolis & M. T. Co. v. Reeder*, 42 Ind. App. 520; *Reynolds v. McManus*, 139 Iowa 242; *Jackson v. Humboldt*, 84 Kan. 445; *Buford v. Hopewell*, 140 Ky. 666; *Gray-M. P. B. Co. v. McNally*, 138 Ky. 823; *Kentucky W. Mfg. Co. v. Shake*, 137 Ky. 742; *Louisville & N. R. Co. v. Reaume*, 128 Ky. 90; *Merrinane v. Miller*, 148 Mich. 412; *Frigstad v. Great Northern R. Co.*, 101 Minn. 40; *Fischer v. St. Louis*, 189 Mo. 567, 107 Am. St. 380; *Partello v. Missouri Pac. R. Co.*, 217 Mo. 645; *Neff v. Cameron*, 213 Mo. 350, 127

some states it is immaterial that exemplary damages were properly awarded if their amount indicates that it was fixed because of improper motives.⁴⁵ An abuse of the power of the trial court in directing a remission of some of the compensatory damages awarded will be corrected.⁴⁶ If a second verdict is for nearly the same sum as one which has been set aside as excessive it will also be set aside, although the question of the

Am. St. 606; *Kennedy v. St. Louis T. Co.*, 103 Mo. App. 1; *Corley v. Board of Com'rs*, 95 Miss. 617; *Draper v. Tucker*, 69 Neb. 434; *Harris v. Scher*, 63 N. Y. Misc. 288; *Toutelotte v. Westchester E. R. Co.*, 120 App. Div. (N. Y.) 417; *Schulz v. Union R. Co.* (N. Y. Misc.), 104 Supp. 722; *Buttner v. New York*, 110 App. Div. (N. Y.) 549; *Hurley v. Metropolitan St. R. Co.*, 87 App. Div. (N. Y.) 66; *Turnpike Co. v. County*, 15 Pa. Dist. 703; *Clark v. New York, etc. R. Co.*, 33 R. I. 83; *Hill v. Union R. Co.*, 25 R. I. 565; *Prewitt v. Southwestern Tel. & T. Co.*, 46 Tex. Civ. App. 123; *Parker v. Boston & M. R.*, 84 Vt. 329; *Bronson v. Canadian Pac. R. Co.*, 18 Ont. L. R. 337; *Runciman v. Star Line S. S. Co.*, 35 New Bruns. 123; *Canadian C. Co. v. Fagan*, 12 Brit. Col. 23; *Kirby v. Thompson*, 138 Ga. 544; *Neil v. Idaho, etc. R. Co.*, 22 Idaho 74; *Illinois Cent. R. Co. v. Woolery*, 163 Ill. App. 516; *Strever v. Woodward*, 160 Iowa 332, 46 L.R.A.(N.S.) 644; *Clark v. New York, etc. R. Co.*, 35 R. I. 479.

A statute denying the right to a new trial on account of the objection that the damages are inadequate has been sustained. *Langdon v. Clarke*, 73 Neb. 516.

The reviewing court will not interfere with the ruling of the trial court refusing to order a new trial on the ground of inadequacy of a

verdict unless such inadequacy is clearly shown. *Ideal Cream Separator Repair Works v. City of Des Moines*, 167 Iowa 517.

⁴⁵ *Louisville & N. R. Co. v. Brown*, 127 Ky. 732, 13 L.R.A.(N.S.) 1135.

⁴⁶ *De Severinus v. Press Pub. Co.* (App. Div.), 132 N. Y. Supp. 80; *Wooding v. Thom* (App. Div.), 132 N. Y. Supp. 50.

The discretion of the trial court is large and its action will not be set aside unless the discretion has been unreasonably exercised. It is the action of the court, and not that of the jury, which is directly under review. *Allen v. New York, etc. R. Co.*, 85 Conn. 709; *Loomis v. Perkins*, 70 Conn. 444; *Cables v. Bristol W. Co.*, 86 Conn. 223. But compare *Pilling v. Benson*, 34 R. I. 519.

The action of the trial court in requiring the remittitur of a portion of the sum awarded will not be disturbed unless there is a clear abuse of the discretion vested in it. *Jones v. Spokane, etc. R. Co.*, 69 Wash. 12; *Jensen v. Denver & R. G. R. Co.*, 44 Utah 100; *Hirabelli v. Daniels*, 44 Utah 88; *Devine v. City of St. Louis*, 257 Mo. 470, 51 L.R.A.(N.S.) 860; *Clark v. Iowa Cent. R. Co.*, 162 Iowa 630; *Reuter v. Hickman, Lauson & Diener Co.*, 160 Wis. 284; *Ott v. Tri-State Telephone & Telegraph Co.*, 127 Minn. 373.

defendant's liability will not be reopened.⁴⁷ Regardless of such circumstances, the new trial may be limited to the issue of the *quantum* of damages,⁴⁸ as where the defendant's exceptions are sustained as to the damages only.⁴⁹ The probability that a third trial would result in a verdict for the same sum as previous verdicts awarded is ground for refusing it.⁵⁰ If the damages awarded are so small that it is doubtful if they can be regarded as substantial a new trial will not be allowed that they may be reduced.⁵¹ In some jurisdictions the appellate court may reverse in part and render such judgment as the court below ought to have rendered. There, if the damages are excessive, the court may reverse altogether or reduce the amount of the judgment, affirming it for a lesser sum where the requisite *data* are furnished by the record,⁵² or the trial court will be directed to give judgment for the proper amount.⁵³ The objection of excessive damages found may, in many cases,

⁴⁷ McKay v. New England D. Co., 93 Me. 201; Smith v. Whittlesey, 79 Conn. 189; Broughel v. Southern New England Tel. Co., 72 Conn. 617, 49 L.R.A. 404. And so if the first verdict is grossly inadequate, the liability being established. Scott v. Yazoo, etc. R. Co., 103 Miss. 522.

⁴⁸ Rushing v. Seaboard A. L. R. Co., 149 N. C. 161; Farrar v. Wheeler, 145 Fed. 482, 75 C. C. A. 386.

⁴⁹ Magnolia M. Co. v. Gale, 189 Mass. 124.

⁵⁰ Caldwell v. Northern Pac. R. Co., 62 Wash. 420.

⁵¹ Watson v. New Milford, 72 Conn. 561, 77 Am. St. 345. See § 11.

⁵² Hollinger v. York R. Co., 225 Pa. 419; Robertson v. Allen, 36 Ark. 553; Chesapeake, etc. R. Co. v. Higgins, 85 Tenn. 620; Sterrett v. Creed, 2 Ohio 442; Fields v. Moul, 15 Abb. Pr. 6; Cohea v. State, 34 Miss. 179; Overall v. Babson, 2 Yerg. 71; Mooney v. Hudson River R. Co., 1 Sweeney, 325; Baker v.

Madison, 62 Wis. 137, 583 (overruling Potter v. Chicago, etc. R. Co., 22 Wis. 615); McLimans v. Lancaster, 63 Wis. 596; Galveston, etc. R. Co. v. Johnson, 24 Tex. Civ. App. 180; Weisman v. Wolinsky (Misc.), 147 N. Y. Supp. 869; National Council Knights & Ladies of Security v. Sealey, — Tex. Civ. App. —, 162 S. W. 455.

An error of the trial court in reducing the award of the jury will be corrected on appeal by entering judgment for the amount specified in the verdict, with interest thereon from the date of the judgment in the trial court. Hoffman v. Shartle, 113 Va. 262.

In accordance with the maxim *de minimis non curat lex*, however, an appeal will be dismissed where the only error claimed is the allowance of an item of \$6 in a judgment of \$1,000. Neville v. Frary, 88 Conn. 50.

⁵³ Lexington R. Co. v. Johnson, 139 Ky. 323.

be removed by the plaintiff remitting the excess. This may be done in the trial and also in the appellate court. If the jury have decided, upon the testimony, several items or elements of damage, and on review one or more of them are held to be improperly included, a remission of so much as was held thus improperly allowed, when the amount can be ascertained, will remove the objection of such excess.⁵⁴ The reviewing

⁵⁴ *Coons v. McKees Rocks Borough*, 243 Pa. 340; *Moneyweight Scale Co. v. David*, 180 Mich. 8; *Texas Bldg. Co. v. Reed*, — Tex. Civ. App. —, 169 S. W. 211; *St. Louis & S. F. R. Co. v. Goode*, 42 Okla. 784; *United Iron Works v. Outer Harbor Dock & Wharf Co.*, 168 Cal. 81; *Yurkonis v. Delaware, L. & W. R. Co.*, 213 Fed. 537; *Miller v. Lloyd*, 181 Ill. App. 230; *Loomis v. Federal Union Surety Co.*, 180 Ill. App. 590; *Blair v. Lewiston, A. & W. St. Ry.*, 111 Me. 586; *Gillispie v. Ambrose*, — Tex. Civ. App. —, 161 S. W. 937; *Heath v. Minneapolis, St. P. & S. S. M. R. Co.*, 126 Minn. 470; *Greenblatt v. McCall & Co.*, 67 Fla. 165; *Norwood v. Maremont, Wolfson & Cohen Co.*, 182 Ill. App. 78 (amount of excess admitted); *Stevens v. Wisconsin Farm Land Co.*, 124 Minn. 421; *Modern v. Superintendents of Poor v. Van Buren Co.*, 183 Mich. 120 (amount of excess undisputed); *Long v. Rucker*, 177 Mo. App. 402 (amount shown by undisputed evidence); *Herrman v. Leland*, 163 App. Div. (N. Y.) 515, *aff'd* 213 N. Y. 644 (excess determined by the difference between the amount of the judgment and that of a bill rendered the defendant); *C. A. Stickney Co. v. Sears, Roebuck & Co.*, 181 Ill. App. 486; *Van Boskerek v. Torbert*, 184 Fed. 419, 107 C. C. A. 383; *Montgomery T. Co. v. Knabe*, 158 Ala. 458; *National F. Co. v. Green*,

50 Colo. 307; *Colorado Springs E. Co. v. Soper*, 38 Colo. 126; *Noxon v. Remington*, 78 Conn. 296; *Young v. Extension D. Co.*, 13 Idaho 174; *Amann v. Chicago Con. T. Co.*, 243 Ill. 263; *Chicago City R. Co. v. Gemmill*, 209 Ill. 638; *Indianapolis St. R. Co. v. Kane*, 169 Ind. 25; *Welsh v. Tri-City R. Co.*, 148 Iowa 200; *Wilder v. Great Western C. Co.*, 134 Iowa 451; *Chicago, etc. R. Co. v. Brandon*, 77 Kan. 612; *Argentine v. Bender*, 71 Kan. 422; *Goss v. Goss*, 102 Minn. 346; *Lewis v. Northern Pac. R. Co.*, 36 Mont. 207; *McKibbin v. Day*, 74 Neb. 424; *Dunning v. Reid*, 76 N. J. L. 384; *Sorenson v. Oregon P. Co.*, 47 Ore. 24; *Adcock v. Oregon R. Co.*, 45 Ore. 173, citing the text; *Tucker v. Buffalo C. Mills*, 76 S. C. 539, 121 Am. St. 957; *Nashville R. & L. Co. v. Trawick*, 118 Tenn. 273, 10 L.R.A. (N.S.) 191, 121 Am. St. 996; *Alabama G. S. R. Co. v. Roberts*, 113 Tenn. 488, 67 L.R.A. 495; *Texas Cent. R. Co. v. Wheeler*, 52 Tex. Civ. App. 603; *St. Louis S. R. Co. v. Price*, 44 Tex. Civ. App. 217; *Houston, etc. R. Co. v. McCarty*, 40 Tex. Civ. App. 364 (sum claimed in petition); *Rodgers v. Bailey*, 68 W. Va. 186; *Henderson v. Coleman*, 19 Wyo. 183; *Murray v. Royal Ins. Co.*, 11 Brit. Col. 213; *Central Vermont R. Co. v. Franchere*, 35 Can. Sup. Ct. 68 (under the code of civil procedure); *Augusta R. Co. v. Glover*, 92 Ga. 132, 2 Am. Neg. Cas. 466; *Craven v. Walker*, 101

court's power to reduce a judgment is not affected because the trial court directed the *remittitur* of part of the sum awarded

- Ga. 845; North Chicago St. R. Co. v. Shreve, 70 Ill. App. 666; Chicago, etc. R. Co. v. Clevenger, 77 id. 186; McNulta v. Hendele, 92 id. 273; Newbury v. Getchell & M. L. Mfg. Co., 100 Iowa 441, 62 Am. St. 582; Drumm v. Cessnum, 58 Kan. 331; Atchison, etc. R. Co. v. Richards, 58 Kan. 344, 3 Am. Neg. Rep. 25; Atchison v. Plunkett, 61 Kan. 297; Detzur v. Stroh B. Co., 119 Mich. 282, 5 Am. Neg. Rep. 371, 44 L.R.A. 500; Trow v. White Bear, 78 Minn. 432; Fremont, etc. R. Co. v. French, 48 Neb. 638; Regier v. Shreck, 47 Neb. 667; Wainwright v. Satterfield, 52 Neb. 403; Rigney v. Tacoma L. & W. Co., 9 Wash. 245, 26 L.R.A. 425; Denison v. Lewis, 5 D. C. App. Cas. 328; Cleveland, etc. R. Co. v. Beckett, 11 Ind. App. 547, 8 Am. Neg. Cas. 199; Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110; Lambert v. Craig, 12 Pick. 199; King v. Howard, 1 Cush. 137; Bank v. Ashley, 2 Pet. 327, 7 L. ed. 440; Hodges v. Hodges, 5 Met. 205; Sanborn v. Emerson, 12 N. H. 57; Trischet v. Hamilton Mut. Ins. Co., 14 Gray, 456; Pierce v. Wood, 23 N. H. 519; Willard v. Stevens, 24 id. 271; Odlin v. Grove, 41 id. 465, 77 Am. Dec. 773; Cross v. Wilkin, 43 N. H. 332; Cram v. Hadley, 48 id. 191; Evertson v. Sawyer, 2 Wend. 507; Howard v. Grover, 28 Me. 97; Spackman v. Byers, 6 S. & R. 385; Atwood v. Gillespie, 4 Mo. 423; Pendleton St. R. Co. v. Rahmann, 22 Ohio St. 446; Hury v. Watson, 4 T. R. 659, note; Toledo, etc. R. Co. v. Beals, 50 Ill. 150; Kavanaugh v. Janesville, 24 Wis. 618; Bigelow v. Doolittle, 36 Me. 115; Strong v. Hooe, 41 Wis. 659; Johnson v. Johnson, 104 Ky. 714; Chitty v. St. Louis, etc. R. Co. 166 Mo. 435; Chicago T. & T. Co. v. O'Marr, 25 Mont. 242, citing the text; Meza v. Pfister, 54 Wash. 7 (damages capable of mathematical calculation); Walker v. Lancashire Ins. Co., 188 Mass. 560 (excessive award of interest); St. Louis, etc. R. Co. v. Bird, 106 Ark. 177; Chesapeake & O. R. Co. v. Meyers, 150 Ky. 841; Pearll v. Bay City, 174 Mich. 643; Delaski v. Northwestern I. Co., 70 Wash. 143.
- The appellate court has given effect to a remittitur voluntarily filed after judgment in the trial court. Craig v. Dowie, 4 Cal. App. 176.
- If the action is for a joint tort a remittitur cannot be conditioned for different sums in favor of the several defendants according to the proofs against them. Chils v. Gronlund, 41 Fed. 505.
- Consent given in open court to the reduction of the amount of the verdict and the noting thereof by the clerk in the journal entry of the judgment is enough to bind all the parties. If the plaintiff receives the sum for which judgment is entered and acknowledges its receipt in full satisfaction thereof, he cannot obtain a second judgment for the full amount of the verdict on the ground that the court had no power to disturb the verdict. Lewis v. Wilson, 151 U. S. 551, 38 L. ed. 267.
- By voluntarily writing off part of a judgment in his favor the plaintiff abandons his claim to the sum remitted and cannot recover it. Hodson v. Union Pac. R. Co., 14 Utah 402, 60 Am. St. 902.
- Where proof is specific and certain as to the amount of an item of damage, improperly considered by

by the jury.⁵⁵ Because of the superior advantage the trial judge has in passing upon the excessiveness of verdicts a reviewing court may properly hesitate to make a further reduction therein.⁵⁶ Where the erroneous part of the damages found by the jury cannot be ascertained and it is impossible to tell what the jury acted upon, or how they made up their verdict under the charge of the court, so as to correct the error and arrive at the amount they should have given, justice between the parties cannot be done by a *remittitur*.⁵⁷ This rule includes

the jury in arriving at their verdict, it will be assumed that the full amount was allowed and a remittitur of so much will be ordered, as a condition of denying a new trial. *Revel v. Pruitt*, 42 Okla. 696.

⁵⁵ *Chicago, etc. R. Co. v. Krayenbuhl*, 70 Neb. 766; *Ross v. Metropolitan St. R. Co.*, 116 App. Div. (N. Y.) 507; *Freeman v. Fuller* (Tex. Civ. App.), 127 S. W. 1194; *International, etc. R. Co. v. Williams*, 55 Tex. Civ. App. 176; *Lecaire v. Tacoma R. & P. Co.*, 62 Wash. 157; *Ohrstrom v. Tacoma*, 57 Wash. 121; *Hemenway v. Washington W. P. Co.*, 49 Wash. 338; *West v. Bayfield M. Co.*, 149 Wis. 145; *Freeman v. Missouri & K. Tel. Co.*, 160 Mo. App. 271; *De Puy v. Kann*, 32 App. Div. (N. Y.) 638; *Stemmerman v. Nassau E. R. Co.*, 36 App. Div. (N. Y.) 218; *Fitzgerald v. Union S. Co.*, 91 Neb. 493; *Hoger v. Hart*, 159 Iowa 234; *Tierney v. Sampsell*, 172 Ill. App. 119; *Peterson v. Seattle E. Co.*, 71 Wash. 349. (In this case the court departed from the rule laid down in earlier cases to the effect that where the trial court has made a substantial reduction it will not order a further reduction.)

It will be presumed in favor of the reduction of the verdict suggested by the trial court that it was

made on the theory that it was the lowest amount which, in any reasonable probability, another jury of fair-minded men would have found on the same evidence. *Koepp v. National E. & S. Co.*, 151 Wis. 302.

The remittitur of a large portion of the sum awarded does not raise the presumption that the verdict was the result of passion or prejudice. *Hirsch v. Chicago Con. T. Co.*, 146 Ill. App. 501; *Taggart v. Hunter*, 5 Kan. App. 7.

⁵⁶ *Hanson v. Johnson*, 141 Wis. 550; *Nelson v. Stange*, 140 Wis. 657.

⁵⁷ *Howard v. Brown*, — Iowa —, 148 N. W. 987; *Hall v. Philadelphia Co.*, 74 W. Va. 172; *St. Louis & S. F. R. Co. v. Criner*, 41 Okla. 256; *Rief v. Great Northern R. Co.*, 126 Minn. 430; *Lauth v. Chicago Union T. Co.*, 244 Ill. 244; *Jones v. George*, 227 Ill. 64; *Cook v. Cleveland, etc. R. Co.*, 143 Ill. App. 109; *Indianapolis T. & T. Co. v. Menze*, 173 Ind. 31; *Smoot v. Kansas City*, 194 Mo. 513; *Field v. Metropolitan St. R. Co.*, 156 Mo. App. 646; *Thero v. Missouri Pac. R. Co.*, 144 Mo. App. 161; *Borough C. Co. v. New York*, 200 N. Y. 149; *Abrashkov v. Ryan*, 130 App. Div. (N. Y.) 429; *Hickey v. Booth*, 29 R. I. 466, 132 Am. St. 832; *St. Louis, etc. R. Co. v. Waren*, 65 Ark. 619; *Brunswick L. etc. Co.*

verdicts so grossly excessive as to indicate by their very amounts that they are the result of passion or prejudice, as well as those in which error in the proceedings has tended to produce an improper verdict.⁵⁸ In several recent cases there

v. Gale, 91 Ga. 813; *Florida Cent. & P. R. Co. v. Burney*, 98 Ga. 1, 14 Am. Neg. Cas. 164; *West Chicago St. R. Co. v. Johnson*, 69 Ill. App. 146; *Chicago & E. R. Co. v. Binkopski*, 72 id. 22; *West Chicago St. R. Co. v. Krueger*, 68 id. 450; *Lowenthal v. Streng*, 90 Ill. 74; *Chicago, etc. R. Co. v. Cleminger*, 77 id. 186; *Pennsylvania Co. v. Gresco*, 79 id. 127; *Nicholson v. O'Donald*, id. 195; *Lenzen v. Miller*, 51 Neb. 855; *Missouri, etc. R. Co. v. Belew*, 22 Tex. Civ. App. 264; *Wright v. Southern Pac. R. Co.*, 14 Utah 383, 399; *Oldfather v. Zent*, 14 Ind. App. 89; *Pavey v. American Ins. Co.*, 56 Wis. 221; *Smith v. Dukes*, 5 Minn. 373. Compare *Baxter v. Chicago & N. R. Co.*, 104 Wis. 307, 6 Am. Neg. Rep. 746, quoted from in the text of § 460; *In re Oldfield's Est.*, 158 Iowa 98; *Walter v. United R. Co.*, 165 Mo. App. 628; *Phelps v. Bergers*, 92 Neb. 851; *Hahn v. Mackay*, 63 Ore. 100; *Freeman v. Wilson* (Tex. Civ. App.), 149 S. W. 413.

The failure of the jury to give effect to the contributory negligence of a decedent has not been considered cause for the court to refrain from indicating its opinion as to the extent to which the verdict was excessive. *Cain v. Southern R. Co.*, 199 Fed. 211.

A judgment will not be affirmed subject to remittitur where the excessive amount cannot be computed or, at least, closely approximated. *New York, C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952.

A remittitur of a part of the damages may be ordered only when the amount of excess is rendered certain from the evidence or is admitted by the defendant. *Lee v. Bagwell*, 14 Ga. App. 699.

Where the judgment includes improper items of damage the amounts of which are not determined in the verdict a new trial should be awarded. *Bare v. Victoria Coal & Coke Co.*, 73 W. Va. 632.

Where there is a wide range in the amount of damages that may be properly awarded it is deemed a better administration of justice on setting aside a verdict for inadequacy to let another jury assess the damages rather than to make the order for a new trial contingent on the defendant's refusal to allow a judgment for a minimum amount to be fixed by the trial court; *Reuter v. Hickman, Lauson & Diener Co.*, 160 Wis. 284.

⁵⁸ *Gleason v. Byrne C. Co.*, 178 Ill. App. 359 (remittitur of two-thirds of amount of verdict); *Waterman v. Minneapolis, St. P. & S. M. R. Co.*, 26 N. D. 540; *Kraskowski v. Aurora, etc. R. Co.*, 167 Ill. App. 469; *Emerson v. Butte E. R. Co.*, 46 Mont. 454; *Rhyne v. Turley*, 37 Okla. 159; *San Antonio T. Co. v. Cassanova* (Tex. Civ. App.), 154 S. W. 1190; *Phillips v. Thomas*, 70 Wash. 533, 42 L.R.A.(N.S.) 582; *Southern Pac. Co. v. Fitchett*, 9 Ariz. 128; *Tunnel M. & L. Co. v. Cooper*, 50 Colo. 390, 39 L.R.A.(N.S.) 1064; *Davis I. Works Co. v. White*, 31 Colo. 82; *Chicago Union T. Co. v. Lauth*, 216 Ill. 176; *Wabash R. Co.*

is manifested a disposition to exercise the power of requiring the parties to consent to a judgment for a less amount than is

v. Billings, 212 Ill. 37, 18 Am. Neg. Rep. 326; Illinois Cent. R. Co. v. Rothschild, 134 Ill. App. 504; Cincinnati, etc. R. Co. v. Richardson, 145 Ky. 516; Buford v. Hopewell, 140 Ky. 666; Johnson v. Great Northern R. Co., 107 Minn. 285; Ewing v. Stickney, 107 Minn. 217; Masteller v. Same, 100 Minn. 236; Taylor v. Grand Ave. R. Co., 185 Mo. 239; Mitchell v. United R. Co., 125 Mo. App. 1; Allen v. Bear Creek C. Co., 43 Mont. 269; Garwood v. Corbett, 38 Mont. 364; Babbitt v. Union Pac. R. Co., 78 Neb. 410; Jones v. New York Cent. etc. R. Co., 144 App. Div. (N. Y.) 55; Greer v. Reese, 14 Pa. Dist. 658; Chicago, etc. R. Co. v. Forrester (Tex. Civ. App.), 137 S. W. 162; Wright v. Beardsley, 46 Wash. 16.

Contra, Shaw v. Seattle, 39 Wash. 590; Felt v. Puget Sound E. R. 175 Fed. 477; Galveston, etc. R. Co. v. Wallis, 47 Tex. Civ. App. 120. See McGraw v. O'Neil, 123 Mo. App. 691; Chicago, etc. R. Co. v. Krayenbuhl, 70 Neb. 766 and local cases cited; Knutson v. Moe Bros., 72 Wash. 290.

No rule can be formulated for ascertaining whether a verdict is the product of passion or prejudice or not. In some cases the trial or reviewing court has required the remittitur of one-half the award or of a sum as large as \$30,000. Cutler v. Pittsburg S. P. G. M. Co., 34 Nev. 45; Zibbell v. Southern Pac. Co., 160 Cal. 237. But the suggestion that a verdict for \$38,750 be reduced to \$10,000 was of itself evidence that the award was the result of improper motives. Tunnel M. & L. Co. v. Cooper, 50 Colo. 390, 39 L.R.A.(N.S.) 1064.

In Washington it is discretionary with the trial court on a finding of passion and prejudice, based solely on the size of the verdict, to grant a new trial either unconditionally or on refusal of the plaintiff to remit a part of the verdict. Matsuda v. Hammond, 7 Wash. 120, 51 L.R.A.(N.S.) 920.

A judgment for \$17,000, influenced by evidence showing the number of the plaintiff's family, has been reduced to \$10,000. Chicago, etc. R. Co. v. Batsel, 100 Ark. 526.

In Cook v. Globe P. Co., 227 Mo. 471, the verdict was for \$75,000 as actual and \$75,000 as punitive damages. The court required that one-half of each sum be remitted; it did not regard the verdict as the result of passion or prejudice. Adcock v. Oregon R. Co., 45 Ore. 173, is to the same effect. A reduction of one-third has not been considered to imply that the verdict was the result of improper motives. Strand v. Great Northern R. Co., 101 Minn. 85.

Nor can the verdict be cured by remittitur where the damages awarded are largely exemplary. Waltham Piano Co. v. Freeman, 159 Iowa 567; Ahrens v. Fenton, 138 Iowa 559.

A verdict in an action for death by wrongful act has been reduced more than one-half. McDonnell v. Central D. Co., 170 Mich. 291.

In a Pennsylvania case a verdict for \$34,814.50 was reduced by remittitur to \$27,851.60. The damages were arrived at by overlooking circumstances in relief of the defendant *pro tanto*, and which the court directed the jury to consider; these circumstances in themselves

specified in the verdict regardless of whether the excessiveness is the result of passion or prejudice.⁵⁹ The reviewing court will try to ascertain the smallest and largest amounts an impartial and unprejudiced jury might assess, this to be done by examining verdicts in similar cases, and when it has fixed these limits, reasonable doubts being resolved in favor of making the minimum small and the maximum large, giving the defendant the choice of consenting to judgment for the larger sum; if he fails to consent then the choice is given the plaintiff to take

furnished no fixed standard for admeasurement as to the question involved. The better practice, said the reviewing court, would be to grant a new trial, though there is no fixed rule requiring it. The court may do so or may require a remittitur. *Cox v. Pennsylvania R. Co.* (Pa.), 85 Atl. 863.

It is extremely difficult to understand the basis on which awards are reduced in view of the generally accepted rule stated in the text, though some of the cases making reductions do so notwithstanding the courts opinion that they were influenced by passion and prejudice. In *Peterson v. Seattle E. Co.*, 71 Wash. 349, the trial court reduced an award for \$15,250 to \$10,250, and the reviewing court ordered a further reduction to \$8,000.

In West Virginia under a statute prescribing liability for causing death by wrongful act and providing that "in every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars," the verdict of a jury cannot be set aside for excessiveness in an amount under \$10,000, their assessment being final, unless the verdict be the result of passion, prejudice, partiality, or corruption on the part

of the jury. *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395.

The finding of the trial court in favor of an injured plaintiff has been reduced from \$3,250 to \$1,000. *Mathis v. Western F. Mfg. Co.*, 72 Wash. 206.

The reduction of a verdict to the extent of one-half is not conclusive of improper motives on the part of the jury. *Harris v. McClintic-M. C. Co.*, 168 Mo. App. 724.

The existence of passion or prejudice on the part of the jury will not be inferred because the trial court reduced a verdict for \$5,000 to \$3,500. *Brossman v. Drake Standard M. Works*, 177 Ill. App. 323.

A verdict for \$5,000 was reduced to \$2,500 in *Previsich v. Butte E. R. Co.*, 47 Mont. 170.

Judgment for \$15,000 for death of a boy 13 years of age reduced by remittitur to \$2,000. *Florida East Coast R. Co. v. Hayes*, 67 Fla. 101

A verdict for \$15,000 for distress of mind and body caused a white person by being put into a sleeping coach with negroes has been pronounced excessive to the extent of \$13,000. *Alabama & V. R. Co. v. Morris*, 103 Miss. 511.

⁵⁹ *Pilling v. Benson*, 34 R. I. 519, requiring that a verdict for personal injury be reduced from \$4,000 to \$1,000.

judgment for the smaller sum; if neither choice is exercised a new trial will follow.⁶⁰ Where the damages consisted of but a single element the appellate court has given the plaintiff the option of remitting a stated sum, though the verdict was characterized as being the result of passion or prejudice.⁶¹ A similar course has been followed under different circumstances.⁶² Where compensatory and exemplary damages are separately awarded, though the latter are not justified, their inclusion does not affect the verdict for the former, and their *remittitur* will be ordered or that part of the verdict allowing them will be stricken out.⁶³ But more generally a plaintiff who has recovered a verdict or judgment which, as rendered, is clearly erroneous, and seeks to avoid a reversal by striking out a part must satisfy the court, either by material in the record or by fair presumption, that this can be done without injustice to the defendant. If he cannot do this the defendant is entitled to have the verdict set aside or the judgment reversed.⁶⁴ In an action for two tracts of land the judgment was given for the plaintiff for both tracts and for damages. On appeal the judgment as to one tract was affirmed, and reversed as to the other. The court held that, as there were no *data* in the record for the apportionment of the damages the entire judgment should be reversed unless all the damages were remitted.⁶⁵ Where the findings on the question of damages are not sustained by the evidence the court may require the plaintiff to remit the damages or submit to a new trial.⁶⁶ And so where competent

⁶⁰ *Beach v. Bird & W. L. Co.*, 135 Wis. 550.

⁶¹ *Yazoo, etc. R. Co. v. Kelly*, 98 Miss. 367; *Vicksburg W. Co. v. Dutton*, 98 Miss. 209.

⁶² *Puls v. Powelson*, 142 Iowa 604, 21 Am. Neg. Rep. 361; *Williams v. Spokane Falls & N. R. Co.*, 44 Wash. 363.

⁶³ *Louisville & N. R. Co. v. Scott*, 141 Ky. 538, 34 L.R.A.(N.S.) 206; *Walsh v. Hyde & B. A. Co.*, 113 App. Div. (N. Y.) 42; *Ellis v. Wahl*, 180 Mo. App. 507.

⁶⁴ *O. & A. R. Co. v. Fulvey*, 17 Gratt. 366; *Davis I. Works Co. v. White*, 31 Colo. 82, citing the text.

If the jury are erroneously charged that they may award exemplary damages a *remittitur* will not be permitted. *Railway v. Hall*, 53 Ark. 7.

⁶⁵ *Hodapp v. Sharp*, 40 Cal. 69; *Hartford D. Co. v. Calkins*, 186 Ill. 104.

⁶⁶ *Ft. Worth, etc. R. Co. v. Linthicum*, 33 Tex. Civ. App. 375 (by statute); *Carpentier v. Gardiner*,

evidence as to the *quantum* of damages has improperly been excluded,⁶⁷ or the jury has been influenced by improper remarks of counsel in his summing up.⁶⁸ In an action for slander the trial court erred in excluding evidence offered in mitigation. The plaintiff was allowed to retain the verdict only on condition that he would consent to have it amended to one for nominal damages.⁶⁹ A jury rendered a verdict for the full amount of the plaintiff's claim notwithstanding he had received property of considerable value which should have been deducted. Because the amount which should be allowed for this property was not ascertained the objection of excess could not be removed by a *remittitur*.⁷⁰ The finding of a court in a case tried without a jury will be set aside if the damages allowed are clearly excessive.⁷¹ In determining whether a verdict is excessive the right of the jury to award interest will be regarded though the instructions were silent concerning it.⁷² A defendant is entitled to a reversal, where the court sets aside a general verdict in the plaintiff's favor and renders judgment against the defendant for a sum which is not sustained by the evidence or findings, and is contrary to any theory contended

29 Cal. 160; *Murray v. Buell*, 74 Wis. 14; *Corcoran v. Harran*, 55 Wis. 120; *Doolin v. Omnibus C. Co.*, 125 Cal. 141; *Thomas v. Gates*, 126 Cal. 1; *Blair v. Lewiston, A. & W. St. Ry.*, 111 Me. 586.

A remittitur will not be required where the verdict is only twelve cents in excess of the sum sued for. *Cameron v. Hart*, 57 Mo. App. 142.

The maxim *de minimis non curat lex* has been applied where the award was excessive by \$2.81. *Spunner v. Roney*, 122 Ill. App. 19. And where \$10 was erroneously allowed as lost profits, the plaintiff being entitled to interest in excess of that amount, which was not allowed. *Weick v. Dougherty*, 28 Ky. L. Rep. 930, 3 L.R.A.(N.S.) 348.

⁶⁷ Where competent evidence on the *quantum* of damages has been improperly excluded the reviewing court will, as a condition of denying a new trial, require a remittitur of so much of the judgment as will reduce the recovery to the minimum a jury of average judgment would award on the evidence. *Triangle Lumber Co. v. Acree*, 112 Ark. 534.

⁶⁸ *Griffith v. American Bridge Co.*, 163 App. Div. (N. Y.) 597.

⁶⁹ *Clark v. Brown*, 116 Mass. 504; *Prather v. First Presbyterian Soc.*, 13 Ohio N. P. (N. S.) 169.

⁷⁰ *Lambert v. Craig*, 12 Pick. 199.

⁷¹ *Mower v. Shannon*, 178 Ala. 469.

⁷² *Biederman v. Interstate T. & B. Co.*, 172 Mo. App. 1.

for, although less than the plaintiff claimed and less than he was entitled to recover, if his theory of the case was correct.⁷³

§ 460. **Same subject.** In those cases in which there is no legal measure of damages or they are unliquidated; where courts only interfere with verdicts when there is such an excess of damages as indicates that the jury has committed an error of a serious nature the plaintiff may have the benefit of remitting a part, so that, if the amount is not still excessive, a new trial will not be granted.⁷⁴ In many instances in cases of this nature the court, on finding the damages too large, have suggested the amount of reduction and thus given the plaintiff a guide as to the sum to be remitted. Oakley, C. J., said: "We have considered it and find no objection on principle to reducing the verdict to an amount such as, if the jury had found it as damages, we would not interfere with their conclusion. That is, in effect, for the court to say to the plaintiff, if you will enter a *remittitur* so as to reduce the verdict to such a sum as we think would not have been unreasonable, if, it had been found by the jury, we will not set it aside." The verdict was \$1,500, and the court gave the plaintiff the option to remit \$1,000 and take judgment for the residue.⁷⁵ The basis of the

⁷³ Hart v. Gerretson Co., 91 Kan. 569.

⁷⁴ Sandy v. Lake St. E. R. Co., 235 Ill. 194; Howard v. Fall River I. Works Co., 203 Mass. 273; American C. Co. v. Sammon, 27 Ohio C. C. 337; Wirsing v. Smith, 222 Pa. 8; Upham v. Dickinson, 50 Ill. 97; Louisville, etc. R. Co. v. Hodge, 6 Bush 141; Johnson v. Von Kettler, 66 Ill. 63; Collins v. Council Bluffs, 35 Iowa 432; Duffy v. Dubuque, 63 id. 171, 50 Am. Rep. 743.

⁷⁵ Latehtimacker v. Jacksonville T. & W. Co., 181 Fed. 276; Felt v. Puget Sound E. R., 175 Fed. 477; Gagnon v. Klauber-W. D. Mach. Co., 174 Fed. 477; Diagneau v. Grand Trunk R. Co., 153 Fed. 593; Scheu v. Pennsylvania R., 141 Fed. 495;

Smith v. Day, 136 Fed. 964; St. Louis, etc. R. Co. v. Freeman, 89 Ark. 326; Same v. Brabbzson, 87 Ark. 109; Same v. Mathis, 76 Ark. 184, 113 Am. St. 85; Swett v. Gray, 141 Cal. 63; Hovey v. New England N. Co., 83 Conn. 278; Florida Cent. P. R. Co. v. Foxworth, 45 Fla. 278; Rhodes v. Rapid Transit Co., 16 Hawaii 319; Maloney v. Winston, 18 Idaho, 740, 47 L.R.A.(N.S.) 634; Prussing v. Jackson, 208 Ill. 85; Fuller v. Illinois Cent. R. Co., 158 Ill. App. 198; Nau v. Standard O. Co., 154 id. 421; Devine v. Chicago City R. Co., 153 id. 382; Lee v. Republic I. & S. Co., 148 id. 585; Merchants' Mut. Tel. Co. v. Hirschman, 43 Ind. App. 283; Hardy v. Chicago, etc. R. Co., 149 Iowa 41; Engvall v. Des Moines City R. Co.,

action of the court in this respect will be to place the sum at such a figure as in every reasonable probability any future

- 145 Iowa 560; Canfield v. Chicago, etc. R. Co., 142 Iowa 658; Heinmiller v. Winston, 131 Iowa 32, 6 L.R.A.(N.S.) 150, 117 Am. St. 405; Parrott v. Chicago, etc. R. Co., 127 Iowa 419; Loneragan v. Small, 81 Kan. 48, 25 L.R.A.(N.S.) 976; Western U. Tel. Co. v. Bodkin, 79 Kan. 792, 21 Am. Neg. Rep. 16 (exemplary damages); Argentine v. Bender, 71 Kan. 422; Chicago, etc. R. Co. v. Frazier, 66 Kan. 422; Reems v. New Orleans G. M. R. Co., 126 La. 511; Johnson v. Levy, 122 La. 118; Dobyns v. Yazoo, etc. R. Co., 119 La. 72; Haynes v. Maine Cent. R. Co., 108 Me. 243; Matson v. Matson, 105 Me. 152; O'Brien v. White, 105 Me. 308; Wood v. Maine Cent. R. Co., 101 Me. 469; Little v. Bousfield, 165 Mich. 654; In re Thompson's Est., 157 Mich. 669; Dickinson v. Pere Marquette R. Co., 148 Mich. 461; King v. Ann Arbor R. Co., 144 Mich. 65; McDonald v. Champion I. & S. Co., 140 Mich. 401; Denchfield v. Minneapolis, etc. R. Co., 114 Minn. 58; Schwartzbauer v. Great Northern R. Co., 112 Minn. 356; Putz v. St. Paul G. Co., 108 Minn. 243; Strand v. Great Northern R. Co., 101 Minn. 85; Bremer v. Minneapolis, etc. R. Co., 96 Minn. 469; Yazoo, etc. R. Co. v. Cobb, 94 Miss. 561; Carver v. Jackson, 82 Miss. 583; Dean v. Wabash R. Co., 229 Mo. 425; Moore v. St. Louis T. Co., 226 Mo. 689; Reynolds v. Same, 189 Mo. 408, 107 Am. St. 360; Stolze v. Same, 188 Mo. 581; Kirby v. St. Louis, etc. R. Co., 146 Mo. App. 304; Stafford v. Adams, 113 Mo. App. 717; Harrington v. Butte, etc. R. Co., 39 Mont. 22; Yergy v. Helena L. & R. Co., 39 Mont. 213; Stewart v. Pittsburg & M. C. Co., 42 Mont. 200; Bailey v. Kling, 88 Neb. 699; Kurpgewelt v. Kirby, 88 Neb. 72, 33 L.R.A.(N.S.) 98; South Omaha v. Sutcliffe, 72 Neb. 746; Chicago, etc. R. Co. v. Krayenbuhl, 70 Neb. 766; Christensen v. Floriston P. & P. Co., 29 Nev. 552; Foley v. Brunswick T. Co., 69 N. J. L. 481; O'Doherty v. Postal Tel.-C. Co., 134 App. Div. (N. Y.) 298; Schierloh v. Interurban St. R. Co., 115 App. Div. (N. Y.) 455; Smith v. Metropolitan St. R. Co., 92 App. Div. (N. Y.) 213; Aronson v. Appegard, 16 N. D. 595; Chicago, etc. R. Co. v. Wehrman, 25 Okla. 147; Taylor v. Winsor, 30 R. I. 44; Memphis St. R. Co. v. Berry, 118 Tenn. 581; Chicago, etc. R. Co. v. Swan (Tex. Civ. App.), 130 S. W. 855; Texas, etc. R. Co. v. Kenny, 46 Tex. Civ. App. 297; Foulger v. McGrath, 34 Utah 86; Cordrey v. Washington S. Co., 65 Wash. 381; Edwards v. Seattle, etc. R. Co., 62 Wash. 77; Swanson v. Pacific S. Co., 60 Wash. 87; Ohrstrom v. Tacoma, 57 Wash. 121; Helland v. Bridenstine, 55 Wash. 470; McClure v. Campbell, 42 Wash. 252; Lehman v. Amsterdam C. Co., 146 Wis. 213; Willette v. Rhinelander P. Co., 145 Wis. 537; Lyttle v. Goldberg, 131 Wis. 613; Young v. Gravenhurst, 24 Ont. L. R. 467 (trial before the court without a jury); Renwick v. Galt, etc. St. R. Co., 12 Ont. L. R. 35; Clarke v. London St. R. Co., id. 279; Stephens v. Toronto R. Co., 11 id. 19; Landro v. Great Northern R. Co., 117 Minn. 306; Knuckey v. Butte E. R. Co., 45 Mont. 106; Colorado & S. R. Co. v. Jenkins, 25

jury, rightly instructed as to the law and with a proper conception of duty, would be liable to award.⁷⁶ In one case a different standard has been favored, and one less likely to result in compensation to the plaintiff. It was said that in fixing the amount of the recovery the court will not be careful to see that it shall be sufficient to compensate for the injury, but rather

Colo. App. 348; *Crantz v. Nassau E. R. Co.*, 154 App. Div. (N. Y.) 247; *Denbeigh v. Oregon-W. R. & N. Co.*, 23 Idaho 663; *Lyons v. Chicago City R. Co.*, 171 Ill. App. 374; *Finklestein v. Chicago*, 168 Ill. App. 475; *Aaron v. Missouri & K. Tel. Co.*, 89 Kan. 186, 45 L.R.A.(N.S.) 309; *Weiss v. Great Northern R. Co.*, 119 Minn. 355; *Harris v. Metropolitan St. R. Co.*, 168 Mo. App. 336; *McDonald v. Metropolitan St. R. Co.*, 164 Mo. App. 111; *McCabe v. Butte*, 46 Mont. 65; *Diblin v. Murphy*, 3 Sandf. 19; *Johnston v. Morrow*, 60 Mo. 339; *Collins v. Albany, etc. R. Co.*, 12 Barb. 492; *Hegeman v. Western R. Co.*, 16 Barb. 353, 13 N. Y. 9, 9 Am. Neg. Cas. 690; *Whitehead v. Kennedy*, 69 id. 462, 470; *Spicer v. Chicago, etc. R. Co.*, 29 Wis. 580; *Patten v. Same*, 32 id. 524, 7 Am. Neg. Cas. 191; *Lombard v. Same*, 47 Iowa 494; *Murray v. Hudson River R. Co.*, 47 Barb. 196; *Bierbauer v. New York, etc. R. Co.*, 15 Hun 559; *Eliot v. Allen*, 1 C. B. 18; *Holmes v. Jones*, 121 N. Y. 461; *Pensacola G. Co. v. Pebley*, 25 Fla. 381; *Van Winter v. Henry County*, 61 Iowa 684; *Broquet v. Tripp*, 36 Kan. 700; *Reddon v. Union Pac. R. Co.*, 5 Utah 344, 17 Am. Neg. Cas. 690, 693, 696; *Corcoran v. Harran*, 55 Wis. 120; *Baker v. Madison*, 62 Wis. 137; *Massey v. Toronto P. Co.*, 11 Ont. 362; *Belt v. Lawes*, 12 Q. B. Div. 356; *Union Pac. R. Co. v. Mitchell*,

56 Kan. 324; *Nicholds v. Crystal P. G. Co.*, 126 Mo. 55, 16 Am. Neg. Cas. 415; *Bee Pub. Co. v. World Pub. Co.*, 59 Neb. 713; *McKenna v. North Hudson R. Co.*, 64 N. J. L. 106, 7 Am. Neg. Rep. 463; *Still v. Nassau E. R. Co.*, 32 App. Div. (N. Y.) 276; *Young v. Cowden*, 98 Tenn. 577; *Telegraph Co. v. Firth*, 105 Tenn. 167; *Hazard P. Co. v. Volger*, 7 C. C. A. 130, 58 Fed. 152; *Fraser v. London St. R. Co.*, 29 Ont. 411; *Sloane v. Southern California R. Co.*, 111 Cal. 668, 32 L.R.A. 193.

A defendant cannot be required to accept an offer of a remittitur of the excess of the damages as a finality and so as to bar him of his right to a review of other proceedings in the trial. *Gardner v. Tatum*, 81 Cal. 370.

A distinction has been made in Washington between cases in which the injury sustained affected only the earning power of the plaintiff to an extent which is capable of ascertainment and cases in which his earning power after the injury is uncertain. In the former class the appellate court will consider the amount awarded and revise it if necessary; in the latter class it will not ordinarily interfere. *Lynch v. Northern Pac. R. Co.*, 67 Wash. 113.

⁷⁶ *Willette v. Rhinelander P. Co.*, 145 Wis. 537; *Chicago, etc. R. Co. v. Batsel*, 100 Ark. 526. See *Olwell v. Skobis*, 126 Wis. 308.

that the amount remitted shall be large enough to strip the verdict of any prejudicial elements, giving the defendant the benefit of reasonable probabilities in respect to the amount of the recovery so that it shall clearly be regarded as not excessive.⁷⁷

According to some courts there is an apparent or real departure from sound principle in the practice as stated by Oakley, C. J., *supra*. The court concludes that the jury committed a serious mistake because they found such excessive damages; and yet allows their finding, covering the major propositions of the case upon which damages are consequent, to stand. Why should a verdict be in part retained under such circumstances? Where their estimate of damages is rejected and another substituted, is the latter a verdict? ⁷⁸ One answer, among the many given to the questions put by some courts, is that in case of personal injuries which are serious the sum which will compensate therefor is a matter concerning which jurors will differ largely, and the fact that the sum found is larger than the court thinks just does not establish that the jury were actuated by prejudice or passion. The law forbids a judge giving sanction to a verdict he deems unjust, but it does not require that he refuse to add his judgment, soberness and experience to the decision of the jury, and, so doing, to award a result more equitable than

⁷⁷ St. Louis, etc. R. Co. v. Brown, 100 Ark. 107.

⁷⁸ See *Luson v. Smith*, 1 Nev. & Man. 304; *Sherry v. Frecking*, 4 Duer 452; *Koeltz v. Blackman*, 46 Mo. 320.

If the amount awarded by the jury as damages is grossly excessive and is not supported by any interpretation which can be given the evidence a remittitur will not be allowed. *Doty v. Steinberg*, 25 Mo. App. 328, following *Koeltz v. Blackman*, *supra*. See *Sherman v. Commercial P. Co.*, 29 Mo. App. 31; *International, etc. R. Co. v. Wilkes*, 68 Tex. 617, 2 Am. St. 515, 8 Am.

Neg. Cas. 635; *Parsons & P. R. Co. v. Montgomery*, 46 Kan. 120.

The general rule as to requiring a remittitur where excessive compensatory damages have been awarded is applied in Iowa; but a distinction is made where excessive exemplary damages are awarded on the ground that their allowance is discretionary, and if the verdict is vitiated by the conduct of the jury it is so as a whole, and not merely to the extent the trial court may think it in excess of what is reasonable. *Ahrens v. Fenton*, 138 Iowa 559.

A verdict for exemplary damages

either setting aside or wholly affirming a verdict.⁷⁹ The supreme court of Georgia strenuously contends that in suits to recover for personal injuries or trespass on land it is not competent for the court to say that the verdict shall stand for any definite sum less than it designates.⁸⁰ The rule in that state is that where general damages have been recovered for a personal tort, if they be so excessive as to lead the court to suspect bias or prejudice, the judge has no power to require a portion of the damages written off and thereupon refuse a new trial; but it is otherwise where the damages claimed are special, and from the testimony can with some accuracy be computed in dollars and cents,⁸¹ and also in actions on contracts.⁸² Interest improperly included in a verdict may be written off in the trial court or stricken from the judgment on appeal.⁸³ In Kentucky and North Carolina a trial court cannot, in an action to recover for personal injuries, require the plaintiff, in order to avoid a new trial, to accept judgment for less than the verdict awards; and if such judgment is accepted under protest it will be reversed either upon the defendant's appeal or upon cross-appeal.⁸⁴ The appellate court cannot say what amount should have been awarded.⁸⁵ The Texas courts denied the power to require a *remititur* in actions to recover damages for torts, but the rule has

has been reduced. *Western U. Tel. Co. v. Hiller*, 93 Miss. 658.

⁷⁹ *Goldie v. Werner*, 50 Ill. App. 297, 14 Am. Neg. Cas. 286; *McNulta v. Hendele*, 92 id. 273.

⁸⁰ *Savannah, etc. R. v. Harper*, 70 Ga. 119, 14 Am. Neg. Cas. 141; *Carlisle v. Callahan*, 78 id. 320; *Central R. Co. v. Perkerson*, 112 Ga. 923, 53 L.R.A. 210; *Seaboard A. L. R. v. Bishop*, 132 Ga. 71; *Same v. Randolph*, 129 Ga. 796; *Tifton, etc. R. Co. v. Chastain*, 122 Ga. 250; *Daniel v. Bailey*, 118 Ga. 408.

⁸¹ *Savannah, etc. R. Co. v. Godkin*, 104 Ga. 655, 4 Am. Neg. Rep. 253.

⁸² *Thornton v. George*, 108 Ga. 9, 69 Am. St. 187; *Mutual L. Ins. Co. v. Chambliss*, 131 Ga. 60; *Macon,*

etc. R. Co. v. Stewart, 125 Ga. 88; *Teasley v. Bradley*, 120 Ga. 373 (excess of interest). See *Malone v. Hammond*, 6 Ga. App. 114.

⁸³ *Seaboard A. L. R. v. Bishop, supra*; *Merchants' Collection Agency v. Gopcevic*, 23 Cal. App. 216.

⁸⁴ *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 15 Am. Neg. Cas. 181; *Shields v. Whitaker*, 82 N. C. 523; *Isley v. Virginia B. & I. Co.*, 143 N. C. 51.

It has been said in a recent case in that state that the court of appeals in its more recent decisions has declared its adoption of a more liberal policy in sustaining verdicts of large amounts. *Kentucky D. & W. Co. v. Wells*, 149 Ky. 275.

⁸⁵ *Kentucky W. Mfg. Co. v. Shake*, 137 Ky. 742.

been changed by statute, and the power of the legislature to make the change has been sustained there and in Alabama.⁸⁶ The same view of the main question seems to be favored in West Virginia.⁸⁷ This is the view in Missouri as to the supreme court,⁸⁸ but not as to the trial courts. It is said in a recent case: Whenever the verdict does not upon its face appear to be the result of passion or prejudice it is wholly within the province of the jury; but when it does so appear, then it ought to be set aside. We have no scales by which we can determine what portion is just, and the result of reason, based upon the evidence, and what part is poisoned with prejudice and passion. We do not think it within our province to assess the damages. When we set aside any part of the verdict we destroy its integrity, and we have no right to set ourselves up as triers of facts and render another and different verdict. The only logical course in such cases is to let the verdict stand or set it aside as an entirety.⁸⁹ It was formerly the rule in Wisconsin, where the excess of the judgment was not readily severable from the rest and clearly ascertainable from the record, that the appellate court would not substitute its judgment for that of the jury and allow the plaintiff to remit accordingly, and then affirm the judgment.⁹⁰ But the opposite view has been, probably, carried further in that state than in any other unless it be Tennessee. The opinion of Justice Marshall in a recent case reviews the more important cases in Wisconsin and seemingly extends the doctrine. The case referred to, as stated

⁸⁶ Texas, etc. R. Co. v. Syfan, 91 Tex. 562; Central R. Co. v. Stever-son, 3 Ala. App. 313.

⁸⁷ Vinal v. Core, 18 W. Va. 1, 60, approving Nudd v. Wells, 11 Wis. 415; Unfried v. Baltimore & O. R. Co., 34 W. Va. 260; Rodgers v. Bailey, 68 W. Va. 186; Bare v. Victoria Coal & Coke Co., 73 W. Va. 632; Hall v. Philadelphia Co., 74 W. Va. 172.

⁸⁸ Chitty v. St. Louis, etc. R. Co., 166 Mo. 435, 445 (indicating the fluctuation of local opinion on the

question); Dominick v. Western Coal & Mining Co., 255 Mo. 463.

⁸⁹ Gurley v. Missouri Pac. R. Co., 104 Mo. 211, 233; Chitty v. St. Louis, etc. R. Co., 148 Mo. 64.

The power of the trial court to order a remittitur is recognized in Missouri, but the better practice, it is said, is to sustain or set aside the verdict as a whole. Unterberger v. Scharff, 51 Mo. App. 102.

⁹⁰ Potter v. Chicago & N. R. Co., 22 Wis. 615.

in the headnotes prepared by that justice, holds that where a judgment in favor of a plaintiff in a personal injury action is right as regards the legal liability of the defendant, but reversible because of the reception of irrelevant evidence tending to prejudice the jury and increase the amount of their verdict, and because compensation was allowed for a disability which does not in fact exist, the court may properly permit the plaintiff, at his election, to avoid a new trial by taking judgment for such sum as will, in the judgment of the court, do justice to the defendant. In naming a sum for which the plaintiff may take judgment in the circumstances above indicated the right of the defendant to a jury trial is not invaded if the amount be placed as low as in all reasonable probability the jury found by their verdict, independent of the prejudicial elements. That is, the court in such a case should not undertake to say what sum of money will measure the plaintiff's loss, but what sum the jury said, by their verdict, stripped of its prejudicial elements, and giving the defendant the benefit of reasonable probabilities in respect to the amount of the recovery, will measure such loss.⁹¹ The course indicated may be pursued either in the trial or appellate court, whether the excessiveness of the award is due to perversity or not. Reasonable doubts will be resolved against the party accorded the option to take the sum named or submit to a new trial.⁹² The first case in which the question arose in Minnesota considered it in a conservative manner;⁹³ but later ones have made a considerable advance. The statutes of that state provide for a new trial where excessive damages have been awarded under the influence of passion and prejudice, and contain no exception under which the trial court may correct the error of the jury by reducing the verdict. It is conceded that a strict following of the statute requires a new trial whenever such a

⁹¹ *Baxter v. Chicago & N. R. Co.*, 104 Wis. 307. Compare *McCann v. Ullman*, 109 Wis. 574. In accord with the text is *St. Louis, etc. R. Co. v. Adams*, 74 Ark. 326, 109 Am. St. 85. But see *Brossard v. Morgan Co.*, 150 Wis. 1, favoring the view that the supreme court will

not interfere with verdicts unless their amount indicates that they were the product of passion or prejudice.

⁹² *Heinlich v. Tabor*, 123 Wis. 565, 68 L.R.A. 669. See *Rueping v. Chicago & N. R. Co.*, 123 Wis. 319.

⁹³ *Craig v. Cook*, 28 Minn. 238.

verdict is returned. But the practice of correcting the error by reducing the damages to what the trial court deems fair, not only in cases where it is found that the jury was actuated by motives other than passion or prejudice, but in cases where there was no other apparent cause, is too firmly established to be departed from. Where there is such a degree of passion and prejudice as to make it clear to the court that it permeated the entire case and influenced the jury upon questions other than damages, no attempt will be made to correct the verdict by a reduction of damages, but an unconditional new trial will be granted.⁹⁴ The doctrine in Tennessee and Colorado is much the same. In a case in which the trial judge suggested a *remittitur* of nearly one-half the verdict it was contended that the excessive award was the result of passion, prejudice, corruption or caprice, and that the whole verdict should be set aside. The appellate court said that, conceding this to be true, and that the trial judge refused to approve the verdict because it was true, the verdict was valid until set aside. If it is reduced by the trial judge to such an amount as makes it a proper verdict on the facts, and this is assented to by the plaintiff it is purged of its taint, and judgment may be rendered for such reasonable amount without the necessity of another trial. This line of argument, the court admits, has no application if there should not have been any verdict for the plaintiff.⁹⁵ In Pennsylvania, though there is no established rule requiring it, the better practice, if the verdict is in excess of the just claim because the jury failed to observe circumstances in the defendant's favor which they were directed to consider, is to grant a new trial.⁹⁶ The power exists to require the *remittitur* of a portion of the damages awarded for the breach of a contract if the jury has not followed the rules governing the liability therefor. The court will fix as the limit of the recovery a fair and reasonable,

⁹⁴ Trow v. White Bear, 78 Minn. 432; Wainwright v. Satterfield, 52 Neb. 403; Bee P. Co. v. World P. Co., 59 Neb. 713.

⁹⁵ Telegraph Co. v. Frith, 105 Tenn. 167; Grant v. Louisville &

N. R. Co., 129 Tenn. 398, citing the text; Colorado & S. R. Co. v. Jenkins, 25 Colo. App. 348.

⁹⁶ Cox v. Pennsylvania R. Co., 240 Pa. 27.

if not an ample and liberal sum for the damages done.⁹⁷ Where there are several plaintiffs and damages are separately awarded to each the error in receiving incompetent evidence in favor of one may be cured by the *remittitur* of the sum awarded him, the damages in favor of the others not having been influenced thereby.⁹⁸ Though the case be one in which exemplary damages may be awarded if the trial court grants a new trial because the award is inadequate it may suggest, so far as the defendant is concerned, the sum he may pay to avoid such trial.⁹⁹ The tendency of the late decisions in the state courts, except as has been otherwise indicated, is in the direction of unqualified support for the practice which allows the appellate and trial courts, in cases in which excessive damages have been awarded, and in which the plaintiff is entitled to substantial damages, to indicate the excess and give him the option to remit it and take judgment for the residue or be awarded a new trial. This is held not to be an invasion of the province of the jury or of the rights of the defendant.¹ And where such power is exercised

⁹⁷ Birmingham W. W. Co. v. Bailey, 5 Ala. App. 474.

⁹⁸ International, etc. R. Co. v. White, 103 Tex. 567.

⁹⁹ Ford v. Minneapolis St. R. Co., 98 Minn. 96.

It is not competent for the court to order a remittitur where the verdict improperly includes exemplary damages, without distinguishing these from those which are compensatory. St. Louis, etc. R. Co. v. Hall, 53 Ark. 7. Where the punitive and compensatory damages are separately specified there can be no valid objection to ordering a remittitur of either.

¹ St. Louis, etc. R. Co. v. Adams, 74 Ark. 326, 109 Am. St. 85, quoting the text; Noxon v. Remington, 78 Conn. 296; Missouri Pac. R. Co. v. Dwyer, 36 Kan. 58, 15 Am. Neg. Cas. 125; Baker v. Madison, 62 Wis. 137; Union v. Durkes, 38 N. J. L. 21; Belknap v. Boston & M.

R., 49 N. H. 358; Arkansas Valley L. & C. Co. v. Mann, 130 U. S. 69, 32 L. ed. 854; Hopkins v. Orr, 124 U. S. 510, 31 L. ed. 523; Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110; Pratt v. Pioneer Press Co., 35 Minn. 251; Hutchins v. St. Paul, etc. R. Co., 44 Minn. 5, 16 Am. Neg. Cas. 294; Belt v. Lawes, 12 C. B. Div. 356; Baxter v. Chicago & N. R. Co., 104 Wis. 307, citing the text; Chitty v. St. Louis, etc. R. Co., 166 Mo. 435, and the cases cited to this section, and the propositions of the preceding section which bear upon the subject, except where a different rule is indicated as prevailing.

"Whether a reduction shall be made in a verdict, or in the alternative a new trial given, is a matter which is addressed to the sound discretion of the trial court, and the appellate court will only interfere with the exercise of such discretion when there has been an abuse

by trial courts independently of a statute it cannot be withdrawn thereby and the exercise of the power limited to courts of appeal.² In Louisiana if the verdict is clearly less than it should be the supreme court will render judgment for such sum as the evidence indicates to be proper.³ This is in harmony with the practice in courts of admiralty.⁴ In other than such courts exercising federal jurisdiction it is generally beyond their power to order the entry of a *remittitur*.⁵ In England and the province of Ontario the courts of appeal cannot, without the defendant's consent, order a conditional new trial.⁶ In the trial court, after a motion for a new trial has been granted on the ground of excessive damages, it is held, in Indiana, to be

shown." *Pierce v. Seattle Elec. Co.*, 78 Wash. 167, reversing a judgment requiring a remittitur of \$3,400 of a verdict for \$7,900 rendered in a case of traumatic neurasthenia, the court having been mistaken as to the law in supposing \$5,000 to be the maximum recovery permitted in such cases and having improperly held an extra judicial conversation concerning the case with a physician appointed as one of a commission to examine the plaintiff prior to trial.

² *Yazoo, etc. R. Co. v. Wallace*, 90 Miss. 609, 122 Am. St. 321; *Mississippi Eastern R. Co. v. Wymond C. Co.*, 93 Miss. 73.

³ *Dougherty v. New Orleans R. & L. Co.*, 127 La. 225; *Burvant v. Wolfe*, 126 La. 787, 29 L.R.A. (N.S.) 677; *Rossey v. Lawrence*, 123 La. 1053; *Warner v. Talbot*, 112 La. 817, 66 L.R.A. 336, 104 Am. St. 460; *Roby v. Kansas City S. R. Co.*, 130 La. 896; *Sullivan v. Shreveport & P. R. Co.*, 39 La. Ann. 800, 4 Am. St. 239; *Caldwell v. Vicksburg, etc. R. Co.*, 41 La. Ann. 624; *Turnblow v. Wimberly*, 106 La. 259.

In Ontario the finding of a judge as to damages for a personal injury

stands upon the same footing as any other finding and if the award of damages is excessive the reviewing court will fix the sum which ought to be awarded, erring if at all, in favor of the plaintiff. *Bateman v. Middlesex County*, 27 Ont. L. R. 122. See s. c., 25 id. 173.

⁴ *The San Rafael*, 141 Fed. 270, 72 C. C. A. 388.

⁵ *Kennon v. Gilmer*, 131 U. S. 22, 33 L. ed. 110; *Duke v. St. Louis, etc. R. Co.*, 172 Fed. 684.

⁶ *Watt v. Watt*, [1905] App. Cas. 115, overruling *Belt v. Lawes*, 12 Q. B. Div. 356; *Hockley v. Grand Trunk R. Co.*, 10 Ont. L. R. 363.

In the overruled English case, *supra*, it was argued that the power to reduce the verdict without the consent of both parties to the action could not exist without the power to increase it without such consent, which, counsel said, would be an absurd conclusion, because then the court would in that case be given damages which a jury had not given. The answer was made by Brett, M. R. "I am, however, by no means prepared to say that the court might not refuse a new trial if a defendant would agree that the damages should be larger. Suppose

too late to avoid the objection by remitting the excess;⁷ and in Kentucky that it is too late after judgment; at all events, after the close of the term.⁸ The remission, to have effect, should be made during the term, and while the judgment is under the control of the court.⁹ It cannot be made after the

a case in which a new trial should be moved for on behalf of the plaintiff on the ground that the amount of damages which the jury had given was obviously unreasonably too small. I am far from saying that the court would not have power in favor of the defendant and in his interest to say that the damages given are too small, but if the defendant will agree to their being increased to such a sum as may be stated, a new trial shall be refused."

⁷ Hill v. Newman, 47 Ind. 187.

⁸ Bealle v. Schoal, 1 A. K. Marsh. 475; Holeman v. Coleman, id. 297; James v. Wilson, 7 Tex. 230.

In *Planters' Bank v. Union Bank*, 16 Wall. 483, 497, 21 L. ed. 473, 479, Strong, J., said: "It is further assigned for error by the defendants that the court allowed the plaintiffs to withdraw a remittitur entered by them of part of the verdict obtained on a former trial of the case. The only objection made in the court below to the allowance was that the remittitur was an acknowledgment of record that the amount remitted was not due. There had been a former trial, in which the plaintiffs had obtained judgment for \$113,296.01, with five per cent. interest from November 25, 1863. This was a larger amount of interest than the petition of the plaintiffs had claimed, and they entered on the judgment a remittitur of the excess, expressly reserving their right to the balance of the judgment. Subsequently a new

trial was granted, and it is now contended that the remittitur had the effect of a *retraxit*. As it was entered after judgment, 'such perhaps would be the effect if the judgment itself had not been set aside and a new trial had not been granted. *Bowden v. Horne*, 7 Bing. 716. But such cannot be its operation now. If it takes effect at all, it must in its entirety, and the plaintiffs must hold their first judgment for the balance unremitted. As their judgment no longer exists, there is no reason for holding that the remission of a part of it is equivalent to an adjudication against them."

⁹ *Robertson v. Allen*, 36 Ark. 553; *Russell v. Hubbard*, 59 Ill. 335; *Rowan v. People*, 18 Ill. 159; *Buckles v. Northern Bank of Kentucky*, 63 Ill. 268; *Fury v. Stone*, 2 Dall. 184, 1 L. ed. 341.

In *Crockett v. Calvert*, 8 Ind. 127, 14 Am. Neg. Cas. 483, a jury in a justice's court found a verdict of \$100 in favor of the plaintiff, and judgment was rendered thereon; but before the entry on the justice's docket was signed and sealed by him the plaintiff entered a remittitur of \$25 of the judgment. The defendant appealed, and the appellate court rendered judgment for \$80; held, a reduction of the judgment so as to carry costs; because the remittitur should have been of \$25 of the *verdict* and judgment taken for the remainder.

After an order reversing a judgment had been made in one of the

judgment has been reversed.¹⁰ The appellate court will not listen to an objection from the defendant based on the fact that the plaintiff has voluntarily remitted in the trial court a portion of the damages awarded by the jury.¹¹ And it is doubtless the rule that the party who has so remitted will not be heard to claim that the amount which remains is insufficient. The offer to remit will not be effective unless it specifies the sum. The plaintiff cannot require the court to substitute its judgment for the verdict upon a question of fact. Hence where the offer was to remit such part of the sum awarded as the court deemed to be fair, there was no error in granting a new trial.¹² The defeated party may acquiesce in the judgment for the reduced sum or have a new trial.¹³ Where it appears that at least nominal damages should have been given, but the jury have found a verdict for the defendant, then whether the court will grant a new trial will depend on whether any other right than that to such damages is involved. If not a new trial will not be granted;¹⁴ but if a judgment for the plaintiff would entitle him to costs or is necessary to vindicate any right drawn in question a new trial will be granted if the jury have erroneously found for the defendant when they should have found nominal damages for the plaintiff.¹⁵ The rule that a new trial will not be

Illinois appellate courts the plaintiff had such order set aside and entered a remittitur of one-half of the judgment, whereupon such court entered judgment for the balance. This action was sustained. *North Chicago St. R. Co. v. Wrixon*, 150 Ill. 532, 2 Am. Neg. Cas. 708.

¹⁰ *Irvine v. Gibson*, 117 Ky. 306, 111 Am. St. 251.

¹¹ *Central R. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463, 14 Am. Neg. Cas. 140; *Savannah, etc. R. Co. v. Godkin*, 104 Ga. 655, 659, 4 Am. Neg. Rep. 253, 69 Am. St. 187.

¹² *Richardson v. Birmingham C. Mfg. Co.*, 116 Ala. 381; *Blackmer & P. P. Co. v. Mobile & O. R. Co.*, 168 Mo. App. 22.

¹³ *Barber v. Maden*, 126 Iowa 402. *Suth. Dam. Vol. II.*—18.

¹⁴ *Ely v. Parsons*, 55 Conn. 83; *Eaton v. Lyman*, 30 Wis. 41; *Laubenheimer v. Mann*, 19 id. 519; *Hibbard v. Western U. Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Jones v. King*, 33 Wis. 422; *Chase v. Bassett*, 15 Abb. Pr. (N. S.) 293; *Ellwell v. Bradham*, 2 Speers 141; *Sherwood v. Gibson*, 5 Up. Can. Q. B. 205; *Smith v. Weed S. M. Co.*, 26 Ohio St. 562; *Mahoney v. Robbins*, 49 Ind. 146; *Hudspeth v. Allen*, 26 id. 165; *Patton v. Hamilton*, 12 id. 256; *Hucker v. Blake*, 17 id. 97. See § 11.

¹⁵ *McCarty v. Leggett*, 3 Hill 134; *High v. Johnson*, 28 Wis. 72; *Rosenbaum v. McThomas*, 34 Ind. 331. See § 11.

granted in favor of a plaintiff who at most is entitled to nominal damages applies only to cases where the trivial nature of the claim is unquestionable.¹⁶ The smallness of the damages is no objection to a new trial when the verdict is manifestly contrary to the evidence and the charge to the jury.¹⁷

§ 461. **Verdicts must be certain.** It may be stated as a reasonable and general rule that a verdict, though informal, is good if the court can understand it. It is to have a reasonable intendment and to receive a reasonable construction, and is not to be avoided unless from necessity. If rendered upon substantial issues of fact it is not to be disregarded because of mere technical defects.¹⁸ A verdict, besides being responsive to the issues, should find with certainty the amount of damages the jury intend to award to the successful party in money.¹⁹ It is safest and most prudent to specify the exact amount.²⁰ It will, however, be deemed certain if it can be rendered so by reference to the facts established by the record or found by the jury. If the jury find all the necessary *data*, so that by mere arithmetical calculation the amount can be determined, the verdict is certain and will support a judgment for the amount so ascer-

¹⁶ *McCarty v. Leggett*, *supra*; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199; *Teal v. Russell*, 3 Ill. 319.

¹⁷ *Brooklyn v. Sequa*, Tay (N. C.). 263; *Addington v. Western & A. R. Co.*, 93 Ga. 566; *Ray v. Jeffries*, 9 Ky. L. Rep. 602, 15 Am. Neg. Cas. 216; *Welles v. Schroeder*, 67 Conn. 257.

¹⁸ *Montgomery v. Shirley*, 159 Ala. 239; *Telfair County v. Clements*, 1 Ga. App. 437; *Diamond State Tel. Co. v. Blake*, 105 Md. 570; *Daniels v. McGinnis*, 97 Ind. 549; *Clark v. Clark*, 132 Ind. 25; *Rowley v. Erickson A. L. Co.*, 178 Ill. App. 222; *Scott v. Riddle* (Tex. Civ. App.), 153 S. W. 408; *Bethea v. Western U. Tel. Co.*, 97 S. C. 385, holding that mere irregulari-

ties will be deemed waived unless seasonably objected to.

¹⁹ *Connelly v. Illinois Cent. R. Co.*, 120 Mo. App. 652; *Cookville C. & L. Co. v. Evans* (Tex. Civ. App.), 135 S. W. 750; *Hunter v. Empire State S. Co.*, 159 Iowa 114; *Mayor v. Calhoun*, 103 Ga. 675; *Louisville & N. R. Co. v. Hartwell*, 99 Ky. 436; *Shell v. Sanders*, 46 Ga. 469.

A verdict in favor of the plaintiff for nominal damages, no sum being named, is void. *Sellers v. Mann*, 113 Ga. 643.

A general verdict for nominal damages and an answer to a special question assessing substantial damages has been sustained for the amount of both sums. *Billings v. Atchison, etc. R. Co.*, 76 Kan. 325.

²⁰ *Darden v. Mathews*, 22 Tex. 320.

tained.²¹ If the verdict does not find the facts upon which the calculation of damages depends according to the issue, nor the

²¹ *Central R. Co. v. Mote*, 131 Ga. 166 (omission of \$ before 10,000 not fatal in action to recover \$20,000); *O'Neill Mfg. Co. v. Woodley*, 118 Ga. 114; *Tifton, etc. R. Co. v. Butler*, 4 Ga. App. 191; *Wood v. Wack*, 31 Ind. App. 252; *Kansas City, etc. R. Co. v. Turley*, 71 Kan. 256; *Lexington R. Co. v. Johnson*, 139 Ky. 323; *Nelson Mfg. Co. v. Shreve*, 104 Mo. App. 474; *Lebanon v. Twiford*, 13 Ind. App. 384; *Evans v. Reeves*, 6 Tex. Civ. App. 254; *New Orleans, etc. R. Co. v. Schneider*, 8 C. C. A. 571, 10 Am. Neg. Cas. 645, 60 Fed. 210; *Phillips v. Behn*, 19 Ga. 298; *Beckwith v. Carleton*, 14 Ga. 691; *Burton v. Anderson*, 1 Tex. 93; *James v. Wilson*, 7 id. 230; *Mays v. Lewis*, 4 id. 38; *Sacrest v. Jones*, 30 id. 596; *Miller v. Shackelford*, 4 Dana 271; *McGregor v. Armill*, 2 Iowa 30; *Gibson v. Lewis*, 27 Mo. 532; *Gaff v. Hutchinson*, 38 Ind. 341; *Fries v. Mack*, 33 Ohio St. 52; *Jackson v. Jackson*, 47 Ga. 99; *Brannin v. Forees*, 12 B. Mon. 506; *Trustees, etc. v. Chicago, etc. R. Co.*, 119 Minn. 181; *Mobile & O. R. Co. v. Greenwald*, 104 Miss. 426.

A finding for the plaintiff or the defendant, no sum being named, is good in the absence of an issue as to the amount of damages. *Dine v. Donnelly*, 134 Ky. 776.

An error as to the amount due may be disregarded and judgment rendered therefor, there being no contention concerning it. *Harris v. McLaughlin*, 39 Colo. 459.

In *Darden v. Mathews*, 22 Tex. 320, the action was on a note and this was the verdict: "We, the jury, find for the plaintiff a judgment

for the amount due on said note, with legal interest, less the sum of \$51, and the interest on the same from January, 1856." The court held that the day of the verdict is fixed by the record; the legal interest defined by the statute and the uncertainty of "January, 1856," was to be resolved most strongly against the party claiming under the verdict; that the ascertainment of the amount was a mere mathematical calculation and could be rendered certain if "said note" refers to the note in the petition. *Roberts, J.*, said: "The object of a verdict is to announce to the court the judgment of the jury as to how far the facts established by the evidence conform to those which are alleged and put in issue by the pleadings. As the facts thus declared constitute the basis of a judgment (which is but the legal consequence of the facts thus found), it follows that the verdict must either affirm or negative such of the disputed facts as will, in connection with those admitted, if any, support a legal judgment. A special verdict reiterates the facts alleged, of which the jury have had proof, in such manner as to indicate their judgment upon them. A general verdict is defined to be a 'finding by the jury in the terms of the issue or issues submitted to them; and it is, wholly or in part, for the plaintiff or defendant.' 2 Tidd's Pr. 869. In its most general form it is, 'We, the jury, find for the plaintiff.' That is, they find the issue, the material facts in dispute, as presented in the pleadings, in favor of the plaintiff. It is only

amount of damages themselves, it is fatally defective. Thus in an action for the conversion of personal property the jury found

by understanding this general expression in connection with, and as a response to, the issue as formed by the pleadings that it can be held to amount to any declaration of facts. The jury, therefore, must be presumed to have expressed their finding with reference to the facts in the pleadings, unless they also state something which shows that such was not their intention. As, for instance, where the jury found for the plaintiff 'the amount of the note adduced,' it was held that the verdict was bad, because by the word 'adduced' they plainly showed that they had reference, not to the facts alleged, but to the facts in evidence. *Smith v. Johnson*, 8 Tex. 418. There is no such expression in this case to prevent the usual presumption from being indulged. This general verdict, 'We, the jury, find for the plaintiff,' will often be sufficient. In such cases its import would be that all the material facts alleged by the plaintiff that were put in issue are established. It is difficult to see, on principle, why this general verdict would not be all that was necessary in an action upon a note where the general issue alone was pleaded and where there were no payments, offsets or other facts established, changing the amount to be recovered and making it different from that claimed in the petition. All the facts as to the amount promised, time of payment, etc., must be specifically set forth just as they are in the note; and interest, whether stipulated in the note or not, follows as a legal consequence. *Hart. Dig., arts. 1606-8.*

"In the English courts a different

practice has prevailed, which renders it necessary for the jury to find interest; because they treated interest not as a legal consequence but as damages, to be allowed or not, according to the discretion of the jury. 2 *Tidd's Pr.* 873. In actions sounding in damages, and in actions where damages may be recovered incidentally, and in all actions of whatsoever character where dates, amounts and the like are not usually intended or understood to be stated accurately, and need not be proved as stated, there should not only be the general finding for the plaintiff, but also a special finding as to the amount. So, too, as in this case, where payments, offsets or other matter is pleaded and established, which reduces the amount of recovery below the amount claimed in the petition, the amount of the reduction should, in some way, be indicated by a special finding." But see *Educational Ass'n, etc. v. Hitchcock*, 4 Kan. 36; *Parker v. Fisher*, 39 Ill. 164.

Dozier v. Jarman, 30 Mo. 216, is an instance of the strict construction of a verdict, and probably is more strict than is warranted by the authorities generally. It was an action to recover damages for a wrongful sale caused to be made by the defendant. The jury found a verdict against him for \$5,253, with interest from the day of sale. After discharge of the jury the court caused the interest to be computed and included it in the judgment on the verdict. The court say: "The action is one sounding in damages, and the amount of damages was specifically found by the jury, upon which interest, eo

for the plaintiff, and instead of assessing his damages determined the *value* of the property "*to be* \$6,308." It was held uncertain because on the language the court could not assume that the jury intended to fix the value at the time of the conversion.²² If the declaration does not state precisely the plaintiff's demand a verdict for the amount claimed, not stating it, will be insufficient. In such a case the *data* for computing the amount is not in the record.²³ A verdict is insufficient to sustain a judgment if it cannot be made certain as to amount without looking out of the record to the evidence given on the trial.²⁴ Where there are two plaintiffs one of whom sues in his own right for the recovery of a sum additional to that he seeks to recover for the injury to the other plaintiff a verdict awarding a single sum cannot be applied to either claim nor can an ap-

nomine, was given in addition. Interest is recoverable, as a matter of law, either by reason of an express contract to pay it, or because it is recoverable as damages which the party is legally bound to pay for the detention of money or property improperly withheld; and where it is imposed to punish negligent, tortious or fraudulent conduct it rests in the pleasure of the jury and is given as damages. Sedg. on Dam. The general rule undoubtedly is that interest is not recoverable on unliquidated damages or for an uncertain demand; and whenever it is allowable, as in trover or trespass, for converting or taking goods—in which the measure of damages is in general the value of the property at the time of the taking or conversion, with interest—the interest is not recoverable as such in addition to the damages assessed by the jury, but must enter into the estimate of and be found as part of the damage itself."

A verdict in an action for use and occupation which assesses damages at a named sum and legal interest

is void for uncertainty and will not support a judgment unless the words "and legal interest" be rejected as surplusage. *Mecker v. Gardella*, 1 Wash. 139. See *Western M. & L. Co. v. Blanchard*, 1 Wash. 230.

²² *Knickerbocker & Nevada S. M. Co. v. Hall*, 3 Nev. 194.

²³ *Neville v. Northcutt*, 7 Col. 294; *Gerhab v. White*, 40 N. J. L. 242.

²⁴ *Curlee v. Rogan* (Tex. Civ. App.), 136 S. W. 1126; *Fries v. Mack*, 33 Ohio St. 52; *Mays v. Lewis*, 4 Tex. 38; *Claiborne v. Tanner*, 18 Tex. 68; *Fromme v. Jones*, 13 Iowa 474; *Smith v. Tucker*, 25 Tex. 594.

In *Fries v. Mack*, *supra*, the action was on a judgment. This was the verdict: "We, the jury, do find for the plaintiff \$7,000 and interest from the *maturity* of the seven *notes of \$1,000 each, given February 2, 1860, up to March 2, 1874.*" The question was as to adding interest to the \$7,000. The court say: "The action is not brought upon promissory notes; nor were any

portionment of the sum be made.²⁵ A judgment cannot rest on a special verdict which contains inconsistent findings and is at variance with the general verdict. In such a case if the elements of damage are separately specified and the court is assured that a fair sum has been awarded for all of them the plaintiff may accept judgment for such sum as the court indicates or have a new trial.²⁶

If the verdict goes beyond the issue raised by the pleadings and passes upon an extraneous fact, or contains any redundant statement such finding or statement may be rejected as surplusage, and will not vitiate the verdict if it is otherwise sufficient,²⁷ unless the addition clearly shows that the jury reasoned

such notes referred to in the pleadings; and the verdict neither gives copies of them nor states the times at which they are respectively payable. Was it, then, within the province of the court to identify the notes referred to by the jury, and ascertain the times when they severally matured, by reference to the evidence offered on the trial? We are constrained to answer this question in the negative. The facts found by the court (in thus identifying the notes, computing the interest thereon and entering judgment accordingly) formed no part of the record, and were found only from the memory or minutes of the judge who tried the case. Without a knowledge of these facts no one could tell from the verdict, considered *per se*, or in connection with the record, from what time the jury intended the computation of interest to commence. The court found from the facts outside of the record that the jury intended by their verdict to refer to certain notes which had been offered in evidence upon the trial. Perhaps they did so intend, though the verdict does not say so. The facts found in regard to it are neither ex-

pressed nor necessarily implied in its language. * * * The judgment should follow as a logical sequence from the issues of fact declared by the pleadings and the findings of the jury thereon. If the judgment is warranted by the pleadings and verdict it should be sustained; but if it has no such basis it cannot be supported." *Wells v. Cox*, 1 Daly 515, must be doubted on the test of the foregoing case, which undoubtedly lays down the correct rule. On the trial the court charged the jury that if their finding was in favor of the plaintiff the amount due him was \$616.29. The jury found for the plaintiff "for the whole amount claimed and interest." After discharge of the jury the court, on motion, supported by the court's memory of its charge and affidavits of the intention of the jury, corrected the verdict by inserting the sum stated in the charge.

²⁵ *Spencer v. Haines*, 73 N. J. L. 325.

²⁶ *Francis v. Brock*, 80 Kan. 100.

²⁷ *Southern R. Co. v. Oliver*, 1 Ga. App. 734; *Marguard v. Wheeler*, 52 Cal. 445; *Watson v. San Francisco, etc. R. Co.*, 50 Cal. 523; *Patochi v. Central Pac. R. Co.*, 52

incorrectly or obviously based their conclusions upon false premises.²⁸

§ 462. **General verdict on several counts.** If there is a distinct and separate cause of action stated in each of several counts, one of which is defective, and a general verdict given upon evidence applicable to all, it cannot be known that the verdict is not based in part on the bad count.²⁹ For this reason it is the rule that where a general verdict is given upon several counts, and one of them is not good, the judgment will be arrested or reversed on error.³⁰ But where it appears that there was but one cause of action stated or, what comes to the same result, that all the evidence was applicable to the good counts, the verdict may be amended so as to apply only to them.³¹

A similar question arises where in a single count a demand

Cal. 90; *Dunlap v. Hayden*, 29 Ind. 303; *Ranney v. Bader*, 48 Mo. 539.

Where a jury returned a verdict for plaintiff "for \$51.60, subject to an offset of \$26.80, if said offset had not already been paid; but if it had been paid, then for \$51.60 without offset," held proper to render judgment for \$51.60, and to reject the balance as surplusage. The court say: "It in no way appears from the verdict whether it ('offset') had been paid or not, and therefore it is the same as if the verdict said nothing about it." Surplusage does not vitiate. *Hawkins v. House*, 65 N. C. 614; *Wills v. Garland*, 2 Va. Cas. 471; *Wendham v. Williams*, 27 Miss. 313; *Patterson v. United States*, 2 Wheat. 222, 4 L. ed. 224; *Duane v. Simmons*, 4 Yeates 441; *Longacre v. State*, 3 Miss. (2 How.) 637; *Gover v. Turner*, 28 Md. 600; *Baker v. Callender*, 6 Mass. 303.

²⁸ *Gregory v. Frothingham*, 1 Nev. 253.

²⁹ *Eddowes v. Hopkins*, 1 Doug. 377; *Holt v. Scholefield*, 6 T. R.

691; *Empson v. Griffin*, 11 A. & E. 186.

In *Kline v. Wood*, 9 S. & R. 294, it was held that if a general verdict is given and some of the counts are for matters without the jurisdiction of the court, the verdict is bad for the whole.

³⁰ *Harker v. Orr*, 10 Watts 245; *Paul v. Harden*, 9 S. & R. 23; *Union T. R. Co. v. Jenkins*, 1 Caines 381; *Highland T. Co. v. McKean*, 11 Johns. 98; *Dutchess Cotton Mfy. v. Davis*, 14 id. 238, 7 Am. Dec. 459; *Stevenson v. Newman*, 13 C. B. 285; *Trevor v. Wall*, 1 T. R. 151; *Hancock v. Haywood*, 3 id. 433; *Grant v. Astle*, 2 Doug. 723; *Holt v. Scholefield*, 6 T. R. 691; *Sheen v. Rickie*, 5 M. & W. 175; *Chadwick v. Trower*, 6 Bing. N. C. 1.

³¹ *Union T. R. Co. v. Jenkins*, *supra*; *Aldrich v. Lyman*, 6 R. I. 98; *Cooper v. Bissell*, 15 Johns. 318; *Grant v. Astle*, 2 Doug. 723; *Stafford v. Green*, 1 Johns. 505; *Sayre v. Jewett*, 12 Wend. 135; *Norris v. Durham*, 9 Cow. 151; *Barnard*

is declared upon to the whole of which the plaintiff is not entitled, or where two or more breaches of a contract are assigned one of which is insufficient to sustain a claim for damages. On such a count a general verdict cannot be sustained.³² Where it is positively and expressly averred that the plaintiff has sustained damage from a cause subsequent to the commencement of the action, or previous to the accrual of his right of action, and the jury give entire damages judgment will be arrested; but where the cause of action is properly laid and the other matter either comes under a *scilicet*, is void, insensible or impossible, and, therefore, it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment.³³

Where part of the special damage laid in the declaration did not fall strictly within the covenant alleged to be broken it was presumed after verdict that the jury were directed at the trial not to take that part into consideration.³⁴ In the opinion of the court there is a difference between an affirmative allegation of facts which would exclude a part of the damages declared for and the absence of an averment necessary to make out title to a part. If a claim of damages is made up of good and bad items, and there is a general verdict for the plaintiff it

v. Whiting, 7 Mass. 358; Barnes v. Hurd, 11 id. 57; Patten v. Gurney, 17 id. 182, 9 Am. Dec. 141; Smith v. Cleveland, 6 Met. 332; Perry v. Boileau, 10 S. & R. 208; Smith v. Latour, 18 Pa. 243; Cornwall v. Gould, 4 Pick. 444; Baker v. Sanderson, 3 id. 348; West v. Platt, 127 Mass. 367; Emblin v. Dartnell, 12 M. & W. 830.

In *Clarke v. Lamb*, 6 Pick. 512, 8 id. 415, it was held that when there are two or more issues, and the verdict is perfect as to some but silent as to others, it is amendable if by the certificate of the judge it shall appear that there was no other matter in trial except what is embraced in the issues on which the verdict is sufficient; and correction

may be made even pending a writ of error. *Petrie v. Hannay*, 3 T. R. 659; *Jones v. Kennedy*, 11 Pick. 125.

³² *Bank v. Bright-C. C. Co.*, 139 Mo. App. 110; *Leach v. Thomas*, 2 M. & W. 427; *Sherry v. Frecking*, 4 Duer 452; *Gordon v. Kennedy*, 2 Bin. 287; *Paley v. Osborne*, 10 Coke 130*b*; *Lloyd v. Morris*, Willes 443; *Talbot v. Herndon*, 4 J. J. Marsh. 553; *Van Rensselaer v. Platner*, 2 Johns. Cas. 17.

³³ *Williams' note to Hamilton v. Vere*, 2 Saund. 171*b*; *Secklemore v. Thistleton*, 6 M. & S. 9; *Gordon v. Kennedy*, 2 Bin. 287.

³⁴ *Campbell v. Lewis*, 2 B. & Ald. 392.

will be intended on a motion in arrest of judgment that the verdict was given only for the good ones.³⁵

In Connecticut, Ohio, South Carolina, and by statute in several other states, if there is one good count in the declaration a general verdict which is responsive to the issue on it is good, and not vitiated by there being another count which is bad.³⁶ Where there are several counts or causes of action a verdict may be taken separately on each; and that is a prudent course. Then, if either is bad, the objection may prevail without prejudice to the verdict on the good counts.³⁷ If the verdict

³⁵ *Edwards v. Reynolds*, Hill & Denio 53; *Lawrie v. Dyeball*, 8 B. & C. 70; *Kitchenman v. Skeel*, 3 Ex. 49; *Steele v. Western I. L. Nav. Co.*, 2 Johns. 283.

The case of *Sheen v. Rickie*, 5 M. & W. 175, does not appear to be consistent with the foregoing cases. Trover was brought for the conversion of chattels and *fixtures*. The court, by construction of the declaration, relieved it of the objection that suit was brought for fixtures annexed; but gave opinion of the effect of a general verdict in favor of the plaintiff had the property indicated by the word "*fixtures*" been technically such. Parke, B., said: "If it distinctly appeared on the face of the declaration that part of the cause of action was such as could not be recovered in trover, I should be strongly disposed to agree in the objection. The case would be easily distinguished from that which has been put, of an action for words, some of which are not actionable; there the court would presume that the nonactionable words were not intended to constitute the cause of action, but were used merely as matter of aggravation, or of explanation; although where the words were spoken at different times, and some of them were

not actionable, the judgment would be arrested. The law is so laid down in the case of *Penson v. Gooday Cro. Car.* 327. If, therefore, it had been clear that this declaration contained two distinct causes of action for one of which trover could not be maintained, then, as general damages have been assessed upon the whole declaration, there must be either an arrest of judgment or a *venire de novo*." *Griffiths v. Lewis*, 8 Q. B. 841; *Alfred v. Farrow*, id. 854.

³⁶ *Walcott v. Coleman*, 2 Conn. 324; *Smith v. Hawkins*, 6 id. 444; *Graves v. Waller*, 19 id. 90; *Johnson v. Mullen*, 12 Ohio 10; *Chisom v. School Directors*, 19 id. 289; *Pratt v. Thomas*, 2 Hill (S. C.) 654; *Taylor v. Sturgingger*, 2 Mills' Const. 367; *Neal v. Lewis*, 2 Bay 204; *Neilson v. Emerson*, id. 439; *Anderson v. Simple*, 7 Ill. 455; *Frankfort B. Co. v. Williams*, 9 Dana 403, 35 Am. Dec. 155; *Scott v. Peebles*, 2 Sm. & M. 546; *Cowdren v. Gardner*, 1 J. J. Marsh. 589; *Peoria, etc. Ins. Co. v. Whitehill*, 25 Ill. 466; *Newell v. Downs*, 8 Blackf. 523. See *Hudson v. Matthews*, Morris 94; *Shannon C. Co. v. Potter*, 14 Ariz. 481.

³⁷ *Hayter v. Moat*, 2 M. & W. 56; *Mooney v. Kennett*, 19 Mo. 551, 61

is general and the declaration contains more than one count the jury may be asked to inform the court upon which count they based their finding.³⁸

§ 463. **Where there are several parties.** Where there are several plaintiffs it is not competent for the jury to find against one and in favor of another.³⁹ Every action at law must be maintained in favor of all the plaintiffs or it will fail as to all. A verdict in a tort action against three defendants is good though it makes no mention of one in default.⁴⁰ And it is good if entitled in the name of the plaintiff against one of the defendants by name, the others being designated as "*et al.*" as against all shown by the record to be defendants,⁴¹ and a general finding in favor of the plaintiff is good, no defendant being named.⁴² It has already been stated that where there are several defendants and there is a default as to one, and an issue as to others, there is but one assessment of damages as to all. Under the old practice the jury were called as well to try the issue as to inquire of the damages.⁴³ In actions *ex contractu* if those who plead succeed otherwise than upon grounds of personal discharge, at most only nominal damages can be given against the defaulted party.⁴⁴

Am. Dec. 576; Clark v. Hannibal, etc. R. Co., 36 Mo. 202; Shuck v. Pfenninghausen, 101 Mo. App. 697. See Piedmont H. Co. v. Henderson, 9 Ga. App. 672; St. Louis, etc. R. Co. v. Farmers' Union G. Co., 34 Okla. 270.

³⁸ Cross v. Grant, 62 N. H. 675, 13 Am. St. 607.

³⁹ Buckhannan v. Gamble, Ga. Dec. 156.

⁴⁰ Golden Gate M. & M. Co. v. Hendy M. Works, 82 Cal. 184.

⁴¹ Knox v. Gregorious, 43 Kan. 26.

⁴² Fishburne v. Engledove, 91 Va. 548; Missouri, etc. R. Co. v. Lightfoot, 48 Tex. Civ. App. 120.

⁴³ Tidd's Pr. 802, 803; 1 Burr. Pr. 372; Hart v. De Lord, 17 Johns. 270; Cuddeback v. Fanely, 2 Wend.

624; Van Schaick v. Trotter, 6 Cow. 599; Sluyter v. Smith, 2 Bosw. 573; Catlin v. Latson, 4 Abb. Pr. 248.

⁴⁴ Gerrish v. Cummings, 4 Cush. 391; Ferguson v. State Bank, 11 Ark. 512; Bruton v. Gregory, 8 Ark. 177.

In Williams v. McFall, 2 S. & R. 280, *assumpsit* was brought against two upon a joint contract. One of the defendants confessed judgment for a certain sum and the other pleaded the general issue, went to trial, and a verdict passed against him for a smaller sum. It was held that judgment could not be entered on the verdict, nor for such defendant, but that the judgment confessed would stand against the party who confessed it. The

In tort actions a verdict in favor of one defendant does not generally affect the plaintiff's right of action against the co-defendants; one may be found to be liable and another or the others may not have incurred any liability.⁴⁵ So where one defendant is defaulted and others defend, there may be an assessment of damages against the former, though the parties who plead are found not liable or are otherwise discharged. Thus, in an early case, trespass was brought against six defendants, three of whom suffered judgment by default; the others pleaded not guilty. On the trial, it appearing by the evidence that the trespass was committed after the action was brought, the three who pleaded were acquitted; but damages were assessed against the others.⁴⁶ So if they plead different pleas, one may be found guilty and the others acquitted.⁴⁷ If sued separately recovery may be had against each. A judgment against one cannot be pleaded in bar of a recovery against another unless it has been satisfied.⁴⁸ But where the action is against several and one is defaulted, and the others plead such a defense that on a verdict in their favor the record will show that the plaintiff had no cause of action against any of the defendants, he will not be entitled to judgment against the parties in default; and it will be the same as to one found guilty on a different plea.⁴⁹

In a joint action against several for trespass or other tort, if all are found guilty entire or joint damages must be assessed against them.⁵⁰ All the legal consequences of being jointly

entry of judgment, or the confession, precluded the entry of another judgment against the other defendants, for two judgments final could not be entered in the same action on a joint claim.

⁴⁵ *Ivey v. Cowart*, 124 Ga. 159, 110 Am. St. 160; *Aldrich v. Inland Empire Tel. & T. Co.*, 62 Wash. 173.

⁴⁶ *Jones v. Harris*, 2 Str. 1108.

⁴⁷ *Mayler v. Ayliffe*, Cro. Jac. 134.

⁴⁸ *McGee v. Overby*, 12 Ark. 164; *Ammonett v. Harris*, 1 Hen. & Munf. 488.

⁴⁹ *Mayler v. Ayliffe*, *supra*; *Biggs*

v. Bengier, 2 Ld. Raym. 1372; *Biggs v. Greinefeld*, 1 Str. 610.

⁵⁰ *Devaney v. Otis E. Co.*, 251 Ill. 28; *Price v. Clapp*, 119 Tenn. 425, 133 Am. St. 730; *Austin E. R. Co. v. Faust* (Tex. Civ. App.), 133 S. W. 449; *Currier v. Swan*, 63 Me. 323; *Westfield G. & M. Co. v. Abernathy*, 8 Ind. App. 73; *Dawson v. McClelland*, [1899] 2 Irish 486; *Halsey v. Woodruff*, 9 Pick. 555; *Fuller v. Chamberlain*, 11 Metc. (Mass.) 503; *Jones v. Grimmett*, 4 W. Va. 104; *Crawford v. Morris*, 5 Gratt. 90; *Bohan v. Taylor*, 6 Cow. 313; *Wakeley v. Hart*, 6 Bin. 316;

guilty must necessarily follow, of which one is that each is liable for all the damages which the plaintiff has sustained without regard to different degrees or shades of guilt.⁵¹ The jury are to estimate the damages against all the defendants, if guilty, according to the amount which they think the most culpable of them should pay.⁵² It is irregular, in such a case, on finding those jointly charged jointly guilty to assess damages against them separately even though they severed in pleading.⁵³ Notwithstanding this rule juries have frequently severed

Bostwick v. Lewis, 1 Day 34; Mitchell v. Millbank, 6 T. R. 199; Hill v. Goodchild, 5 Burr. 2790. See Clissold v. Machell, 26 Up. Can. Q. B. 422.

A judgment against a principal and sureties must be for equal amounts. Merrinane v. Miller, 157 Mich. 279, 25 L.R.A. (N.S.) 585.

⁵¹ Mashburn v. Dannenberg, 117 Ga. 567; Cincinnati, etc. R. Co. v. McElroy, 146 Ky. 668; Halsey v. Woodruff, *supra*; Railroad v. Jones, 100 Tenn. 512, citing the text.

The rule is not changed by a statute authorizing several verdicts and judgments against one or more plaintiffs, or for or against one or more defendants, so as to conform to the rights of the parties. Railroad v. Jones, *supra*.

⁵² Ivey v. Cowart, 124 Ga. 159, 110 Am. St. 160; Warren v. Westrup, 44 Minn. 237, 20 Am. St. 578, citing the text; Clark v. Bales, 15 Ark. 452; Hardy v. Brodus, 35 Tex. 666; Crawford v. Morris, *supra*; Hair v. Little, 28 Ala. 236; Beal v. Finch, 11 N. Y. 128.

In Clark v. Newsam, 1 Ex. 131, it was held that where two persons were jointly sued for false imprisonment, one of whom had acted from improper motives, the damages ought not to be assessed with reference to the act and the motives of

the most guilty, or the most innocent, party; but the true criterion of damages is the whole injury which the plaintiff has sustained from the joint act. Compare Hair v. Little, *supra*.

⁵³ Hay v. Collins, 118 Ga. 243 (except in trespass); Lynch v. Chicago, 152 Ill. App. 160; Buttron v. Bridell, 228 Mo. 622; Callison v. Lemons, 2 Port. 145; O'Shea v. Kirker, 8 Abb. Pr. 69; St. Louis, etc. R. Co. v. South, 43 Ill. 176, 92 Am. Dec. 103, 8 Am. Neg. Cas. 150; Weakly v. Royer, 3 Watts 460; Tyrell v. Lockhart, 3 Blackf. 136; Palmer v. Crosby, 1 id. 139; Ridge v. Wilson, id. 409; Mitchell v. Millbank, 6 T. R. 199; Bohan v. Taylor, 6 Cow. 313; Wakely v. Hart, 6 Bin. 316.

A defendant who has filed a separate plea may not complain of a verdict apportioning the damages, all the defendants being charged with liability by it. Hooks v. Vet, 192 Fed. 314, 113 C. C. A. 526.

In Hill v. Goodchild, 5 Burr. 2790, Lord Mansfield said: "We hold that as the trespass is jointly charged upon both defendants, and the verdict has found them both jointly guilty, the jury could not afterward assess several damages. We do not think that the present case calls for an opinion upon those cases where the defendants are

the damages, aiming, no doubt, to apportion them according to the culpability of the respective defendants; and in Kentucky, Georgia (in actions sounding in trespass) and South Carolina

charged jointly and severally, where the defendants plead severally, or where the defendants are found guilty of several parts of the same trespass, or at a different time; or where a joint action is brought for two several trespasses, and the damages found severally, as being severally guilty. We don't meddle with any of these cases; there is a variety of opinions in the books relating to them."

The report of Heydon's Case, 11 Coke 5a, states that a great question was moved and depended for divers terms, how and against whom, and for what damages, judgment should be entered. And at last upon consideration had of the precedents, and of our books, it was resolved *per totam curiam*: "1. That when in trespass against divers defendants, they plead not guilty, on several pleas, and the jury find for the plaintiff in all, the jurors cannot assess several damages against the defendants, because all is one trespass, and made joint by the plaintiff, by his writ and declaration; and although one of them is more malicious, and *de facto* doth more and greater wrong than the others, yet all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present. * * * In trespass against two, if the jury find one at one time, and the other at another time, there several damages may be taxed; but if the plaintiff himself confesses that they committed the trespass severally, there the writ shall abate; and so there is a difference between finding by

verdict and confession of the party. Also there is a difference betwixt an express confession and not gain-saying.

"2. In trespass against two, where one comes and appears, etc., against whom the plaintiff declares *simul cum*, etc., who pleads and is found guilty by the inquest to damages, and afterwards the other comes and pleads and is found guilty, the defendant who pleaded last shall be charged with the damages taxed by the former inquest; for the trespass which the plaintiff has made joint by his writ and declaration, and done at one time, cannot be severed by the jury, if the jury find the trespass to be done by all at one and the same time, as the plaintiff hath supposed. Against which it was objected that it might be mischievous to the defendant who last pleads; for excessive damages, by consent between the plaintiff and the first defendant, may be found, with which the second defendant shall be charged; and he shall have no remedy to relieve himself by attain, inasmuch as he is a mere stranger to the issue, upon the trial whereof the damages were assessed. But it was resolved that in such case he should have attain; for although he is a stranger to the issue, yet, because by the law he is privy to the charge, he shall have attain. * * *

"4. In the case at bar, for as much as in judgment of law the several juries gave a verdict all at one and the same time, the plaintiff may have election to have judgment *de melioribus damnis*, by any of the

juries are permitted, in their discretion, to do so;⁵⁴ elsewhere it is irregular; but the irregularity may be cured by the plaintiff entering a *nolle prosequi* as to all the defendants but one, and taking judgment against him only; and he may elect to enter judgment for the best damages;⁵⁵ or, according to some cases, the plaintiff may elect to enter judgment, *de melioribus damnis*, against all the defendants found jointly guilty.⁵⁶ Where the verdict was against three of the defendants, being

inquests, and it shall bind all; but *fiat nisi unica executio*. * * *

"5. Where, in trespass, the defendants plead several pleas, all triable by one and the same jury, and both the issues are found for the plaintiff, the jury cannot sever the damages; and if they do, the whole verdict is vicious."

In *Player v. Warn*, Cro. Car. 54, it was held in an action of trover against two that the jury might find the defendants severally guilty as to part of the property and not guilty as to the residue.

In *Turner v. McCarthy*, 4 E. D. Smith 250, it was held this could not be done where it appears that the injury resulted from the joint act of both defendants. The case concedes that if it appeared that each defendant was liable for part of the injury there might be an apportionment of damages (citing *Austen v. Willward*, Cro. Eliz. 860; *Heydon's Case*, *supra*); but not where the whole injury was jointly done. *Holly v. Mix*, 3 Wend. 350, 20 Am. Dec. 702.

⁵⁴ *Standard O. Co. v. Doyle*, 118 Ky. 662, 111 Am. St. Rep. 331; *Cincinnati, etc. R. Co. v. McElroy*, *supra*; *Louisville & N. R. Co. v. Roth*, 130 Ky. 759; *Ivey v. Cowart*, 124 Ga. 159, 110 Am. St. 160; *Bevin v. Linguard*, 1 Brev. 503, 2 Am. Dec. 684; *White v. McNeily*.

1 Bay 11; *Boon v. Horn*, 3 Strobl. 159. Such apportionment does not diminish the merit or amount of the recovery. The aggregate of all the damages found is the damage of the plaintiff.

⁵⁵ *Nashville R. & L. Co. v. Trawick*, 118 Tenn. 273, 10 L.R.A. (N.S.) 191, 121 Am. St. 996 (*nolle entered after judgment*); *Bulkley v. Smith*, 1 Duer 643; *Crawford v. Morris*, 5 Gratt. 90; *Allen v. Craig*, 13 N. J. L. 294; *Holly v. Mix*, 3 Wend. 350, 20 Am. Dec. 702; *Bohan v. Taylor*, 6 Cow. 313; *Minor v. Mechanics' Bank*, 1 Pet. 46, 74, 7 L. ed. 47, 59; *Warren v. Westrup*, *supra*; *Hardy v. Thomas*, 23 Miss. 544, 57 Am. Dec. 152.

The payment by one of the defendants of the judgment entered against him will entitle the other to an order directing the satisfaction of the judgment against him. *Foy v. Barry*, 159 App. Div. (N. Y.) 749.

⁵⁶ *Ft. Worth v. Williams*, 55 Tex. Civ. App. 289; *Heydon's Case*, 11 Coke 5a; *Rochester v. Anderson*, 1 Bibb 439; *O'Shea v. Kirker*, 8 Abb. Pr. 69; *Bulkley v. Smith*, 1 Duer 643. But see *Davis v. Chance*, 2 Verg. 94; *San Marcos E. L. & P. Co. v. Compton*, 48 Tex. Civ. App. 586; *San Antonio, etc. R. Co. v. Bowles*, 88 Tex. 634.

silent as to the others, and no motion was made in arrest of judgment, those against whom the verdict was rendered being content to allow the entry of judgment against them, it was said that every intendment must be made in support of the verdict and the judgment; that it might well be presumed that the defendants not included in the verdict of guilty were intended not to be found guilty,⁵⁷ or that, on the plaintiff taking judgment against those found guilty, he, by implication and intendment, discharged the other defendants by way of *nolle prosequi*, which could be entered as well after as before verdict, and even after judgment.⁵⁸ A several verdict cannot be cured by reducing it to one-half the amount and charging it to a joint verdict.⁵⁹

In actions against several damages against all can be assessed only for acts committed by all jointly; and the rule is the same although all have been defaulted by agreement.⁶⁰ Separate acts, not committed with a common purpose or design and without concert, will not authorize a joint recovery.⁶¹ If it be proved that only one was concerned the plaintiff may recover against him as if he only had been sued. Persons who have not conspired together or united in committing the wrong should not be joined in the same action as defendants.⁶² A verdict against two or more may be set aside as to some of them if the evidence does not sustain it.⁶³

§ 464. Double, treble and exemplary damages. When penal damages are followed by statute and are specially claimed in the declaration, as they must be,⁶⁴ it is appropriate, and according to the general practice, for the jury, if they find the defendant guilty, to find single damages in terms; then the court, on motion, will direct judgment for the increased damages provided for.⁶⁵ But if the statute contains no express or

⁵⁷ See *Gulf, etc. R. Co. v. James*, 73 Tex. 12, 15 Am. St. 743; *Lockwood v. Bartlett*, 7 N. Y. Supp. 481.

⁵⁸ *Washington G. L. Co. v. Lansden*, 9 D. C. App. Cas. 508.

⁵⁹ *Glore v. Akin*, 131 Ga. 481.

⁶⁰ *Folger v. Fields*, 12 Cush. 93.

⁶¹ *Leidig v. Bucher*, 74 Pa. 65.

⁶² *Id.* See 140 *et seq.*

⁶³ *Sparrow v. Bromage*, 83 Conn. 27, 27 L.R.A.(N.S.) 209.

⁶⁴ *Royse v. May*, 93 Pa. 454; *Rees v. Emrick*, 6 S. & R. 286; *Chipman v. Emeric*, 5 Cal. 239; *Palmer v. York Bank*, 18 Me. 166, 36 Am. Dec. 710. See § 425.

⁶⁵ *Chilton v. Missouri L. & M. Co.*, 144 Mo. App. 315; *San Fran-*

implied directions on the subject it is immaterial whether the court or the jury doubles or trebles the damages.⁶⁶

To authorize judgment for such statutory damages a verdict should be found for the plaintiff, separately, upon a count framed under the statute. When the declaration contains several counts, some for common-law causes and others upon a statute giving double or treble damages, and a general verdict is found, a judgment for only single damages can be rendered; for it cannot be judicially known but that the verdict includes damages for all the causes stated in the declaration.⁶⁷ In New York if the verdict does not state whether it is for single or treble damages the presumption will be that it is for the latter.⁶⁸ There are cogent reasons of a most practical character in favor of the separation of compensatory and

cisco & S. H. B. Soc. v. Leonard, 17 Cal. App. 254; Guild v. Prentis, 83 Vt. 212 (in rendering judgment); Rousey v. Wood, 57 Mo. App. 650; Robbins v. Farwell, 193 Pa. 37; Eccles v. Union Pac. C. Co., 15 Utah 14; Cross v. United States, 1 Gall. 26; Quimby v. Carter, 20 Me. 218; Beekman v. Chalmers, 1 Cow. 584; Swift v. Applebone, 23 Mich. 252, 1 Am. Neg. Cas. 149; Warren v. Doolittle, 5 Cow. 678; Livingston v. Platner, 1 Cow. 175; San Francisco & S. H. B. Soc. v. Leonard, 17 Cal. App. 254; Cox v. Pennsylvania R. Co. (Pa.), 85 Atl. 863.

Under some statutes the trial judge is vested with discretion in allowing treble damages. *Isom v. Book*, 142 Cal. 666.

It is presumed that a verdict for a given sum is for treble damages if there is nothing in it or the charge of the court to indicate otherwise, and there cannot be a further increase of the sum specified. *Henning v. Kieper*, 37 Pa. Super. Ct. 488.

If the basis on which the verdict rests is shown the jury may be di-

rected to double the amount of their verdict. *Campbell v. Iowa Cent. R. Co.*, 124 Iowa 248.

⁶⁶ *Richards v. Sanderson*, 39 Colo. 270, 121 Am. St. 167; *Allen v. Bainbridge*, 145 Mich. 366; *Carpenter v. Chicago & A. R. Co.*, 119 Mo. App. 204; *Bekker v. White River Valley R. Co.*, 28 S. D. 84; *Jensen v. South Dakota Cent. R. Co.*, 25 S. D. 506, 35 L.R.A.(N.S.) 1015; *Quimby v. Carter*, 20 Me. 218; *Memphis, etc. R. Co. v. Carley*, 39 Ark. 246.

The jury should make the assessment. *Chicago, etc. R. Co. v. Watkins*, 43 Kan. 50. The court may treble the damages. *Cox v. Pennsylvania R. Co.*, 240 Pa. 27.

⁶⁷ *Ewing v. Leaton*, 17 Mo. 465; *Lebeaume v. Woolfolk*, 18 id. 514; *Lowe v. Harrison*, 8 id. 350; *Shrewsbury v. Bawtlitz*, 57 id. 414; *Thayer v. Sherlock*, 4 Mich. 173; *Osborn v. Lovell*, 36 id. 246; *Benton v. Dale*, 1 Cow. 160.

⁶⁸ *Prignitz v. McTiernan*, 18 N. Y. Misc. 651; *Livingston v. Platner*, 1 Cow. 175.

exemplary damages in verdicts. These are indicated in several late decisions.⁶⁹

§ 465. Judgment. The judgment is the legal conclusion upon the facts established by the pleadings and verdict.⁷⁰ If there is no plea, and the subject of the action is of such a nature that, the declaration being confessed, the amount of the recovery can be ascertained by mere computation and the record affords the *data* for determining the amount for which judgment may be rendered, then the assessment may be made by the clerk — unless the practice is otherwise by statute; in other cases, as we have seen, a jury must be called. If witnesses have to be examined, and the damages are unliquidated a failure to answer the declaration does not authorize the entry of final judgment in some states,⁷¹ while in others it does.⁷² Where a case is tried by a jury and they return a verdict for the plaintiff, but without any finding of damages, the court may amend it in this respect by adding nominal damages, as it is a legal consequence of the finding, and enter

⁶⁹ Louisville & N. R. Co. v. Scott, 141 Ky. 538, 34 L.R.A.(N.S.) 206; Bushong v. Alderson (Tex. Civ. App.), 143 S. W. 200; Hamilton v. Western U. Tel. Co., 96 S. C. 398.

⁷⁰ Lamphear v. Buckingham, 33 Conn. 237.

⁷¹ Martin v. Price, Minor 68; Phillips v. Malone, id. 110; Beam v. Hayden, 5 Bush 426; Kenum v. Henderson, 6 Ala. 132; Arrington v. Mobile, etc. R. Co., 30 Miss. 470; Clarke v. Seaton, 18 B. Mon. 226; Shirley v. Landram, 3 Bush 552.

Ballard v. Purcell, 1 Nev. 342, was decided under a code which provided the manner of entering a judgment by default in two different classes of actions: first, where the action is on a contract for the recovery of money or damages only, and there is a failure to answer, when it is made the duty of the clerk to enter the default, and immediately thereafter to enter a

judgment; in the second class, default is entered in the same manner, but the plaintiff must apply to the court for the relief demanded in his complaint; and it is also provided that if the taking of an account, or the proof of any fact, be necessary to enable the court to give judgment, the court may take the account, or hear the proof, or may in its discretion order a reference or a jury trial for that purpose. It was held, if the suit be for unliquidated damages, they must be shown by proof in one of these modes.

By the code of Kentucky allegations of value or amount of damages cannot be taken as true by failure to answer. Daniel v. Judy, 14 B. Mon. 393; Clarke v. Seaton, 18 id. 226.

⁷² § 416.

judgment accordingly; and this correction is necessary to give the plaintiff a judgment for costs.⁷³

§ 466. **Judgment must follow verdict.**⁷⁴ The verdict is good if it contains the *data* for ascertaining the amount with certainty by calculation. The judgment is warranted by the verdict when rendered for the amount so ascertained.⁷⁵ Thus, where the suit was on a note for \$100 and the jury returned a verdict "for the plaintiff for the amount of the note, \$100," and a judgment was rendered for \$105.66, principal debt and interest, the court, holding that the interest followed the debt as an incident, affirmed the judgment.⁷⁶ When the verdict is excessive and the excess is remitted the judgment is properly

⁷³ Von Schoening v. Buchanan, 14 Abb. Pr. 185; Pickens v. Hayden, 2 Stew. 10; Stevens v. Briggs, 14 Vt. 44, 39 Am. Dec. 209; Loomis v. Tyler, 4 Day 141; Thomas v. Commonwealth, 3 J. J. Marsh. 121.

The omission of the word "dollars" in a verdict for plaintiff in *assumpsit* does not affect the validity of the judgment rendered thereon though no amendment was made. Hopkins v. Orr, 124 U. S. 510, 31 L. ed. 523.

⁷⁴ Haumueller v. Ackermann, 130 Mo. App. 387; Butte E. R. Co. v. Matthews, 34 Mont. 487; Blackwell, etc. R. Co. v. Bebout, 19 Okla. 63; Citizens' R. & L. Co. v. Case (Tex. Civ. App.), 138 S. W. 621; Tipton v. Tipton, 47 Tex. Civ. App. 619; Black v. Moore, 35 Tex. Civ. App. 613; Colonization Soc. v. Reed, 25 Tex. Sup. 343; Diedrich v. Northwestern R. Co., 47 Wis. 662; Mitchell v. Giessendorff, 44 Ind. 358; Reid v. Dunklin, 5 Ala. 205; Martin v. Commonwealth, 6 J. J. Marsh. 549.

A judgment not in harmony with the findings as to damages will be reversed. State v. Richeson, 36 Ind. App. 373.

⁷⁵ Louisville & N. R. Co. v. Fort,

112 Tenn. 432. See § 464; Dawson v. Shirk, 102 Ind. 184.

⁷⁶ McAfee v. Dix, 101 App. Div. (N. Y.) 69; Hurst v. Webster Mfg. Co., 128 Wis. 342; Fisk v. Holden, 17 Tex. 408. See West v. Milwaukee, etc. R. Co., 56 Wis. 318. *Contra*, Niebling v. Laidlaw, 12 Ohio C. C. (N. S.) 463.

Interest may be added to a verdict upon a liquidated demand if the damage was done at a specified time. Collins v. Gleason C. Co., 140 Iowa 115, 497, 118 id. 36, 18 L.R.A. (N.S.) 736.

The judgment rendered on a special verdict silent as to interest because the question was not submitted may include interest from the time the money was due. Ripley v. Wenzel (Tex. Civ. App.), 139 S. W. 897; San Antonio v. Marshall (Tex. Civ. App.), 85 S. W. 315.

Under a statute which provides that "when, by the verdict, either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of the recovery," the court has no power to add interest to the amount named in the verdict. *Hal-lum v. Dickinson*, 47 Ark. 120. And such is the rule though proof

rendered for the residue.⁷⁷ If a verdict exceed the penalty of a bond the court may enter judgment for the proper amount.⁷⁸ Where the jury have assessed the damages for a tort at an entire sum no court of law, upon a motion for a new trial because the amount awarded is excessive and for the insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury. If this is done either party may complain of the judgment.⁷⁹ If the statute prescribes the rule of damages and upon the admitted facts the court might properly have directed a verdict for a certain sum, it may increase the amount included therein, the finding being in disregard of the instructions.⁸⁰ If interest is improperly allowed the fact may be disregarded.⁸¹ An error made in assessing damages may be corrected by the court on a motion for a new trial.⁸² A clerical error in entering a judgment may be cured by a *remittitur*.⁸³

§ 467. **Judgment must be certain.** The judgment must be certain and must state the amount adjudged in the lawful money of the forum. The entry ought to contain in itself such precision and certainty as to enable the clerk to issue execution by inspection of it without reference to other entries.⁸⁴ A verdict in *assumpsit* was found in favor of the plain-

of partial payments has been made. *Metzger v. Metzger*, 35 App. D. C. 389. See *O'Brien v. Omaha W. Co.*, 83 Neb. 71.

⁷⁷ *Linder v. Monroe*, 33 Ill. 388; *O'Meara v. Cardiff C. Co.*, 154 Ill. App. 321.

⁷⁸ *Cohea v. State*, 34 Miss. 179.

⁷⁹ *Kenyon v. Gilmer*, 131 U. S. 22, 29, 33 L. ed. 110, 113; *Brown v. McLeish*, 71 Iowa 381; *Beckley v. Miller*, 96 Ark. 379.

⁸⁰ *Schweitzer v. Connor*, 57 Wis. 177. It was held in *Rafferty v. Missouri R. Co.*, 15 Mo. App. 559, that a judgment cannot be rendered upon a verdict which awards a less

sum as damages than the statute fixes.

⁸¹ *Jacobson v. United States G. Co.*, 150 Iowa 330; *Baum v. Daniels*, 55 Tex. Civ. App. 273.

⁸² *Brown v. Doyle*, 69 Minn. 543; *Coxe v. Anoka W., etc. Co.*, 91 Minn. 50.

⁸³ *Redinger v. Jones*, 68 Kan. 627.

⁸⁴ *Boyken v. State*, 3 Yerg. 426; *Harmon v. Childress*, id. 327; *Peet v. Whitmore*, 14 La. Ann. 408; *Spiva v. Williams*, 20 Tex. 442; *Roberts v. Landram*, id. 471; *Early v. Moore*, 4 Munf. 262; *Berry v. Anderson*, 2 How. (Miss.) 649; *Claughton v. Black*, 24 Miss. 185;

tiff for \$90 with interest from a day stated; a judgment was entered on it for \$90 with interest from the same day. This judgment was reversed and then entered up for the aggregate amount, the verdict being good. The judgment was uncertain. "The date," say the court, "from which interest is to be calculated is given by the verdict, but the time to which it was to run cannot be ascertained without reference to the whole record; it would run till the rendition of the judgment, from which time the principal and interest, as a gross amount of damages, would carry interest. The rendition of the judgment is the act of the court, and a defect in the judgment cannot be amended by the clerk in issuing execution." ⁸⁵ The judgment need not specify the amount of interest

Downing v. Dean, 3 J. J. Marsh. 378; Mitchell v. Gibson, 14 Ark. 224; Bartlett v. Blanton, 4 J. J. Marsh. 426; Bartle v. Plane, 68 Iowa 227; Battell v. Lowery, 46 Iowa 49.

⁸⁵ Tankersley v. Silburn, Minor 185.

A judgment cannot be rendered to draw interest prior to its rendition. Simmons v. Garrett, McCahon 82.

The judgment entry in Barnett v. Caruth, 22 Tex. 173, 73 Am. Dec. 255, recited the trial and set out the verdict: "We, the jury, find for the plaintiffs one thousand two hundred and nineteen 55-100 dollars principal; and the further sum of one hundred and seventy-seven 89-100 dollars interest; making in the aggregate \$1,347.44" After the recitals the entry contained judgment: "It is ordered, adjudged and decreed by the court that the plaintiffs do recover of the defendant for their debt, damages and costs," etc. This judgment was held erroneous for being uncertain as to the amount of recovery. See Martin v. Commonwealth, 6 J. J. Marsh. 549;

Hann v. Gosling, 9 N. J. L. 248; Blane v. Sansum, 2 Call 495; Codwise v. Taylor, 4 Sneed 346; Brown v. Horless, 22 Tex. 645.

A more liberal rule was laid down in Pennsylvania, in Lewis v. Smith, 2 S. & R. 142. The judgment in that case is thus referred to and maintained by Tilghman, C. J.. "The judgment was entered in the way very usual in this court in actions on the case; that is to say, the prothonotary entered in the docket *judgment*, without mentioning for what sum. Inconveniences frequently arise from our loose practice; but the practice of every court is justly said to be the law of the court; and we should produce much greater evils than those we wished to prevent should we attempt now to destroy past judgments because they were not entered in a manner so accurate as they might have been. * * * I take it, that where judgments are confessed, if the plaintiff's demand is of the nature of a debt, which may be ascertained by calculation, whether it arise on a note or other writing, or on an account, it is

due the plaintiff if it awards interest from a day designated.⁸⁶

In rendering judgments for money, and all judgments for debts or damages must be so rendered, and in lawful currency,⁸⁷ the denominations of the money must be specified.⁸⁸ A judgment for an amount expressed in barren figures, as "for four hundred and sixty-one $5\frac{3}{100}$ damages," is a nullity; it does not express a sum of money.⁸⁹ Expressing the amount in figures is not, probably, an infraction of the statutes requiring judicial proceedings to be recorded in the English language,⁹⁰ but it is deemed too unsafe, and therefore has been held not to be tolerated.⁹¹ In New Jersey, such proceedings being required to be recorded "in words at length," stating the amount of a judgment in figures has been held to be good cause for reversal.⁹² Costs become a part of the judgment when taxed; hence, where a judgment is for a certain sum, with costs and charges herein expended, taxed at ——— dollars and ——— cents, it is not so uncertain as to amount, after the costs are taxed, as to prevent suit on it.⁹³

sufficient to enter *judgment generally*. The judgment is supposed to be for the amount laid in the declaration, and the execution issues accordingly. But the plaintiff indorses on the execution the amount of the actual debt, and if the defendant complains that injustice has been done the court are always ready to give immediate and liberal relief on motion."

⁸⁶ Dinsmore v. Anstill, Minor 89

⁸⁷ Duerson v. Bellows, 1 Blackf. 217; Maynard v. Newman, 1 Nev. 271; Sibert v. Kelly, 6 T. B. Mon. 669; Whetstone v. Colley, 36 Ill. 328; Stockton v. Scobie, 1 J. J. Marsh. 6; Carson v. Pearl, 4 id. 92; Griffith v. Miller, 6 id. 329; Randolph v. Metcalf, 6 Cold. 400; Erlanger v. Avegno, 24 La. Ann. 77; Buchegger v. Schultz, 13 Mich. 420; Henderson v. McPike, 35 Mo. 255; Bank v. Trumbull, 53 Barb. 459; Mitchell v. Henderson, 63 N.

C. 643; Chamberlin v. Vance, 51 Cal. 75; Munter v. Rogers, 50 Ala. 283.

⁸⁸ Carr v. Anderson, 24 Miss. 188.

⁸⁹ Carpenter v. Sherfy, 71 Ill. 427; Lawrence v. Fast, 20 Ill. 338, 71 Am. Dec. 274; Pittsburg, etc. R. Co. v. Chicago, 53 Ill. 80; Randolph v. Metcalf, 6 Cold. 400. See Tidd v. Rines, 26 Minn. 201; Gutzwiller v. Crowe, 32 Minn. 70.

⁹⁰ Fullerton v. Kelliher, 48 Mo. 542; Tankersley v. Silburn, Minor 185.

⁹¹ Linder v. Monroe, 33 Ill. 388.

The use of figures, preceded by the dollar mark, has been held sufficient. Davis v. McCary, 100 Ala. 545.

⁹² Cole v. Petty, 2 N. J. L. 60; Walter v. Vanderhoof, id. 73; Smith v. Miller, 8 id. 175, 14 Am. Dec. 418.

⁹³ Schroeder v. Boyce, 127 Mich. 33. Compare Noyes v. Newmarch,

SECTION 6.

RESTITUTION AFTER REVERSAL OF JUDGMENT.

§ 468. **How made.** When it happens that a judgment is collected or paid pending a writ of error, appeal, or *certiorari* the defendant is entitled, on its reversal, to restitution of what he has lost by the erroneous judgment. If money has been collected or received upon a judgment valid at the time and binding between the parties, and that judgment is subsequently reversed, it may be recovered although payment may not have been coerced by actual duress.⁹⁴ It may be recovered by suit.⁹⁵ Other common-law remedies are cumulative.⁹⁶ A court of equity is possessed of power to order the restitution of money collected under its decree after a reversal thereof, if the decree of reversal extends to a dismissal of the bill for want of equity. Such restitution may be ordered by rule.⁹⁷ The court which rendered the erroneous judgment may cause restitution to be made, and the appellate court after reversing it, if informed by the record or otherwise that the judgment has been collected, may require restitution to be made by process from the court below and enforce compliance by *mandamus*.⁹⁸ The mode of proceeding to procure such restitution must be regulated according to circumstances. Sometimes it is done by a writ of restitution without a *scire facias*, when the record shows that the money has been paid and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored.⁹⁹ It

1 Allen 51; Case v. Plato, 54 Iowa 64.

⁹⁴ Nashville, etc. R. Co. v. Bean, 128 Ky. 758, 129 Am. St. 333; Lott v. Swezey, 29 Barb. 87.

⁹⁵ Id.; Sturgis v. Allis, 10 Wend. 354; Clark v. Pinney, 6 Cow. 297; Green v. Stone, 1 Har. & J. 405; Langley v. Warner, 3 N. Y. 327; McCracken v. Paul, 65 Ark. 553, 67 Am. St. 948; Florence C. & I. Co. v. Louisville B. Co., 138 Ala. 588,

100 Am. St. 50; New Jersey Soc. v. Knoll, 77 N. J. L. 138; Harrigan v. Gilchrist, 121 Wis. 127.

⁹⁶ Id.

⁹⁷ Morgan v. Hart, 9 B. Mon. 79.

⁹⁸ Ex parte Morris, 9 Wall. 605, 19 L. ed. 799; Hall v. Emmons, 11 Abb. Pr. (N. S.) 435.

⁹⁹ Id.; 2 Salk. 588; Tidd's Pr. 1033; Hunt v. Westervelt, 4 E. D. Smith 225.

In Safford v. Stevens, 2 Wend.

has been said that the right to restitution must be enforced;¹ but the same court subsequently ruled that that will not ordinarily be done against a solvent party if the result will be to prejudice his rights to contest the merits of his claim in the local courts.²

§ 469. Liability of third parties; restitution of property, and compensation for loss of its use. What is done under the execution pursuant to its precept is valid, and, so far as strangers and third persons are concerned, final.³ Where the property taken under the erroneous judgment, in the absence of a *superseedeas* bond on appeal, has, by voluntary sale, or by seizure and sale under process, passed to innocent purchasers pending the appeal; or where money collected under such judgment is received by one in a fiduciary character, as by an administrator, and he has, pursuant to an order of court, paid it over to an-

158, a judgment of nonsuit, rendered in the common pleas, was reversed with costs, and a new trial granted. The record of the supreme court contained a suggestion that the plaintiff obtained satisfaction of the judgment for costs in the common pleas, whereby the defendant had lost \$73.83, "as was suggested, shown to, and manifestly appeared" to the court; whereupon the court awarded restitution. In the court of errors, referring to this practice, the chancellor said: "It was undoubtedly the former practice to award restitution on the reversal of the judgment, only where it appeared by the return of the execution that the damages or costs erroneously awarded by the court below had been actually levied and paid over. And if the fact did not appear upon the record, the party was put to his *scire facias* inquiry to ascertain the fact, upon the return of which restitution was awarded. But I believe the modern practice has been to apply to the court on affidavit for leave to suggest the

fact on the record, and upon which the judgment of restitution is awarded. I see no objection to this course, as the court would undoubtedly permit the defendant to traverse the suggestion, if there was any doubt of its truth." See *Sheridan v. Mann*, 5 How. Pr. 201; *Arrow-smith v. Van Arsdale*, 21 N. J. L. 471.

In New Jersey the amount to be restored is settled by an assessment signed by one of the judges. *Id.*; *Harm v. McCormick*, 4 N. J. L. 109; *Randolph v. Bayles*, 2 id. 52; *McChesney v. Rogers*, 8 id. 272.

The practice is now very generally regulated by statute.

¹ *Hier v. Anheuser-B.* B. Ass'n, 60 Neb. 320.

² *State v. Horton*, 70 Neb. 334.

³ *Harrigan v. Gilchrist*, *supra*; *Langley v. Warner*, 3 N. Y. 327; *South Fork C. Co. v. Gordon*, 2 Abb. (U. S.) 479; *Bank of United States v. Bank of Washington*, 6 Pet. 8, 8 L. ed. 299. See *Reynolds v. Hosmer*, 45 Cal. 616.

other, the summary remedy provided by the statute for ordering restitution cannot properly be administered; the party must pursue a different remedy by which all necessary parties may be brought before the court.⁴ The court can by such summary remedy reach what is still in the possession of the adversary party.⁵ If suit is brought against an officer who has sold property to satisfy a judgment, afterwards reversed, and who still holds the proceeds, the recovery or restitution will be limited to the amount realized; but where the action is against the person who occasioned the injury recovery may be had for the whole damage the injured party has sustained by reason of the erroneous judgment and execution,—he may recover the full value of the property sold;⁶ such value to be estimated as of the time the sale was made, with interest, or if the property was wrongfully placed in the hands of a receiver prior to sale, reasonable rents may be recovered up to the time the purchaser obtained possession, with interest from that time and the usual costs.⁷ Upon this point the authorities are not agreed, the general and better opinion tending to the view that the judgment defendant is only entitled to so much as the plaintiff has realized upon the execution. This doctrine has been thus expressed: After a reversal the plaintiff is bound to make restitution, but he cannot be treated as a wrong-doer for causing execution to issue and the defendant's property to be levied on and sold. The judgment protects him while it remains in force. It may seem a hardship to the defendant in such a judgment

⁴ *Polk County v. Syphen*, 17 Iowa 358, 85 Am. Dec. 568. See *Hay v. Bennett*, 153 Ill. 271.

⁵ *Lovell v. German Ref. Church*, 12 Barb. 67.

⁶ *Reynolds v. Hosmer*, 45 Cal. 616; *Bac. Abr.*, tit. Execution; *Thompson v. Thompson*, 1 N. J. L. 159; *Grayson v. Lilly*, 7 T. B. Mon. 6.

⁷ *Hays v. Griffith*, 85 Ky. 375.

Where, pending an appeal, real estate was sold on execution to the judgment plaintiff, and the judgment was reduced by allowing a

credit, the plaintiff could not be compelled to keep the property at the sum bid and pay the defendant the difference between the amount of the bid and the reduced judgment. *Munson v. Plummer*, 58 Iowa 736.

And where stocks sold under a judgment deteriorated in value the plaintiff was not bound to account for their value at the time of the sale, nor to retain them at the price bid. *Fort Madison L. Co. v. Batavian Bank*, 77 Iowa 393.

that under it his property may be sold for greatly less than its value, and his right of restitution be limited to what came into the hands of the plaintiff. But such hardship, when it occurs, will generally, if not always, be the result of his own acts. If by failing to appeal, or to obtain a *supersedeas* on appeal, he permits the judgment to remain in force and enforceable he can hardly complain that the other party proceeds to enforce it. To entitle the defendant to restitution it must appear that the money has been paid to the plaintiff.⁸ In California no recovery can be had, in the action for restitution, of attorney's fees for defending the original action and obtaining a reversal of the judgment rendered therein.⁹ The assignee of an erroneous judgment who procures an execution under it and becomes a purchaser of the property pursuant to a sale is not a stranger to the proceedings and cannot claim protection as a *bona fide* purchaser.¹⁰ But creditors who do nothing more than file their claims against their debtor after judgment against him in a suit instituted by other creditors are not liable for the damages resulting from such erroneous judgment, nor can they be compelled to restore the sum received by them in satisfaction of their claims. The defendant's remedy is solely against those who were parties to the original proceeding.¹¹ If a sale is made to satisfy the claims of different creditors and the judgment is reversed as to only one of them, the judgment defendant cannot recover the value of the property, but only the sum realized by the plaintiff whose judgment is reversed.¹²

Restitution may be had of land sold under a decree of foreclosure to the plaintiff pending an appeal after reversal,¹³ and

⁸ Per Gilfillan, C. J., in *Peck v. McLean*, 36 Minn. 228, 1 Am. St. 665, citing *Gay v. Smith*, 38 N. H. 171; *Bickerstaff v. Dellinger*, 1 Murphy 272; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Eyre v. Woodfine*, Cro. Jac. 278; *McGuire v. Ely*, Wright 520; *Lovett v. German Ref. Church*, 12 Barb. 67. This rule prevails under the statutes of California. *Dowdell v. Carpy*, 137 Cal. 333.

Restitution can be compelled only to the extent the parties have profited by the judgment. *Schnabel v. Waggener*, 118 Ky. 362.

⁹ *Dowdell v. Carpy*, *supra*.

¹⁰ *Reynolds v. Hosmer*, 45 Cal. 616; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449.

¹¹ *Hays v. Griffith*, 85 Ky. 375.

¹² *Northern Bank v. Riley*, 12 Ky. L. Rep. 92 (Ky. Super. Ct.).

¹³ *Bryant v. Fairfield*, 51 Me. 149.

in such case the restoration will include an accounting for rents and profits, less the value of improvements and additions.¹⁴ It includes the right to costs which the party should have recovered when the erroneous judgment was rendered. Thus after a judgment in favor of a plaintiff had been affirmed by a county court and reversed by the supreme court it was held that restitution entitled the defendant to the costs of defending before the justice and of prosecuting the appeal before the county court.¹⁵ The damages recoverable by one who has been wrongfully dispossessed of his property under an erroneous judgment include the reasonable rental value of it for the time he was out of possession for the purpose for which the owner used it, his necessary expenses in moving from and to the same, the deterioration of the property while it was wrongfully withheld so far as that was caused by the wrong-doer's neglect, less the taxes paid by the latter and the value of such reasonable and necessary permanent repairs made by him.¹⁶

Payment or collection of the erroneous judgment is not regarded as a payment of or upon the debt or demand upon which it was rendered, and if a new trial is ordered such payment or collection will only avail by way of set-off.¹⁷ Restitution in such cases, that is where, on reversal, a new trial is granted, is held to be discretionary in New York under the code, and the court may therefore impose conditions for the safe keeping of the funds to answer any eventual recovery.¹⁸ It was discretionary before the statute.¹⁹ In determining the

¹⁴ *Raun v. Reynolds*, 15 Cal. 459, 18 Cal. 275.

¹⁵ *Estus v. Baldwin*, 9 How. Pr. 80; *Jacks v. Darrin*, 1 Abb. Pr. 232.

¹⁶ *Lewis v. Scott*, 24 Ky. L. Rep. 2367.

¹⁷ *Ringgold v. Randolph*, 13 Ark. 328; *Close v. Stuart*, 4 Wend. 95.

¹⁸ *Marvin v. Brewster*, 56 N. Y. 671; *Young v. Brush*, 18 Abb. Pr. 171; *Britton v. Phillips*, 24 How. Pr. 111.

¹⁹ In *Kirk v. Eaton*, 10 S. & R. 103, a judgment confessed was, after

a year and a day, sought to be revived by *scire facias*; there was an issue of payment. Judgment for the plaintiff having been rendered, land was sold on execution to third persons to satisfy it. Part of the money was paid to prior incumbrancers or creditors, and the residue to the plaintiff. The judgment was afterwards reversed for irregularity and the defendant asked restitution. On this question the court say, by Tilghman, C. J.: "Under the circumstances of this case that

rights of the parties on an application for restitution demands between them not embraced in the original suit and not dis-

is a very important question. The plaintiff's original judgment, which was a lien on the defendant's land, is in force. But the lien is gone by the sale of the land, because the purchaser will hold it, notwithstanding the judgment be reversed. Then if the money is put in the hands of the defendant all security is gone. It appears that the defendant is in bad circumstances. The proceeds of sale did not pay the whole of the plaintiff's debt. The plaintiff ought not to hold the money after the reversal of the judgment. But he has a right to ask of the court that they will place it where it may be found if it shall be proved that he has not received satisfaction for the original judgment. We cannot presume that the judgment has been satisfied. Its strength is not at all impaired by the reversal of the proceedings on the *scire facias*. I do not recollect that a case so circumstanced has hitherto been before the court. We have said that, in general, restitution is matter of course. But it will be found that in the cases which have been decided the original judgment has been reversed, and that there is no room for presumption that there is anything due to the plaintiff; or, if the original judgment has not been reversed, there has been no suggestion that the security of the plaintiff would be endangered by the restitution. The defendant will obtain substantial justice, and he ought to be satisfied if the money in the hands of the plaintiff be deposited in court, subject to the event of a trial on the issue of payment in another

scire facias to be sued out by the plaintiff. If, indeed, the defendant had a right to an award of restitution *ex debito justitiae*, then this court would be forced to give it, be the consequence what it may. But that I do not take to be the case. In *Baker v. Smith*, 4 Yeates 185, the court quashed the execution but refused to award restitution. In regard to executions levied on land, our situation is different from England. There the land is not sold, and therefore the judgment retains its lien, although restitution be made of the land. I mean in a case like the present, where the judgment on a *scire facias* is reversed without touching the original judgment. But with us the lien is destroyed by the sheriff's sale, which stands good, though the judgment be reversed. Suppose judgment on a *scire facias* on a mortgage should be reversed for some defect in form after the mortgaged property had been sold. Would it not be a bad administration of justice if the mortgagee should be compelled to place the money in the hands of the mortgagor in insolvent circumstances and thus lose all security for his debt? And how, in principle, is that to be distinguished from the case before us? Courts of justice are studious to preserve to the parties all the security in their power. And in this they look to the defendant as well as the plaintiff. A writ of error is no *supersedeas* to an execution whose operation has commenced before notice to the plaintiff. Yet, if the case require it, the money levied by the execution will be retained in court

posed of on the final judgment or decree will not be considered.²⁰ But when the rule has been made absolute and a money judgment has been rendered it stands like any other judgment between the same parties and is subject to be set off by another judgment held against the party in whose favor the restitution is ordered.²¹

till the event of the writ of error be known. 2 Saund. 101, note *b*; Willes 271. There the court ties the hands of the plaintiff for the security of the defendant. Here we

ought not to shut our eyes to the consequences of giving the money to the defendant.”

²⁰ Morgan v. Hart, 9 B. Mon. 78.

²¹ Smith v. Bohon, 12 Bush 448.

PART II.

APPLICATION OF THE LAW OF DAMAGES TO VARIOUS CONTRACTS AND WRONGS.

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SECTION 1.

PENALTIES.

§ 470. **Bonds and penalties.** A bond is a form of obligation under seal, by which the party making it, the obligor, acknowledges himself bound to the other party, the obligee, in a specified sum. If accompanied by no other agreement or condition it evidences an absolute debt, and no question of penalty ordinarily arises. In that form it is called a single bond. When a condition of defeasance is added the sum stated in the bond is called a penalty; for it is usually much larger in amount than the value of the thing specified to be done in the condition, which shows the real nature of the contract and contains its essence. There is no express agreement on the part of the obligor to perform such condition; but he has thereby made the obligation subject to be discharged by performance of the act or acts which the condition specifies. Literally, the obligor, by

the terms of the instrument, says he is absolutely obliged to pay the penalty unless he fulfills the condition. Such was formerly his legal obligation. On failure to perform the condition the penalty became an absolute debt, and at law was recoverable. In equity, however, it was treated as security for performance of the condition, and relief was granted against the enforcement of the penalty on payment of a sum as damages, ascertained to be an equitable equivalent of the condition not performed; in other words, that court would not allow the obligee to take more than in conscience he ought.¹

§ 471. Penalties in affirmative agreements. Penalties are also often stipulated to be paid in agreements and covenants in the event of the breach of affirmative stipulations. In such cases the party injured is not confined to his action for the penalty, but has an election to sue on the agreement or covenant. In that action he is entitled to recover full damages without regard to the penalty. It is not the measure of damages, nor does it limit the recovery thereof, if the actual injury requires a larger amount for just compensation.² He may sue for the penalty, and when he does so the recovery is governed substantially by the same principles as when the action is upon a bond. By the early common law, in either case, if by the terms of the condition of defeasance or the agreement the penalty became forfeited it might be recovered, after which there could be no further recovery upon the obligation because, by recovery of the penalty, the whole was satisfied.³

§ 472. Statute of 8 and 9 William III. It was provided, however, in substance, by statute enacted in 1679 in England that in all actions in courts of record upon any bond or for

¹ Black. Com. Book II, p. 251; *Hale v. Thomas*, 1 Vern. 509; *Bishop v. Church*, 2 Ves. 371; *Hobson v. Trevor*, 2 P. Wms. 191; *Cannel v. Buckle*, id. 243; *Collins v. Collins*, 2 Burr. 820; *Chilliner v. Chilliner*, 2 Ves. 528. See *Bonafous v. Rybot*, 3 Burr. 1370.

² *Meinert v. Botcher*, 60 Minn. 204; *New Holland T. Co. v. Lan-*

caster County, 71 Pa. 442; *Lowe v. Peers*, 4 Burr. 2225; *Noyes v. Phillips*, 60 N. Y. 408; *Thompson v. Rose*, 8 Cow. 266; *Stroble v. Large*, 3 McCord 112; *Haggart v. Morgan*, 4 Sandf. 198; *Rhyne v. Rhyne*, 160 N. C. 559; *Wilkes v. Bierne*, 68 W. Va. 82, 31 L.R.A.(N.S.) 937.

³ Id.

the recovery of any penal sum for the non-performance of any covenants or agreements in any indenture, deed or writing contained the plaintiff might assign as many breaches as he saw fit, and the jury might assess not only the usual damages and costs, but also damages for such of the breaches assigned as the plaintiff should prove. The ordinary judgment was to be entered on the verdict; and when given for the plaintiff on demurrer, by confession or *nil dicit* he might suggest breaches on the roll; and upon writ of inquiry prove them and recover damages; upon the defendant's paying, either upon execution or into court, the damages assessed with costs further execution upon the judgment was to be stayed; but the judgment remained as a security to answer further breaches which might again be suggested on *scire facias*, when a similar trial and proceeding were required.⁴ The assignment of breaches under this statute was held compulsory because the statute was made for defendants and was highly remedial, while it secured to the obligee all he in conscience ought to receive.⁵ This statute extends to all bonds and deeds for the performance of covenants or the payment of money which were of a divisible nature and capable of partial breach or a succession of breaches, or from the violation of which only part of the damages guarded against might arise.⁶ It includes, therefore, bonds for the payment of money by instalments;⁷ for the payment of an annuity;⁸ for the performance of an award;⁹ and where a bond is conditioned for the payment of a single sum and also for the performance of other covenants breaches must be assigned though the action is merely brought to recover the single sum, for which purpose it is like the common money bond;¹⁰ for in all such cases, as the plaintiff would have been entitled at law

⁴ 8 and 9 Will. III., ch. 11, § 8.

⁵ Roles v. Rosewell, 5 T. R. 538; Hardy v. Bern, id. 636; Van Benthuyzen v. De Witt, 4 Johns. 213; Hodges v. Suffelt, 2 Johns. Cas. 406.

⁶ Mayne on Dam. (8th Eng. ed.) 285.

⁷ Willoughby v. Swinton, 6 East Suth. Dam. Vol. II.—20.

530; Harrington v. Cox, 3 Ir. C. L. 87; Hodgkinson v. Wyatt, 1 Dowl. & L. 668; Randall v. Burton, 23 Up. Can. C. P. 268.

⁸ Walcott v. Golding, 8 T. R. 126; Ryan v. Massey, 2 Ir. C. L. 642.

⁹ Welch v. Ireland, 6 East 613.

¹⁰ Quin v. King, 1 M. & W. 42.

to issue execution to the full amount of his judgment, the defendant would have been forced to an expensive remedy in equity.¹¹

§ 473. Statute of 4 and 5 Anne. Another statute was enacted soon afterwards providing for relief at law against penalties in money bonds conditioned for the payment of a lesser sum at a time certain. By this statute it was provided that where an action is brought upon any bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before action, paid to the obligee, his executors or administrators the principal and interest due by the defeasance or condition, though such payment was not made strictly according to the condition or defeasance, yet it shall and may, nevertheless, be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition and defeasance and had been so pleaded. It also provided that if at any time pending an action upon any such bond with a penalty the defendant brings into court where the action is depending all the principal money and interest due thereon, and also all such costs as have been expended in any suit at law or in equity upon such bond, the money so brought in shall be deemed and taken to be in full satisfaction and discharge of the bond, and the court shall and may give judgment to discharge the defendant from the same accordingly.¹²

These provisions merely recognized and confirmed the doctrine previously established in equity that, in the case of a bond with a penalty, the true intent of the penalty was to insure payment, not only of the stated principal money and interest on the day fixed, but also of subsequent interest down to the actual payment of the principal, although the bond contained no stipulation for interest beyond the day fixed, and under them the interest is payable as interest, and not as damages for default in payment.¹³ The statute applies wherever a

¹¹ Mayne on Dam. (8th Eng. ed.) See 23 and 24 Vict., ch. 26, § 25.
286.

¹³ Heynes v. Dixon, [1900] 2 Ch.

¹² 4 and 5 Anne, ch. 16, §§ 12, 13. 561.

single sum is, by the condition, payable at a certain time or is contingently so payable after the contingency has happened. Thus, it is held to apply to *post obit* bonds;¹⁴ to bonds for the payment of interest and principal where both have become due,¹⁵ even though the money became payable in consequence of certain provisions in an indenture of even date; provided, that by the course of pleading the jury have found that the money had become payable;¹⁶ to bonds for the payment of principal and interest, with proviso that on default of paying the interest maturing before the principal the whole amount of principal and interest should become due.¹⁷

§ 474. **American statutes and practice.** Similar statutes have been enacted in this country. They are not all precisely the same, nor has a uniform practice been adopted under them. They accomplish, however, the same purpose by avoiding the necessity of resorting to equity for relief from the penalty on paying or suffering recovery for such damages, not exceeding the penalty, as are a just compensation for non-performance of the condition.¹⁸ In most cases falling within the provisions of the statute of William special breaches are required to be assigned, and either successive recoveries are allowed therefor, or else upon any breach of the condition full damages are assessed once for all as upon a total breach.¹⁹

¹⁴ *Murray v. Earl of Stair*, 2 B. & C. 82; *Cardozo v. Hardy*, 2 Moore 220.

¹⁵ *Smith v. Bond*, 10 Bing. 125, 2 Dowl. & L. 460.

¹⁶ *Id.*; *Darbishire v. Butler*, 5 Moore 198.

¹⁷ *James v. Thomas*, 5 B. & Ad. 40; *Husband v. Davis*, 10 C. B. 645; *Marriage v. Marriage*, 1 C. B. 761.

¹⁸ *Scarratt v. Cook B. Co.*, 117 Ga. 181; *State v. Reynolds*, 137 Mo. App. 261. The breach of an ordinary bond conditioned for the performance of a special act gives the obligee the right to recover only the

damages actually sustained. *Ripley v. Eady*, 106 Ga. 422.

¹⁹ *Ahl v. Ahl*, 60 Md. 207; *Meinert v. Bottcher*, 60 Minn. 204; *Waldo v. Forbes*, 1 Mass. 10; *Gardner v. Niles*, 16 Me. 279; *Sibley v. Rider*, 54 Me. 463; *Fales v. Hemenway*, 64 Me. 373; *Webb v. Webb*, 16 Vt. 636; *Clammer v. State*, 9 Gill 279; *Dale v. Moulton*, 2 Johns. Cas. 205; *Rosenkrantz v. Durling*, 29 N. J. L. 191; *Moore v. Fenwick*, 1 Gilmer 214; *Clark v. Goodwin*, 1 Blackf. 73; *Mitchell v. Porter*, 3 id. 499; *Rany v. Governor*, 4 id. 2; *Nelson v. Gray*, 2 G. Greene 397; *Cameron*

Neither the statute of William nor the American statutes, as a rule, provide for a bond conditioned for the performance of a collateral undertaking, as a bond of indemnity. And where judgment on such a bond is entered under a warrant the execution, following the judgment, goes for the penalty if nothing is shown by the record to restrain the plaintiff from collecting the whole sum. He proceeds, however, at his peril, subject to the interference of a court of equity if he takes execution before there has been a breach of the condition, or, if after a breach, he directs the collection of a larger sum than the damages actually sustained. In either case equity will restrain the execution, direct an issue of *quantum damnificatus*, and, when the damages are ascertained upon the trial of such an issue, it will grant relief upon their payment.²⁰

Under the code it has been intimated that breaches should in all cases be assigned because the cause of action is required

v. Boyle, id. 154; Spalding v. Mil-
lard, 17 Wend. 331; Harmon v.
Dedrick, 3 Barb. 192; Hughes v.
Smith, 5 Johns. 168; Munroe v. Al-
laire, 2 Caines 320; Van Benthuy-
sen v. De Witt, 4 Johns. 213; Allen
v. Watson, 16 id. 205; Nelson v.
Bostwick, 5 Hill 37, 40 Am. Dec.
310; Hodges v. Suffelt, 2 Johns.
Cas. 406; Patterson v. Parker, 2
Hill 598; Rogers v. Coleman, 3 Cow.
62; Smith v. Jansen, 8 Johns. 111;
Caverly v. Nichols, 4 id. 189; Cook
v. Tousey, 3 Wend. 444; Sprague v.
Seymour, 15 Johns. 474; Farnham
v. Mallory, 3 Keyes 527; Howard
v. Farley, 18 Abb. Pr. 260, 19 id.
126, 3 Robert. 308; O'Connor v.
Such, 9 Bosw. 318; Van Wyck v.
Montrose, 12 Johns. 350; Brown
v. Hallett, 1 Caines 517; Clark
v. State, 7 Blackf. 570; Karch v.
Commonwealth, 3 Pa. 269; State
v. Lawson, 2 Gill 62; State v. Mc-
Alpin, 6 Ired. 347; Black v. Caru-
thers, 6 Humph. 87; Hinckley v.
West, 9 Ill. 136; Scarborough v.
Thornton, 9 Pa. 451; Arnold v. Com-

monwealth, 8 B. Mon. 109; Sims
v. Harris, id. 55; Ray v. Justices,
6 Ga. 303; State v. Votaw, 8 Blackf.
2; Walcott v. Harris, 1 R. I. 404;
Toles v. Cole, 11 Ill. 562; Fleming
v. Tolee, 7 Gratt. 310; Scott v.
State, 2 Md. 284; Governor v. Wiley,
14 Ala. 172; Garrett v. Logan, 19
Ala. 344; Wilson v. Cantrel, 19 Ala.
642; Trice v. Turrentine, 13 Ired.
212; Young v. Reynolds, 4 Md. 375;
Rubon v. Stephan, 25 Miss. 253;
Mitchell v. Laurens, 7 Rich. 109;
Witmore v. Rice, 1 Biss. 237; Rich-
man v. Richman, 10 N. J. L. 114;
Dent v. Davison, 52 Ill. 109.

The penalty of a peace bond and
for appearance is recoverable upon
the failure to fulfil either condition.
Crump v. People, 2 Colo. 316; Shir-
ley v. Terrell, 134 Ga. 61; Lawton
v. State, 5 Tex. 272.

²⁰ Per Chancellor Bates in *Staats*
v. Herbert, 4 Del. Ch. 508, 519, cit-
ing 2 Story's Eq., § 1314; *Sloman*
v. Walter, 1 Bro. Ch. 418; *Erring-*
ton v. Aynesley, 2 id. 342; *Hardy v.*
Martin, 1 Cox 64.

to be stated in ordinary and concise language.²¹ In some states an action of debt may be brought on a money bond as soon as there is any default in the payment of interest or any instalment of the principal,²² in others, not until all the moneys payable by the condition are due.²³ In Arkansas debt will not lie until all the instalments are due, but covenant may be brought when one becomes due.²⁴ By the general practice judgment is rendered for the penalty, but it is only nominally the debt; the breach of the condition is treated as the gist of the action.²⁵ Where damages are assessed upon particular breaches the judgment for the penalty is to be enforced only to the extent of such damages.²⁶ If such a judgment be sued on in another state the damages which had been assessed for the breaches measure the recovery.²⁷ Though in the court where originally rendered it stands as security for further breaches, they cannot be assigned when the judgment is sued on in another jurisdiction.²⁸ If a

²¹ *Western Bank v. Sherwood*, 29 Barb. 383.

²² *Depuy v. Gray*, 1 Ala. 357; *Thatcher v. Taylor*, 3 Munf. 249; *Galbraith v. O'Bannon*, Sneed. 61; *Nailor v. Kearney*, 1 Cranch C. C. 112; *Davidson v. Brown*, id. 250.

²³ *Booth v. Hall*, 6 Md. 1; *Peyton v. Harmon*, 22 Gratt. 643. See *Platt on Covenants*, 545.

²⁴ *State v. Scroggin*, 10 Ark. 326.

²⁵ *Murphy v. Sommerville*, 7 Ill. 360; *Strain v. Babb*, 30 S. C. 342, 14 Am. St. 905; *State v. Moss*, 18 S. C. 367.

In *Wilson v. Spencer*, 11 Gratt. 261, the judgment was rendered for the damages assessed instead of the penalty. It was held that the judgment was not entered in proper form; yet, as the error produced no injury to the defendant, it was not reversed. *Pate v. Spotts*, 6 Munf. 394. Compare *Wales v. Bogue*, 32 Ill. 464; *Scarborough v. Thornton*, 9 Pa. 451; *State v. Cross*, 6 Ind. 387.

After verdict and judgment for

the penal sum the defendant, upon a hearing to ascertain the sum due and payable may prove unpleaded payments on the bond. *Merrill v. McIntire*, 13 Gray 157.

²⁶ *Van Wyck v. Montrose*, 12 Johns. 350; *Marvin v. Bell*, 41 Vt. 607.

²⁷ *Batley v. Holbrook*, 11 Gray 212.

²⁸ *Id.* In *People v. Compher*, 14 Ill. 447, a judgment was obtained by the people on an official bond against the sheriff and his sureties for the penalty in the circuit court of S. county, and it was held that a subsequent assignment of breaches was not a distinct action, but was to be regarded as part of the original suit; and therefore the fact that the defendants resided in different counties from that in which the judgment was rendered and were served with notice of such subsequent assignments of breaches where they resided, did not oust the court of jurisdiction.

bond is accompanied by a condition to do an illegal act it is void; but if the condition is illegal in part only, and that part severable, perhaps only void *pro tanto*.²⁹

§ 475. **Statutory bonds.** A statutory bond has been held to be vitiated by the omission of a material condition required by the statute.³⁰ The principle is well settled that official bonds are valid if the condition substantially complies with the statute. The exact form prescribed is not essential unless made so by the charter or act.³¹ Courts do not favor technical objections to official or other statutory bonds, and when not strictly in compliance with the statute they have been sustained as voluntary obligations, the conditions of which secure

²⁹ *Greenwood v. Colcock*, 2 Bay 67; *Brown v. Gitchell*, 11 Mass. 11; *Lowrey v. Barney*, 2 Chip. 11; *Kavanaugh v. Saunders*, 8 Me. 422; *State v. Findley*, 10 Ohio 51.

³⁰ *Dixon v. United States*, 1 Brock. 177. See *Justices v. Wynn*, *Dudley* 22.

As to the effect of taking a statutory bond with a larger penalty or a severer condition than that prescribed, see also *Commonwealth v. Lamb*, 1 W. & S. 261; *Woods v. State*, 10 Mo. 698; *People v. Carbannes*, 20 Cal. 525.

Extra-statutory conditions in an official bond do not enlarge the rights of parties suing thereon. *Cambridge v. Foster*, 195 Mass. 411.

If the conditions of a bond are not all sustainable those which are good, if separable from the others, may be the subject of an action in case of a breach. *United States v. Mora*, 97 U. S. 413, 24 L. ed. 1013; *State v. McGuire*, 46 W. Va. 328, 76 Am. St. 822; *Newman v. Newman*, 4 M. & S. 70; *Farrar v. United States*, 5 Pet. 373, 8 L. ed. 159. See *United States v. Hodson*, 10 Wall. 395, 19 L. ed. 937; *Speck v. Commonwealth*, 3 W. & S. 324; *United States v. Gordon*, 1 Brock. 190, 7

Cranch 287; *Kavanaugh v. Saunders*, 2 Me. 422; *Hall v. Cushing*, 9 Pick. 404; *Sanders v. Rives*, 1 Stew. 109; *United States v. Morgan*, 3 Wash. C. C. 10; *Same v. Tingey*, 5 Pet. 129, 8 L. ed. 71; *Same v. Brown*, *Gilpin* 155; *Vroom v. Smith*, 14 N. J. L. 479; *Kountze v. Omaha H. Co.*, 107 U. S. 378, 27 L. ed. 609.

Where there is a discrepancy between the condition and the penal portion of the bond, it will be held single, and the obligee entitled to the whole amount. But to support the condition the court will transpose or reject insensible words, and construe it according to the obvious intention of the parties. *Swain v. Graves*, 8 Cal. 549. See *Stockton v. Turner*, 7 J. J. Marsh. 192; *Butler v. Wigge*, 1 Saund. 65.

³¹ *Holmes v. Langston*, 110 Ga. 861; *Moulding v. Wilhartz*, 169 Ill. 422; *Ten Hopen v. Taylor*, 103 Mich. 178; *Healy v. Newton*, 96 Mich. 228; *Jackson v. Hopkins*, 92 Va. 601; *Alleghany County v. Van Campen*, 3 Wend. 49; *People v. Holmes*, 2 id. 281, §15; *Fellows v. Gilman*, 4 id. 414; *Lawton v. Erwin*, 9 id. 233; *Cornell v. Barnes*, 7 Hill 35; *Myers v. Kiowa County*, 60 Kan. 189.

the performance of the obligation assumed if they contain nothing contrary to law.³²

There is a conflict of authority concerning the liability of sureties upon bonds given pursuant to an unconstitutional statute, or in proceedings before courts which have no jurisdiction of the subject-matter. In Indiana, Kentucky and Iowa it is settled that a bond or recognizance taken by an officer or court

- ³² *Simmons v. Sharpe*, 2 Ala. App. 385; *MacKenzie v. Porter*, 40 Colo. 340; *Wall v. Mount*, 121 Ga. 831; *Awtrey v. Campbell*, 118 Ga. 464; *Anderson v. Blair*, 118 Ga. 211; *O'Brien County v. Mahon*, 126 Iowa 539; *State v. United States F. & G. Co.*, 81 Kan. 660, 26 L.R.A.(N.S.) 865; *Kaill v. Bell*, 79 Kan. 358; *Shreves v. Gibson*, 76 Kan. 709; *Buhrer v. Baldwin*, 137 Mich. 263; *Waterous E. Works Co. v. Clinton*, 110 Minn. 267; *State v. Smith* 87 Miss. 551; *Huttig-McD. P. B. Co. v. Springfield S. Co.*, 140 Mo. App. 374; *Blanchard v. Anderson*, 27 Okla. 732; *United States F. & G. Co. v. Rainey*, 120 Tenn. 357; *Hummel v. Del Greco*, 40 Tex. Civ. App. 510; *Yost v. Ramey*, 103 Va. 117; *Pacific B. Co. v. United States F. & G. Co.*, 33 Wash. 47; *Chambers v. Cline*, 60 W. Va. 588; *Milwaukee v. United States F. & G. Co.*, 144 Wis. 603; *Higdon v. Fields*, 6 Ala. App. 281; *Commonwealth v. Gould*, 48 Pa. Super. 528; *Carnegie v. Hulbert*, 70 Fed. 209, 16 C. C. A. 498; *Painter v. Gibson*, 88 Iowa 120; *Brady v. Butts*, 15 Ky. L. Rep. 127 (Ky. Super. Ct.); *Bellinger v. Thompson*, 26 Ore. 320; *McChord v. Fisher*, 13 B. Mon. 193; *United States v. Rogers*, 28 Fed. 607; *State v. Wood*, 51 Ark. 205; *Camden v. Greenwald*, 65 N. J. L. 458, 463; *Mathews v. Lee*, 25 Miss. 417; *State v. Thomas*, 17 Mo. 503; *Postmaster-General v. Rice*, Gilpin 554; *Davison v. Burgess*, 31 Ohio St. 78; *Bagby v. Chandler*, 9 Ala. 770; *Montville v. Haughton*, 7 Conn. 543; *Stephens v. Crawford*, 3 Ga. 499, 1 id. 574; *Commonwealth v. Wolbert*, 6 Bin. 292, 6 Am. Dec. 452; *Governor v. Allen*, 8 Humph. 176; *Gathwright v. Callaway*, 10 Mo. 663; *Thomas v. White*, 12 Mass. 314, 369; *Kavanaugh v. Saunders*, 8 Me. 442; *Sweetzer v. Hay*, 2 Gray 49; *Supervisors v. Coffinbury*, 1 Mich. 355; *Horn v. Whittier*, 6 N. H. 88; *State v. Perkins*, 10 Ired. 333; *Dalton v. Miami Tribe No. 1*, 2 Am. L. Record (Ohio), 329; *People v. Johr*, 22 Mich. 461; *Justices v. Ennis*, 5 Ga. 569; *McCroskey v. Riggs*, 12 Sm. & M. 712. Compare *Tucker v. Hart*, 23 Miss. 548; *Stevens v. Hay*, 6 Cush. 229; *Crawford v. Meredith*, 6 Ga. 522; *Supervisors v. Jones*, 19 Wis. 51; *Scarborough v. Parker*, 53 Me. 254; *Governor v. Matlock*, 2 Hawks 366; *Johnson v. Gwathmey*, 2 Bibb 186, 4 Am. Dec. 694; *Stevens v. Treasurer*, 2 McCord 107; *Grimes v. Butler*, 1 Bibb 192; *Williamson v. Woolf*, 37 Ala. 298; *Cross v. Gabeau*, 1 Bailey 211; *United States v. Tingey*, 5 Pet. 115, 8 L. ed. 66; *Montville v. Haughton*, 7 Conn. 543; *Morrell v. Sylvester*, 1 Me. 248; *Smith v. Crocker*, 5 Mass. 538; *State v. Bowman*, 10 Ohio, 445; *Goodman v. Carroll*, 2 Humph. 490; *Lord v. Lancey*, 21 Me. 468. See § 477.

acting wholly under a statutory power must be authorized by a valid statute or it will be void; and in suing upon such instrument the complaint must set out the facts showing that it was taken in a case in which the law authorized it, and in many cases it must appear that it was taken exactly or substantially in accordance with the statutory power.³³ In Missouri and Nebraska it is not a defense to the sureties, after their principal has obtained possession of a defendant's property by means of their bond, that the statute pursuant to which it was given was unconstitutional.³⁴ In California there is an apparent conflict in the decisions. In *Benedict v. Bray*³⁵ it is held that an attachment bond given in a case of which the court had no jurisdiction is void. In *McDermott v. Isbell*³⁶ it is ruled that it is no defense to an action on a replevin bond that the court in which the suit was pending was incompetent to try it.

§ 476. Impossible condition. If the condition be impossible when the bond is made or becomes so afterwards by the act of God, the law or the obligee the penalty is saved; and the bond in the one case is void, and in the other is discharged.³⁷

³³ *Hoeg v. Pine*, 143 Iowa 243; *Carroll County v. Cuthbertson*, 136 Iowa 458; *Commonwealth v. Ledford*, 129 Ky. 190; *Caffrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126, citing numerous local cases; *Couchman v. Lisle*, 15 Ky. L. Rep. 543 (Ky. Super. Ct.).

Earlier cases in Iowa recognized that a bond not given in the prescribed manner nor duly accepted is enforceable if the principal had reaped the desired benefit from it. *State v. Cannon*, 34 Iowa 322; *State v. Wright*, 37 id. 522. See *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Robertson v. Shepherd*, 165 Mo. 360; *Dickerson v. State*, 20 Neb. 72.

³⁴ *United States F. & G. Co. v. Ettenheimer*, 70 Neb. 144, 147, 113 Am. St. 783; *McVey v. Peddie*, 69

Neb. 525; *Stevenson v. Morgan*, 67 Neb. 207, 108 Am. St. 629; *State v. Stark*, 75 Mo. 566.

³⁵ 2 Cal. 251, 56 Am. Dec. 332.

³⁶ 4 Cal. 113. See § 485.

³⁷ *People v. Hathaway*, 206 Ill. 42, 102 Ill. App. 628; *Kuhl v. Chamberlain*, 140 Iowa 546; *People v. Title G. & S. Co.*, 227 U. S. 382, 57 L. ed. 561; *Commonwealth v. Overby*, 80 Ky. 208, 44 Am. Rep. 471; *Kirby v. Commonwealth*, 1 Bush 114; *State v. Glenn*, 40 Ark. 332; *Phillipi v. Capell*, 38 Ala. 575; *Haralson v. Walker*, 23 Ark. 415; *Hanks v. Pickett*, 27 Tex. 97; *Scully v. Kirkpatrick*, 79 Pa. 324, 31 Am. Rep. 62; *Thornborow v. Whitacre*, 2 Ld. Raym. 1164; *People v. Bartlett*, 3 Hill 570; *Barker v. Hodgson*, 3 M. & S. 267; *Brown v. London*, 9 C. B. (N. S.) 726;

But a bond for the performance of covenants is not discharged by the condition becoming impossible by the death of the obligor. In a case, involving this point the court say: "Although the rule of law formerly was that the penalty was saved and the performance of the condition excused in such an event, yet in equity the condition was enforced as an agreement; and, if specific execution were impracticable, a compensation in damages, to be ascertained by an issue at law, was awarded to the obligee. And since the courts of law have been authorized by statute to assess the damages actually sustained in an action for the penalty they may obtain original jurisdiction in those cases where equity would have granted relief by directing an issue at law."³⁸ Impossibility of performance does not arise so long as it is in the power of the obligor to perform one alternative of the condition by the aid of the obligee; and if there are two conditions in the alternative, one of which is, at the execution of the bond, impossible, the condition of the bond will be broken if the other is not performed or its performance is not prevented by some valid reason.³⁹

§ 477. **Penalty limit of recovery, except as to interest.** The penalty is the limit of liability for breach of the condition of a bond. This proposition is universally admitted.⁴⁰ It should

White v. Mann, 26 Me. 211; Harmony v. Bingham, 12 N. Y. 99; Gilepins v. Consequa, Peters' C. C. 86; Clifford v. Watts, L. R. 5 C. P. 577; Ward v. Syme, 8 N. Y. Leg. Obs. 95. See Butler v. Wigge, 1 Saund. 66; Wild v. Harris, 7 C. B. 1005; Milward v. Littlewood, 20 L. J. (Ex.) 2; Brewster v. Kitchell, 1 Salk. 198; Warren v. Powers, 5 Conn. 381; Jones v. Howard, 9 C. B. 19; Appleby v. Meyers, L. R. 2 C. P. 651; Taylor v. Caldwell, 2 B. & S. 826; Boast v. Firth, L. R. 4 C. P. 1. But see Irion v. Hume, 50 Miss. 419.

³⁸ Miller v. Nichols, 1 Bailey 226. See White v. Mann, 26 Me. 361; Allen v. State, 6 Blackf. 252.

³⁹ Pindar v. Upton, 45 N. H. 258;

Seaman v. Paddock, 55 Mo. App. 296.

⁴⁰ Abbie v. Jones, 82 Ark. 414; Merrinane v. Miller, 157 Mich. 279; Mullen v. Morris, 43 Neb. 596; Hughes v. Wickliffe, 11 B. Mon. 202; Wilde v. Clarkson, 6 T. R. 203; McClure v. Dunkin, 1 East 436; McKnight v. McLean, 3 Brown Ch. 596; Tew v. Winterton, id. 496; Woods v. Commonwealth, 8 B. Mon. 112; New Haven Bank v. Miles, 5 Conn. 587; Cherry v. Mann, Cooke 269, 5 Am. Dec. 696; Noyes v. Phillips, 16 Abb. Pr. (N. S.) 400, 60 N. Y. 419; Clark v. Bush, 3 Cow. 151; Payne v. Ellzey, 2 Wash. (Va.) 143; Hifford v. Alger, 1 Taunt. 218; Goldhawk v. Duane, 2 Wash. C. C. 323; Seamons v. White, 8 Ala,

be considered, however, in connection with the principle that the statute under which the bond was given enters into and forms a part of the bond and may extend the scope of liability beyond the words of the latter.⁴¹ In case of private bonds the

656; *Windham v. Coates*, id. 285; *Perry v. Denson*, 1 *Greene* 467; *King v. Brewer*, 19 *Ind.* 267.

In *Sweem v. Steele*, 5 *Iowa* 352, an action was brought on a bond in a penalty of \$100, conditioned to make title to land—verdict, \$224. The court was requested, but refused, to instruct the jury that they could not find for the plaintiff a greater amount than that specified in the bond given for, or to secure, a deed to the land. *Woodward, J.*: "The second instruction asked by defendant, that the plaintiff could not recover beyond the penalty of the bond, involves the question whether the plaintiff may sue in covenant on the condition of a bond. If he may thus sue, we understand all the books which treat of damages recoverable on bonds and penal obligations to mean that he must recover without respect to the penalty. And after a pretty full examination of the subject, yet with some hesitation on the part of one of the court, it is our opinion that an action as for covenant broken will lie upon a penal bond of the nature of the one before us. Of this character were the cases of *Stewart v. Noble*, 1 *G. Greene* 26, and *Buckmaster v. Grundy*, 1 *Scam.* 310, in which neither counsel nor court took any exception on this ground; and, although the damages actually rendered by the jury in these cases were within the penalty, still the rule of damage laid down and maintained in one of them did not restrict them to the penalty; and the other case comes within the princi-

ple of *Foley v. McKegan*, 4 *Iowa* 1, the obligor having died without neglect of performance." The refusal of the instruction was held not erroneous. The judges were different when the case got to the supreme court again (10 *Iowa* 374), and then *Lowe, C. J.*, said: "If the facts set out in the petition were true, although not established, it would seem that the acts of the defendant most complained of, and the consequent damages accruing to the plaintiff, resulted from a breach of trust which occurred before the execution and delivery of the bond sued upon; and that the penalty in the bond was agreed upon as liquidated damages in the event the defendant should fail to obtain for plaintiff the title to the land in question; and it is more than doubtful in the case as stated whether the plaintiff, under any circumstances, should recover more than the penalty of the bond."

In *Hughes v. Wickliffe*, 11 *B. Mon.* 209, *Graham, J.*, said: "In nearly all, if not in all, the cases in which damages exceeding the penalty have been given, there is an express and not an implied covenant in the condition that the obligor must do or omit some particular act; and where that is not the case it is manifest, as in *Graham v. Bickham*, 4 *Dall.* 149, that the parties could not and did not intend the liability of the obligor to be limited by the penalty." *Baker v. Cornwall*, 4 *Cal.* 15.

⁴¹ *Growbarger v. United States F.*

penalty is the measure of the obligation where it is founded solely on the bond.⁴² But it is only where a suit is brought thereon that this limitation is material or effective. If brought on a judgment rendered on a bond,⁴³ or upon some distinct covenant in a bond or other obligation the penalty is unimportant. Where a debt is secured as such by securities in addition to a bond the fact that a bond has been taken will not usually effect the remedy on the other obligations.⁴⁴ If the bond debtor resorts to equity to obtain relief from legal proceedings it has been held that, as he who seeks equity must do equity, he might be compelled, after submitting his case to its jurisdiction, to do what was just under the circumstances, and not be allowed to reap advantage from a delay which he compelled his adversary to undergo.⁴⁵ So equity will carry the debt beyond the penalty

& G. Co., 126 Ky. 118, 11 L.R.A. (N.S.) 758, 128 Am. St. 274.

The error of an officer in fixing the penalty of a guardian's bond at a sum in excess of what it should have been cannot be corrected by the courts. *Peelle v. State*, 118 Ind. 512.

⁴² *Rogers v. Abbot*, 206 Mass. 270, 138 Am. St. 394; *Westcott v. Fidelity & D. Co.*, 87 App. Div. (N. Y.) 497; *Nelson & A. C. & C. Mfg. Co. v. Armstrong*, 93 Minn. 449; *Board of Education v. National S. Co.*, 183 Mo. 166; *Spencer v. Perry*, 18 Mich. 394. See *Niven v. Jardine*, 23 Up. Can. C. P. 470. The defendants gave a bond to the plaintiff in the sum of \$45, conditioned to pay him \$45 a year so long as he should continue the minister of a certain congregation. They paid him without suit for the first two years. For the next four years the plaintiff sued them, declaring upon the bond as a covenant, and obtained judgments, which were satisfied without any question being raised. He then sued for the sixth year, and the question

of liability was left to the court without pleadings. It was held that covenant would not lie; but that to a declaration on the bond the former payments, not having been paid or received in satisfaction of the penalty, could form no defense; and that the defendants were entitled only to have satisfaction entered on payment of penalty and costs.

⁴³ *Blackmore v. Flemming*, 7 T. R. 442; *McClure v. Dunkin*, 1 East 436.

⁴⁴ *Clarke v. Abingdon*, 17 Ves. 106; *Mower v. Kip*, 6 Paige 91.

⁴⁵ *Fraser v. Little*, 13 Mich. 195, per *Campbell, J.*; *Mackworth v. Thomas*, 5 Ves. 329; *Tew v. Winton*, 3 Brown Ch. 489; *Knight v. McLean*, id. 496; *Hughes v. Wynne*, 1 M. & K. 20; *Clarke v. Sexton*, 6 Ves. 411; *Clarke v. Abbingdon*, 17 Ves. 106; *Pulteney v. Warren*, 6 Ves. 92; *Grant v. Grant*, 3 Russ. 598, 3 Sim. 341; *Jeudwine v. Agate*, 3 Sim. 129; *Walters v. Meredith*, 3 Y. & Coll. 264; *Hugh Andley's Case*, *Hardress* 136.

where the obligee is kept out of his money by injunction or is prevented from going on at law.⁴⁶ So where an advantage is made of the money.⁴⁷ In a late Irish case, after a decree for administration of real and personal estate, a receiver, who had been previously appointed to collect the rents of the lands of the deceased, and to pay interest on the incumbrances, and who was also a mortgagee in possession, remained in possession. One of the incumbrances was a bond debt for 500*l.*, on which payment had been entered, and the judgment was registered as a mortgage against the lands. The receiver paid interest for a number of years to the bond creditor, his accounts being passed upon by the court and embodied in a final decretal order which showed that payments had been applied to interest, and that the principal sum remained due. Subsequently other payments of interest were made, the total amount thereof exceeding the penalty of the bond. The bond creditor claimed the amount of the principal and interest accrued since the last interest payment. His right to receive such amount was challenged by a subsequent bond creditor on the ground that his demand was satisfied by the payment of the penalty of the bond. This was held untenable; the payments having been made as interest, and the amount of interest due at any one time, together with the principal, never having reached the penalty, the rule which prevents a creditor from receiving more than the amount of the penalty did not apply.⁴⁸ The sole ground upon which relief in equity has been denied to the obligee of a money bond beyond the amount of the penalty is that at law the bond creditor is only entitled to the penalty of the bond, and where he comes into equity for a legal demand equity will give the same relief as he would have been entitled to at law.⁴⁹

⁴⁶ *Pulteney v. Warren*, 6 Ves. 92.

⁴⁷ *Lord Dunsany v. Plunkett*, 2 Bro. P. C. 251.

⁴⁸ *Knipe v. Blair*, [1900] 1 Irish 372.

⁴⁹ *Long v. Long*, 16 N. J. Eq. 59; *Grosvenor v. Cook*, 1 Dick. 208;

Hale v. Thomas, 1 Vernon 349; *Mackworth v. Thomas*, 5 Ves. 330.

In *Long v. Long*, *supra*, Chancellor Green discusses the anomalies of our jurisprudence relating to bonds with great learning and vigor. He says: "At law the penalty of the

In a few cases where a bond has been given for a money demand and the sum mentioned in the former part and in the

bond has always been considered the debt. Originally the obligor at law was required to pay the penalty as the debt, and could only be relieved in equity by paying the principal and interest money due. Such was originally its design, and such to this day it is in form; a debt justly due to be paid, the obligation to be void only upon the performance of the condition. It is clear, said the master of the rolls in *Clarke v. Sexton*, 6 Ves. 415, that both at law and in equity the penalty is the debt, and upon this very ground it is urged that no interest can be recovered beyond the penalty. But if it be a debt, and if that debt become due, as it clearly does at law (in form at least), upon the breach of the condition, and judgment may be entered upon it, why may not interest be reckoned either upon the principle specified in the condition, or upon the penalty to an amount equal to the sum due upon the bond? No form or principle of law is thereby violated. It is the constant practice of courts of law to recover interest beyond the penalty in the shape of damages; and yet the court of chancery in England, planting itself upon the rule at law, refuses to afford relief, which is both equitable and in accordance with the intention of the parties. The English penal bond is in form an anomaly. The bond is not given for the actual debt, but for the penal sum, with condition that if the real debt and interest are paid at maturity the bond is satisfied. If not paid at maturity the bond is unsatisfied, and the penal sum has become the real debt. So the courts of law held. Equity said, no: what-

ever may be the form, in substance the amount of the obligation is a mere penalty which the obligee shall not enforce. He is entitled only to the principal and interest of the real debt. After a long struggle, with the history of which we are all familiar, equity triumphed. What purports to be in form the real debt is but the penalty. The form is retained; the substance is changed. But if the form of the bond and the form of the remedy upon it are anomalous, the justice meted out to the parties is still more so. Equity says to the obligee, you shall not have the sum which the obligor bound himself to pay, and which he has acknowledged to be due, because, though in form a debt, in substance it is a penalty. The sum specified in the condition, with interest, is the real debt. But the moment the real debt exceeds the penalty, and the obligee asks for the amount due, the answer is, the penalty is the debt, and you can have no more. But if the penalty is the debt, and the real debt and interest exceeds the penal sum, so that it is no longer inequitable to demand it, why shall not the obligee have interest on the penalty? Courts of law say he shall have it in the form of damages for the detention of the debt. Shall a court of equity hesitate to give it?

"The justice of the claim, and the anomalous attitude of the English courts upon the question, is thus clearly presented by Mr. Evans in his notes to Pothier. 2 Pothier on Obl. (3d Am. ed.) 93: 'The allowing a party to have satisfaction to the extent not only of the debt which constitutes the penalty,

condition is the same, or nearly so, and that sum the actual debt, it has been recovered with the stipulated interest. The

but also of the interest on that penalty, which is the proper damages for its detention, appears to be no more than answering the claims of ordinary justice, when the non-performance of the condition is attended with circumstances that render the penalty, without such interest, an imperfect satisfaction of the primary object of the contract; and it certainly ought to be the aim of every tribunal to render as perfect justice as is consistent with the rules of law. By the rules of law, real damages may be allowed for the detention of a debt. For that the case of *Holdipp and Otway*, 2 Saund. 106, is a decisive authority. By the forms of law, one shilling damages is always awarded for the detention of the penalty, or any other debt; and these forms will be best rendered subservient to their substantial purposes by their being extended so far as may be necessary for securing the original obligation, provided they are not extended further than is consistent with their own particular character. And this is particularly the case with respect to bonds for securing money, when the principal and interest amount to more than the formal penalty. Whilst the court restrains the legal operation of the formal instrument, in order that it may not be carried beyond the substantial purpose on the one hand, it is very unequal justice not to allow the full extent of that operation when it is necessary to enforce such purpose on the other. And it is the more extraordinary that courts of equity, which in other cases so far sacrifice the form to the substance of the trans-

action as to enforce the specific performance of an agreement, only evidenced by its being the condition of a penal obligation, without allowing the payment of the penalty to be substituted for the performance of the agreement, should so completely deviate from that practice in the very instance of all others where the real purpose of the agreement is most indisputably evident, and where the measure of justice is with the most facility ascertained. But so are the precedents; it is easier to follow precedents than to investigate principles, and there is often a timidity in deviating from even those precedents which are most at variance with principles.'

" * * * I think both upon principle and upon authority, the plaintiff in an action upon a penal bond, with condition for the payment of money only, is entitled to recover the full amount of the penalty as a debt, and the excess of interest beyond the penalty in the shape of damages for the detention of the debt. This being the relief to which the plaintiff is entitled at law, it is clear that the complainant in *equity* is entitled to at least a full relief. The only difficulty, as we have seen, in the obligee's recovering in equity the full amount of principal and interest due him upon the bond has been that the plaintiff, coming into equity to recover a legal demand, can recover no more than he would do at law. Independently, therefore, of all precedent or authority directly upon the question, I should hold that upon a bill in this court for the recovery of a bond debt, either upon the bond itself or a

fact that the amount exceeded the sum so stated in the formal part of the bond has not been regarded.⁵⁰ The sum stated was not considered as in the nature of a penalty; the bond was, therefore, allowed to operate as single.⁵¹

It has been held in two cases that the recovery on a statutory bond cannot exceed the sum designated in the statute as the penalty, though the bond specifies a larger sum as penalty.⁵² In the Indiana case cited the decision was influenced somewhat by statutes, one of which was to the effect that a bond like that in suit shall not be invalid, nor the principal or surety be discharged, but they shall be bound by such bond to the full extent contemplated by the law requiring the same. In South Dakota a majority of the court have held, under a statute declaring that no official bond shall be void for want of compliance with the statute, but shall be valid in law for the matter contained therein, that an official bond, voluntarily executed in a penal sum greater than that prescribed by statute, may be enforced to the full amount of the penalty.⁵³

§ 478. Same subject. The condition of a penal bond not being an affirmative undertaking, but only at law an optional defeasance of the bond, the penalty fixes the extent of liability in case the condition is not performed. When the penalty became the actual debt under the old law, upon the forfeiture, the amount of it was the precise sum demandable except damages for its subsequent detention; and since the change in the

mortgage to secure the bond, the complainant may recover the full amount of principal and interest due upon the bond, though it exceed the amount of the penalty. And this upon the ground that it is the debt justly due, that it is in accordance with the intention of the parties, and that it violates no principle of law or equity. Equity will disregard the form in which the remedy is obtained, and look alone to the substance of the transaction."

⁵⁰ *Stuart v. Abbey*, 62 N. Y. Misc.

84; *Jones v. State* (Tex. Civ. App.), 81 S. W. 1010; *Hawthorne v. State*, 39 Tex. Civ. App. 122; *Fleming v. Toler*, 7 Gratt. 310; *United States v. Arnold*, 1 Gall. 348; *Francis v. Wilson*, Ryan & M. 105; *Lonsdale v. Church*, 2 T. R. 388; *Smedes v. Hooghtaling*, 3 Caines 48.

⁵¹ *Fleming v. Toler*, *supra*.

⁵² *McCaraher v. Commonwealth*, 5 W. & S. 21, 39 Am. Dec. 106; *Graham v. State*, 66 Ind. 386.

⁵³ *State v. Taylor*, 10 S. D. 182, 65 Am. St. 707.

law by which only a nominal forfeiture is recognized and recovery is practically limited to the damages actually sustained by breach of the condition, the penalty has continued to be the utmost that can be recovered; for the change was intended for the benefit of the obligor. He is entitled to be discharged from the obligation of the bond when due by paying the penalty, however much the actual damages for breach of the condition may exceed it in amount.⁵⁴ But if such damages exceed the penalty it has been made a question whether the amount of the recovery can be increased beyond the amount of the penalty by interest from the time when the penalty, or damages to an equal amount, became due.⁵⁵

A distinction has sometimes been made between sureties and principles, the penalty being held as absolutely the limit in respect to the former.⁵⁶ And in certain cases interest has been allowed beyond the penalty as damages for its detention on money bonds, while the rule has been stated to exclude interest, beyond it, on bonds with other collateral conditions.⁵⁷ The cases which refuse interest beyond the penalty proceed on the technical ground that the penalty does not become the debt

⁵⁴ *Mullen v. Morris*, 43 Neb. 596; *Sutorius v. Dunstan*, 59 N. Y. Super. Ct. 166; *Bazemore v. Bynum*, 127 N. C. 11; *New Home S. M. Co. v. Seago*, 128 N. C. 158; *Atwell v. Towles*, 1 Munf. 175; *Brangwin v. Perrott*, 2 W. Black. 1190; *Wilde v. Clarkson*, 6 T. R. 303; *Clark v. Seyton*, 6 Ves. 411; *McClure v. Dunkin*, 1 East 436; *Hellen v. Ardley*, 3 C. & P. 12; *White v. Sealey*, 1 Doug. 49; *Carter v. Thorn*, 18 B. Mon. 613; *Culver v. Green*, 4 Hill 570.

⁵⁵ See § 477.

⁵⁶ *Leggett v. Humphrys*, 21 How. 66, 16 L. ed. 50; *Farley v. Larson*, 5 Cow. 424; *Clark v. Bush*, 3 Cow. 151; *Pitts v. Tilden*, 2 Mass. 118; *Mower v. Kip*, 6 Paige 88; *Ansley v. Mock*, 8 Ala. 444; *Seamons v. White*, id. 656.

The answer to this position has been thus expressed: "It may be a reasonable doctrine that a surety who has bound himself under a fixed penalty for the payment of money, or some other act to be done by a third person, has marked the utmost limit of his liability. But when the time comes for him to discharge that liability, and he neglects or refuses to do so, it is equally reasonable and altogether just that he should compensate the creditor for the delay which he has interposed." *Brainard v. Jones*, 18 N. Y. 35; *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360; *James v. State*, 65 Ark. 415.

⁵⁷ *Long v. Long*, 16 N. J. Eq. 59; *Ives v. Merchants' Bank*, 12 How. 159, 164, 13 L. ed. 937.

by the damages reaching an equal amount, and hence there can be no default predicated of the obligor's omission to pay it. Campbell, J., in a thoroughly considered Michigan case, pointedly remarked that "when an undertaking or condition is secured by a penal bond, which is not supposed to represent the actual debt by its penalty, such penalty never becomes the actual debt except by way of forfeiture; and upon such a forfeiture interest was never allowed to run by the common law or by statute. And the cases * * * from Massachusetts and Kentucky, which assume that interest runs merely from the fact that the penalty became the debt upon forfeiture, are entirely unsupported, and would probably never have been made had not the actual debt in these cases equaled or exceeded the penal sum. As authorities they are based upon a false assumption, and cannot be maintained on any such principle."⁵⁸ The weight of American authority, however, is in favor of allowing interest as damages beyond the penalty. The penalty is the limit of liability at the time of the breach; interest is afterwards given, not on the ground of contract, but as damages for its violation; for delay of payment after the duty to pay damages for breach of the condition to the amount of the penalty had attached.⁵⁹ For

⁵⁸ *Fraser v. Little*, 13 Mich. 195; *State v. Sandusky*, 46 Mo. 377.

The rule that the penalty cannot be enlarged by the addition of interest is adhered to in Michigan. *People's Sav. Bank v. Campau*, 124 Mich. 106; *White S. M. Co. v. Dakin*, 86 Mich. 581, 13 L.R.A. 313.

In North Carolina the statute provides that penal bonds shall not draw interest. *New Home S. M. Co. v. Seago*, 128 N. C. 158.

⁵⁹ *Baum v. Hartmann*, 226 Ill. 160, 117 Am. St. 246; *Goff v. United States*, 22 App. D. C. 512; *Ellyson v. Lord*, 124 Iowa 125; *Rogers v. Abbot*, 206 Mass. 270, 138 Am. St. 394; *Rowe v. Peabody*, 207 Mass. 226 (penalty less than the damages); *Empire State S. Co. v. Lindenmeier*, 54 Colo. 497; *Charles* *Suth. Dam. Vol. II.—21.*

v. Witt, 88 Kan. 484; *Mullen v. Morris*, 43 Neb. 596, 611, citing the text; *Grand Lodge A. O. U. W. v. Cleghorn*, 20 Tex. Civ. App. 134; *Whereatt v. Ellis*, 103 Wis. 348, 74 Am. St. 865; *Blewett v. Front St. C. R. Co.*, 2 C. C. A. 415, 51 Fed. 625 (recognizing the rule, but not allowing interest under the facts); *Gloucester v. Eschbach*, 54 N. J. L. 150, approving *Long v. Long*, 16 N. J. Eq. 59, and disapproving *Wilson's Case*, 38 id. 205; *Camden v. Ward*, 67 N. J. L. 558; *Beard v. Shannon*, 73 N. Y. 292; *Olmstead v. Olmstead*, 38 Conn. 309; *Tyson v. Sanderson*, 45 Ala. 364; *James v. State*, 65 Ark. 415; *McMullen v. Winfield B. & L. Ass'n*, 64 Kan. 298, 91 Am. St. 236; *Folz v. Tradesmen's T. & S. Fund Co.*, 201 Pa.

the purpose of recovering interest beyond the penalty after breach it does not appear to be necessary to consider the penalty

583; *Brainard v. Jones*, 18 N. Y. 35; *Washington County Ins. Co. v. Colton*, 26 Conn. 42; *Bonsall v. Taylor*, 1 McCord 503; *Carter v. Thorn*, 18 B. Mon. 613; *Harris v. Clap*, 1 Mass. 308, 2 Am. Dec. 27; *Pitts v. Tilden*, 2 Mass. 118; *Waldo v. Forbes*, 1 id. 10; *Lyon v. Clark*, 8 N. Y. 148; *Baker v. Morris*, 10 Leigh 284; *Tennants v. Gray*, 5 Munf. 494; *Roane v. Drummond*, 6 Rand. 182; *Tazewell v. Saunders*, 13 Gratt. 354; *State v. Wylie*, 2 Strob. 114; *Bank v. Smith*, 12 Allen 243, 90 Am. Dec. 144; *Carter v. Carter*, 4 Day 30, 4 Am. Dec. 177; *United States v. Arnold*, 1 Gall. 348; *Bank of United States v. Magill*, 1 Paine 661; *Marshall v. Winter*, 43 Miss. 666; *Maryland v. Wayman*, 2 Gill & J. 279; *Sillivant v. Reardon*, 5 Ark. 140; *Allen v. Grider*, 24 id. 271; *Boyd v. Boyd*, 1 Watts 365; *Potter v. Webb*, 6 Me. 14; *Hughes v. Hughes*, 54 Pa. 240; *Roulain v. McDowall*, 1 Bay 490; *Judge of Probate v. Heydock*, 8 N. H. 491; *Burchfield v. Haffey*, 34 Kan. 42, overruling *Simmons v. Garrett*, McCahon 82; *Clark v. Wilkinson*, 59 Wis. 543; *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360; *Carlon v. Dixon*, 14 Ore. 293; *Crane v. Andrews*, 10 Colo. 265; *Bailey v. James*, 11 Gratt. 468, 62 Am. Dec. 469; *Spokane & I. L. Co. v. Loy*, 21 Wash. 501. See *Perrett v. Wallis*, 2 Dall. 252; *Ritchie v. Shannon*, 2 Rawle 196; *Norris v. Pitmore*, 1 Yeates 408; § 331.

In *Tazewell v. Saunders*, 13 Gratt. 354, *Moncure, J.*, said: "I think, therefore, the true doctrine with us is that full interest on a bond, or judgment for a penalty, is generally recoverable at law or in equity,

though the principal and interest exceed the penalty; the only difference between the forums being that, according to the strict rules of law, the penalty must still be considered in form as the debt, and the excess of interest can only be recovered indirectly in the shape of damages; while equity takes no notice of the penalty, but gives a direct decree for the principal and running interest, as in other cases. Full interest should in all cases be given, though there be a penalty, and the principal and interest exceed it, wherever full interest would be given if there were no penalty. In other words, the penalty should have no effect on the question of interest, except in regard to the form of recovering the excess in an action at law upon the bond."

Pettes v. Tilden, 2 Mass. 118, was ejection on a mortgage; objection to entering judgment for more than the penalty of the bond. It was said: "This has never been questioned except in the case of a surety. It has been ruled so often in the case of the principal that the point cannot now be brought in question. It rests on principles of law as well as equity."

Harris v. Clap, 1 Mass. 308, 2 Am. Dec. 27: Debt on bond to secure performance of an award and payment within one hundred and twenty days. It was held that the award had force from acceptance by the court of common pleas and judgment upon it there; that interest on the amount of the award, which was less than the penalty, from that time might be recovered though exceeding the penalty. *Sedgwick, J.*, dissented.

the debt; it has its proper effect in limiting the amount of damages when the condition was broken. If the damages amounted

United States v. Arnold, 1 Gall. 348; Story, J.: "Notwithstanding some contrariety in the books, I think the true principle supported by the better authorities is that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach." Referring to this case, Campbell, J., in *Fraser v. Little*, 13 Mich. 195, said: "Although interest was awarded on a penalty, yet the question of such allowance was not discussed, and is not mentioned on the appeal." 9 Cranch 104.

Mower v. Kipp, 6 Paige 88; Mortgage to secure \$1,650 mentioned in the condition of the bond; decree for the actual debt, which exceeded the penalty.

Smedes v. Hooghtaling, 3 Caines 48; Kent, C. J.: "Interest is recoverable beyond the penalty, but it depends on principles of law, and is not an arbitrary, *ad libitum* discretion in the jury."

Warner v. Thurlo, 15 Mass. 154: Suit on replevin bond; the actual damages, interest and costs amounted to more than the penalty. The court held that recovery might be had of the penalty and interest from the commencement of the suit. It is said that no case in Massachusetts goes further than that.

Wild v. Clarkson, 6 T. R. 303: Bond of indemnity to parish against the expense of a bastard child; application to pay penalty into court in full satisfaction allowed. *Lonsdale v. Church* overruled. Kenyon, C. J.: "Suppose the plaintiff proceeds in this action and no defense is made to it; the judgment would be for the penalty of the bond and 1s. nominal damages for detention

of the debt. But here the defendant is willing to pay the whole penalty and the costs of the action, and the plaintiff is not entitled to more. In actions on bonds, or on any penal sums for performance of covenants, etc., the act of parliament (8 & 9 Will. 3, ch. 11, sec. 8) expressly says there shall be judgment for the penalty; and that the judgment shall stand as security for further breaches, but the obligor is not answerable *in the whole*, beyond the amount of the penalty."

McClure v. Dunkin, 1 East 437: Judgment rendered on a bond in Ireland; *assumpsit* brought on that judgment; interest upon it was included in the recovery; motion to reduce the judgment to the penalty and costs of the first judgment, based on the supposed doctrine that there can be no recovery on a bond debt for more than the penalty and costs. Kenyon, C. J.: "If this had been an action on the bond, the objection would have holden good; but after judgment recovered, *transit in rem judicatam*, the nature of the demand is altered; and this being an action on the judgment, it was competent for the jury to allow interest to the amount of what was due."

Lonsdale v. Church, 2 T. R. 388: Defendant was receiver of harbor dues of Whitehaven, appointed by plaintiffs, who were trustees for carrying into execution acts of parliament relating to that harbor; he entered into three bonds, 2,000*l.* each, conditioned to account to plaintiffs for all the moneys received. On being called on to account he admitted he had 5,400*l.* in his hands. The trustees, sup-

then to the penalty, and could then have been assessed and their collection absolutely enforced, no principle is violated by allow-

posing he had received interest for several parts of that sum, filed a bill for discovery, and brought three actions on the bonds. The defendant obtained a rule calling on the plaintiffs to show cause why a stay should not be granted in two of the actions on payment of the penalties into court; and why a reference should not be granted to compute the amount due for principal in the third; and why, on payment of what a master might think due, and costs, a stay should not be granted. Buller, J., allowed the payment into court in two actions but refused a stay; he was not satisfied with the determination of *White v. Sealy*, 1 Doug. 49.

In *Elliot v. Davis*, Bunb. 22, in an action on a bond, decree was made for the whole amount, though it exceeded the penalty. Lord Mansfield, in another case, said the penalty is mere security, and when it is not sufficient, the plaintiff may recover damages as well as penalty. Nothing can prove the principle stronger than the constant practice where an action is brought on a bond of giving 1s. damages.

Dewall v. Price, 2 Show. P. C. 15: Debt on a bond; penalty 140*l.*; bill in chancery; reference to compute principal, interest and costs; principal 154*l.*; costs 67*l.*; decree for all.

White v. Sealy, 1 Doug. 49: Held, that sureties were not liable for more than the penalty, though the bond was given for payment of the yearly rent, nearly as large as the penalty on a twenty years' lease.

In *McKnight v. McLean*, 3 Brown Ch. 496, Buller, J., sitting in an

equity cause, allowed interest beyond the penalty of a bond, but he was overruled by Lord Thurlow, who held that there could be no such allowance, and that the rule was the same in equity as at law.

Bromley's Case, 1 Atk. 75: Where a bankrupt's estate was sufficient to pay all, with a large surplus, creditors whose debts carried interest were allowed it from the time the computation was stopped by the commission, but such as were creditors by bond, not beyond their penalties.

Bunscombe v. Scarborough, 6 Q. B. 13: Recovery on replevin bond limited to penalty and costs. *Lonsdale v. Church* treated as overruled, and stated that *Francis v. Wilson* did not re-establish it. Doubt expressed whether 1s. damages for detention of debt in such cases is right. See *Shut v. Proctor*, 2 Marsh. 226; *Brangwin v. Perrot*, 2 W. Black. 1190.

Anonymous, 1 Salk. 154: If one by will subjects his lands to payment of his debts those barred by statute of limitations are to be paid; but bond debts, on which interest has overrun the penalties, held not to carry interest beyond the penalty; but if the trustee omits to pay in a reasonable time he must pay interest after such neglect.

Heffrod v. Alger, 1 Taunt. 218: Replevin bond. Lord Mansfield, speaking of a bond to pay a smaller sum, said it is very reasonable to calculate interest on the sum secured by the condition; but when the principal and interest equal the amount of the penalty the interest must thenceforth cease.

ing interest from that time, if the matter of the condition be such that interest would accrue from such default had there

Hughes v. Wynne, 1 M. & K. 20: A person conveyed estates to trustees upon trust, to sell and apply the proceeds to discharge all his bond debts, together with the interest then due and to grow due to the day of payment; held, that a bond creditor was not entitled to principal and interest beyond the penalty.

Clarke v. Abingdon, 17 Ves. 106: Debt secured by a bond and mortgage, the latter securing not the bond in terms, but the debt. Master of the rolls: "If he sues upon the former (bond) he cannot have interest beyond the penalty; but the mortgage is to secure payment, not of the bond, but of the sum for which the bond was given, together with all interest that may grow due thereon. The same sum is therefore differently secured by different instruments; by a penalty and by a specific lien. The creditor may resort to either; and if he resorts to the mortgage, the penalty is out of the question."

Johnes v. Johnes, 5 Taunt. 656: After judgment on a bond, affirmed, motion made for interest accruing between judgment and affirmance; refused on statute 8 and 9 Will. 3.

Grant v. Grant, 3 Sim. 340, 3 Russ. 598: Where an obligor has, by vexatious proceedings, delayed the obligee in recovering on his bond, a court of equity will decree payment of the full amount of principal and interest although it exceeds the penalty of the bond. See *Pulteney v. Warren*, 6 Ves. 79.

Jewdine v. Agate, 3 Sim. 129: Obligees held entitled to be paid out of the assets of the deceased obligor a sum exceeding the penalty. Held, that the doctrine of equity is that,

"wherever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an estate, the relinquishment of a right, the payment of an annual sum, or the payment of a sum indefinite in amount, there, notwithstanding the agreement appear in the form of a bond with a penalty, the court will consider that the recital in the condition of the bond is evidence of the agreement, and will not limit the relief it gives to the amount of the penalty." See *Kirwane v. Blake*, 4 Brown P. C. (Toml. ed.) 532.

Where an action is brought by a common informer no damages for detention of the penalty can be obtained. He has no right to the money before the action is commenced; and, therefore, it cannot be said to be detained from him. *Mayne on Dam.* 2. But it is otherwise where the penalty is given to the party aggrieved. *North v. Musgrave*, 1 Roll. Abr. 574; *Frederick v. Lookup*, 4 Burr. 2018; *Cuming v. Sibley*, id. 2489. If a defendant does not pay a penalty which is certain on demand, but forces the plaintiff to a suit, he is subject to damages for its detention. But where the penalty is uncertain, as where treble damages are given, then no damages are allowed for the detention. *North v. Wingate*, Cro. Car. 559; *Sedgwick v. Richardson*, 3 Lev. 374. In an action for a penalty against several, only one penalty can be recovered against all. Although the words are, "that every person offending contrary thereto shall forfeit to the party aggrieved for every offense," etc., yet the meaning is that the penalty

been no penalty. Interest may properly be charged against sureties for delay after it became their duty to pay, as well as against the principals.⁶⁰

In some jurisdictions interest is recoverable from the date of the breach;⁶¹ in others from the time the action was begun;⁶² in Pennsylvania from the time of making demand on the surety,⁶³ and in Tennessee, the proceeding being in the nature of a general creditor's bill, from the date of the decree adjudging liability.⁶⁴ If a demand upon the principal is necessary to

shall relate to the offense, and not to the person. *Patridge v. Emson*, Noy 62. When a penalty is given for a continuous offense, one penalty only can be recovered. *Garret v. Messenger*, L. R. 2 C. P. 583; *Apothecaries Co. v. Burt*, 5 Ex. 363.

When a statute imposes a penalty of forfeiture for an act injurious to the rights of another and it is given to the party aggrieved, it is in the nature of a satisfaction for the wrong done. Only one penalty can be recovered for doing a prohibitable or punishable act, as for removing goods from demised premises; and all who assist in the commission of the offense may be sued together. *Conley v. Palmer*, 2 N. Y. 182.

Under the New York statute of 1857, to prevent extortion by railroad companies, only one penalty of \$50, together with the excess of fare, can be recovered for all acts committed prior to the commencement of the action. The forfeiture is not given for the satisfaction of the injury received; that is fully satisfied by a return of the sum extorted, with interest; but it is given to compensate the party injured for his expenses in the prosecution, and to compel the payment of such a sum by the company violating the law as will effectually stop the prac-

tice. A recovery can be had under this by a party who has paid the excessive fare when riding simply for the purpose of obtaining the penalty. *Fisher v. New York, etc. R. Co.*, 46 N. Y. 644.

⁶⁰ *Carter v. Thorn*, 18 B. Mon. 613; *O'Brien County v. Mahon*, 126 Iowa 539; *McShane v. Howard Bank*, 73 Md. 135; *Murray v. Aiken*, 39 S. C. 457; *People v. Lyons*, 168 Ill. App. 396.

⁶¹ *People v. Pacific S. Co.*, 155 Ill. App. 586; *Getchell & M. L. & Mfg. Co. v. Peterson*, 124 Iowa 599; *Brainard v. Jones*, 18 N. Y. 35; *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360; *Thomssen v. Hall County*, 63 Neb. 777, 57 L.R.A. 303; *McShane v. Bank*, *supra*; *Steinbock v. Evans*, 122 N. Y. 551; *Hartford v. Franey*, 47 Conn. 76, 36 Am. Rep. 51 (which is, when an officer succeeds himself and has money in his possession, from the date of his second bond).

⁶² *Warner v. Thurlo*, 15 Mass. 154; *Dwyer v. United States*, 35 C. C. A. 448, 93 Fed. 616; *Goff v. United States*, 22 App. D. C. 512.

⁶³ *Pennsylvania Co. v. Swain*, 7 Pa. Dist. 406, 189 Pa. 626; *Folz v. Tradesmen's T. & S. F. Co.*, 201 Pa. 583.

⁶⁴ *United States F. & G. Co. v. Rainey*, 120 Tenn. 357.

start the interest period running against him it is necessary as to the sureties; and where the claim is wholly unliquidated, so that a demand against the principal will not start the interest period as against him, it will not against the sureties, nor will the commencement of the action have that effect, because the latter circumstance has no significance as to the time when interest should be computed other than that it constitutes a demand.⁶⁵ In New York and Tennessee interest is not recoverable upon a bond given to secure the performance of an act other than the payment of money. In such a case the recovery is limited to the amount of the penalty, and interest runs only from the judgment.⁶⁶ In addition to interest, the costs which the obligee is made to incur by the obligors' failure to pay on demand and subsequent defense of the action may be recovered.⁶⁷

⁶⁵ Per Marshall, J., in *Whereatt v. Ellis*, 103 Wis. 348, 74 Am. St. 865.

It is observed in the case last cited that only a few adjudications are out of harmony with the rule that the time of the breach of the bond fixes the beginning of the interest period if the principal is liable for interest from that time. Citing the text, and *United States v. Arnold*, 1 Gall. 348. The opinion in the latter case is by Justice Story. The following words were used: "I think the true principle, supported by the better authority, is that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach." In *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360, Peters, J., observed in substance: It is commonly said that damages cannot exceed the penalty of a bond. Rightly understood that is true. It limits the amount the sureties agreed to pay; but they agreed to pay that amount if the damages suffered by the obligee should equal

it, immediately upon the breach of the bond. So in such circumstances, if the full penalty be paid at the date the bond is breached, an obligee will get no more than the sureties agreed to pay. If the obligation of the sureties be not met at the time of the breach, they become liable for interest from that time because of their failure to perform the contract. To the same effect are *United States v. Curtis*, 100 U. S. 119, 25 L. ed. 571; *Bank of Brighton v. Smith*, 12 Allen 243, 90 Am. Dec. 144; *Leighton v. Brown*, 98 Mass. 515; *Frink v. Southern Exp. Co.*, 82 Ga. 33, 3 L.R.A. 482; *Burchfield v. Haffey*, 34 Kan. 42.

⁶⁶ *Dwyer v. United States*, *supra*; *Sachs v. American S. Co.*, 72 App. Div. (N. Y.) 60; affirmed without opinion, 177 N. Y. 551; *Louisville & N. R. Co. v. United States F. & G. Co.*, 125 Tenn. 658. See § 516.

⁶⁷ *Polhemus P. Co. v. Hallenbeck*, 46 App. Div. (N. Y.) 463; *Sachs v. America S. Co.*, *supra*.

SECTION 2.

BONDS OF OFFICIAL DEPOSITARIES OF MONEY.

§ 479. **Liability absolute for money received.** The official bonds of public officers whose duty is to receive, safely keep and faithfully disburse public moneys are of a distinctive character, and will receive first attention. There is a plain line of difference running through the cases upon this subject,⁶⁸ resulting from diverse principles which are held to govern the responsibility of such officers. Where the care and custody of public funds are so regulated by law that the specific moneys received are required to be kept and accounted for the officer is a mere agent or bailee. In other cases no such regulations exist, and the officer is left at liberty to keep the funds according to his discretion; he is required to answer certain calls out of them and to pay the residue to his successor. In cases of the former class, whatever may be the form of the bond, that is whether it be general for the faithful performance of official duty, or special, the identical funds officially received belong to the public corporation for which the officer is a depositary or treasurer. And though his responsibility is not wholly regulated by the law of bailments, it is largely so. If governed entirely by that law the funds in his hands would be at the risk of the owner so long as the regulations for their safe keeping are strictly followed; no loss would fall upon him unless it accrued through his fault. But from motives of policy, as well as upon the terms of the statutes and the bonds required, it seems to be settled that all official custodians of money and their sureties are held absolutely bound for its safe keeping, as well as to comply with any special regulations to preserve its identity.⁶⁹

⁶⁸ See Mechem on Public Officers, §§ 298-301.

⁶⁹ *Muzzy v. Shattuck*, 1 Denio 233; *Thompson v. Board of Trustees*, 30 Ill. 99; *Hancock v. Hazard*, 12 Cush. 112, 59 Am. Dec. 171; *Ross v. Hatch*, 5 Iowa 149; *New Providence v. McEachron*, 33 N. J. L. 339; *Supervisors v. Kaime*,

39 Wis. 468; *Yawger v. American Surety Co.*, 212 N. Y. 292, L.R.A. 1915D, 481.

In *United States v. Prescott*, 3 How. 578, 11 L. ed. 734, McLean, J., said: "Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he

Whether the identical money received is required to be kept and paid over so as to create a bailment in the strict sense, as

should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to fraud which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss without laches on his part."

In *Ross v. Hatch*, *supra*, the treasurer, from whom the public funds were stolen without his fault, was exonerated because on the terms of the law and his bond he was bound only to reasonable diligence.

In *Boyden v. United States*, 13 Wall. 17, 20 L. ed. 527, it is held that where the law imposes but the duty of a bailee the officer, by giving the required bond faithfully to discharge the duties of his office, will increase his responsibility to that of an insurer. Strong, J., said: "He would then (as a mere bailee) be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more, except in the case of common carriers, and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an insurer by express contract; and this he does when he binds himself in a penal bond to perform the duties of his office without exception! There is an established difference between a duty created merely by

law, and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities; but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything accruing after the contract was made, though unforeseen by the contracting party, and not within his contract, he will not be excused. *Metcalf on Contracts*, 213; *The Harriman*, 9 Wall. 161. The rule has been applied rigidly to bonds of public officers intrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even though the money may have been lost without fault on their part." See *United States v. Prescott*, 3 How. 578, 11 L. ed. 734; *Same v. Dashiell*, 4 Wall. 182, 18 L. ed. 319; *Same v. Keebler*, 9 Wall. 83, 19 L. ed. 574; *State v. Harper*, 6 Ohio St. 607.

It seems to the writer that if the legal duty is only the due care and fidelity of a bailee, a bond which in terms merely secures the performance of that duty does not increase it. If the bond is required by a statute, and such a condition is prescribed, the two provisions—the one defining the officer's duties, and that prescribing the official bond—would be construed together as requiring the same thing. And if the bond is made, in the absence of a statute, pursuant to some executive regulation, the same rule would apply, for the officer could not require more than the performance of the duty imposed by law. The absolute responsibility is more satis-

is the case generally under statutes of the United States, or whether it is received with no regulations to preserve its identity, the officer is held to the same absolute rule of liability.⁷⁰

factorily based on the ground of public policy. See *United States v. Thomas*, 15 Wall. 337, 21 L. ed. 89, and, for differing interpretations of it, *Livingston v. Woods*, 20 Mont. 91, and *Smythe v. United States*, 107 Fed. 376, 46 C. C. A. 354.

⁷⁰ *Trustees of Schools v. Cowden*, 240 Ill. 39; *Cicero v. Hall*, 240 Ill. 160; *Ellison v. Langdon*, 135 Ky. 607; *Lamb v. Dart*, 108 Ga. 602; *Coe v. Foree*, 20 Tex. Civ. App. 550; *State v. Nevin*, 19 Nev. 162, 3 Am. St. 873; *Wilson v. Wichita County*, 67 Tex. 648; *Nason v. Directors of Poor*, 126 Pa. 445; *Tillinghast v. Merrill*, 151 N. Y. 135, 56 Am. St. 612, 34 L.R.A. 678; *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *Rose v. Douglass Tp.*, 52 Kan. 451, 39 Am. St. 354; *Board of Education v. Jewell*, 44 Minn. 427, 20 Am. St. 586; *Smythe v. United States*, 107 Fed. 376, 46 C. C. A. 354, 188 U. S. 156, 47 L. ed. 425; *Fairchild v. Hedges*, 14 Wash. 117, 31 L.R.A. 851; *Griffin v. Levee Com'rs*, 71 Miss. 767; *Van Trees v. Territory*, 8 Okla. 353; *State v. Blair*, 76 N. C. 78; *Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. 673, 32 L.R.A. 223; *Thomssen v. Hall County*, 63 Neb. 777, 57 L.R.A. 303; *Commonwealth v. Comly*, 3 Pa. 372; *Muzzy v. Shattuck*, 1 Denio 233; *Hancock v. Hazzard*, 12 Cush. 112, 59 Am. Dec. 171; *Morbeck v. State*, 28 Ind. 86; *Halbert v. State*, 22 Ind. 128; *New Providence v. McEachron*, 33 N. J. L. 339; *State v. Harper*, 6 Ohio St. 607; *United States v. Prescott*, 3 How. 578, 11 L. ed. 734; *Same v. Dashiell*, 4 Wall. 182, 18 L. ed. 319; *Same v. Keebler*,

9 Wall. 83, 19 L. ed. 574; *Board of Justices v. Fennimore*, 1 N. J. L. 242; *Hayes v. Greer*, 4 Bin. 80; *Hennepin County v. Jones*, 18 Minn. 199; *State v. Bobleter*, 83 Minn. 479; *Arnold v. State*, 77 Miss. 463, 78 Am. St. 533; *United States v. Watts*, 1 New Mex. 553; *Ramsay's Est. v. People*, 197 Ill. 572; *Northern Pac. R. Co. v. Owens*, 86 Minn. 188, 57 L.R.A. 634; *Phillipsburg v. Degenhart*, 30 Mont. 299 (though the money was collected without authority).

A treasurer who receives interest on public funds is liable therefor on his bond. *Richmond County v. Wandel*, 6 Lans. 33; *State v. McFetridge* 84 Wis. 473 20 L.R.A. 223; *State v. Harshaw* 84 Wis. 532. See § 353. If the funds were loaned by direction of the proper authorities. *Hunt v. State* 124 Ind. 306. It is immaterial that the loans and deposits from which the interest came were made in violation of law. *State v. McKinnon*, 15 Ohio C. C. (N.S.) 1.

In Colorado the state treasurer is absolutely liable for money received by him, but he is not bound to account for interest received on state funds deposited by him in bank, in the absence of a statute to that effect. *State v. Walsen*, 17 Colo. 170, 15 L.R.A. 456.

In Kentucky the trustee of the jury fund is not liable for interest received thereon under a statute which imposes on him the duty to pay over moneys received. *Commonwealth v. Godshaw*, 92 Ky. 435. In accord. *Shelton v. State*, 53 Ind. 331, 21 Am. Rep. 197; *Bocard v.*

In the latter case, however, the authorities are not uniform that the officer is not a bailee or agent, though he may not be required to keep and account for the specific funds received; still it is his duty to keep the public funds separate from all others and to devote them exclusively to the purposes for which he received them; and any deviation from this course is a breach of duty and of his official bond.⁷¹ But in some states such officers are held as debtors for the money paid them; the title to money officially received vests in them personally, and is, therefore, wholly at their risk; they are treated like bankers. They must account for it fairly and meet all obligations when presented, to the extent of the funds received; then, and only then, is there no default or breach of the condition of their official bond.⁷² On the death of such an officer the funds go to his personal representatives;⁷³ and in no event can they be taken possession of specially by his successor or sued for by the public corporation for whose use the officer held them, in case he lends or otherwise misspends them.⁷⁴ A custodian of federal obligations, lost

State, 79 Ind. 270; *Snapp v. Commonwealth*, 82 Ky. 173. See *Thouron v. East Tennessee, etc. R. Co.*, 90 Tenn. 609.

"A county treasurer is not liable on his bond for interest which he has not collected and has been unable to collect upon the public funds in his care, unless it appears that some act or neglect of his has prevented or hindered the collection of such interest." *Hamilton County v. Cunningham*, 87 Neb. 650; *Furnas County v. Evans*, 97 Neb. 54.

The liability of the sureties is not lessened by the commission on the sum they pay, that being less than the liability of the principal. *State v. Perkins*, 114 La. 301.

⁷¹ *Clisby v. Mastin*, 150 Ala. 132, 124 Am. St. 64; *State v. McKinnon*, 11 Ohio N. P. (N.S.) 165; *Supervisors v. Kaime*, 39 Wis. 468; *Freeholders v. Wilson*, 16 N. J. L. 110.

⁷² *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637; *Steinback v. State*, 38 Ind. 483; *Rock v. Stinger*, 36 Ind. 346; *Board of Justices v. Fennimore*, 1 N. J. L. 242; *Hayes v. Greer*, 4 Bin. 80; *Morbeck v. State*, 22 Ind. 128; *New Providence v. McEachron*, 33 N. J. L. 339; *Linville v. Leininger*, 72 Ind. 491; *Brown v. State*, 78 id. 239.

The payment of a sum equal to the amount of the bond does not absolve the sureties from liability for money subsequently collected by their principal. *Graham v. Baxley*, 117 Ga. 42.

⁷³ *Allen v. State*, 6 Blackf. 252; *Rock v. Stinger*, *supra*.

⁷⁴ *Steinback v. State*, *Rock v. Stinger*, *supra*.

In *Perley v. Muskegon County*, *supra*, an action for money had and received was brought by the county for moneys loaned by its treasurer, and it was held it would not lie.

without his fault, is liable for their value, and not merely for the cost of reprinting new ones to take their place. The government can stand upon the officer's bond and insist that he has not discharged his duties by safely keeping the moneys that came to his hands and which he undertook to pay over when required, at least where the loss is not attributable to overruling necessity

Campbell, J., said: "There can be no middle ground between personal and official ownership of moneys. If the moneys used by Martin Perley could be treated as specifically county funds, the liability of parties receiving them would be immediate and would not depend upon his default. They might have been sued at any time, before as well as after his accounting. * * * In law there can be no difference between a loan to a banker and a loan to any one else. There is no rule of law which presumes one borrower without security as safer than another. And where, as here, the deposits were promiscuous and from all sources, it would be idle to attempt to attach contract relations with the county to funds which no ingenuity could identify. There is not much difficulty in reaching the personal duty of the treasurer. He is bound to have money to pay liabilities as required, to the full extent of his receipts. And he is bound, when his term ends, to have the balance ready to turn over to his successor. He could not be liable to a civil action if he makes all the payments required by law to be made. He and his sureties are bound on their bond when any such failure occurs. And it appears reasonable that if he has, with any dishonest understanding, put money into the hands of others, which has not been returned, and which it was known could not have come from any other source, and

could only have been derived from his office, and must be officially accounted for, and restored, those persons have done an injury for which they should be accountable to those whom they have injured. It may be questionable how far the county could be regarded as directly damaged, if the sureties are responsible or damaged beyond the deficiency in their ability. But there can be no injury where all that is borrowed has been restored. In such a case as the one suggested, the injury consists in destroying to a great extent his power to meet his obligations, and this cannot be done when he is placed again in his former position. As he is the only legal custodian of county funds, no one can be required to do more than to put them in his hands. He has a right to demand them, and he can keep them where he pleases. He is, himself, to all intents and purposes, the treasury, and bound to account for all that he receives, and no one else can supervise his action. But an action based on any such theory must be an action on the case or a bill in equity, and not an action for money had and received. It can never be determined in advance, when money is lent, how far the county will be injured or that it will be injured at all. And the action is not based on the source or identity of the particular funds which have been used. It must depend more on the state of the accounts than upon the identity of the

or to any public enemy.⁷⁵ According to some cases the strict rule of liability stated is limited to such funds as are the property of the public, the officer who holds private funds being regarded as a bailee for hire.⁷⁶ Other cases do not recognize such a distinction, the funds being in possession of the officer pursuant to a statute.⁷⁷ Under a statute prohibiting an officer from using public funds and requiring him to keep them on deposit, he is regarded as standing in the position of a bailee for hire and is bound, *virtute officii*, to exercise good faith and reasonable skill and diligence in the discharge of his trust or, in other words, to bring to its discharge that prudence, caution and attention which careful men usually exercise in the management of their own affairs, and is not responsible for any loss occurring without fault on his part, as by the failure of the bank in which he deposited money, having used the proper degree of caution in selecting the depository and being without fault or negligence in allowing the money to remain there.⁷⁸ This view is admittedly against the weight of authority, and contrary to a former decision of the court promulgating it.⁷⁹ Substantially the same conclusion has been announced in other cases in the absence of a statute requiring the deposit of the funds.⁸⁰ An unjustified refusal to pay a warrant is attended

money, and the wrong is much in the nature of a voluntary transfer of property in fraud of creditors, whereby they will be delayed or hindered, and of which the county may justly complain if actually defrauded."

⁷⁵ *Smythe v. United States*, 188 U. S. 156, 47 L. ed. 425.

⁷⁶ *People v. Faulkner*, 107 N. Y. 477; *Wilson v. People*, 19 Colo. 199, 22 L.R.A. 449, 41 Am. St. 243; *Fairchild v. Hedges*, 14 Wash. 117, 31 L.R.A. 851.

⁷⁷ *Northern Pac. R. Co. v. Owens*, 86 Minn. 188, 195, 57 L.R.A. 634; *Morgan v. Long*, 29 Iowa 434; *Wright v. Harris*, 31 id. 272; *Havens v. Lathene*, 75 N. C. 505; *State v. Gatzweiler*, 49 Mo. 17.

⁷⁸ *Livingston v. Woods*, 20 Mont. 91.

⁷⁹ *Jefferson County v. Lineberger*, 3 Mont. 231. The rule is otherwise in Minnesota, the statute influencing the decision. *State v. Mobleter*, 83 Minn. 479.

⁸⁰ *State v. Copeland*, 96 Tenn. 296, 31 L.R.A. 844; *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675; *Cumberland v. Pennell*, 66 Me. 357, 31 Am. Rep. 284; *State v. Houston*, 78 Ala. 567; *People v. Faulkner*, 107 N. Y. 477; *State v. Gramm*, 7 Wyo. 329, 40 L.R.A. 690; *Wilson v. People*, 19 Colo. 199, 22 L.R.A. 449; *Healdsburg v. Mulligan*, 113 Cal. 205, 33 L.R.A. 461; *Roberts v. Laramie County*, 8 Wyo. 177.

with liability for the expense the holder reasonably incurs to compel its payment and for interest during the time the money was withheld.⁸¹ Liability for a penalty imposed by a statute enacted after the execution of a bond does not attach to the sureties thereon.⁸² The diverse views indicated in the preceding discussion in respect to the nature of such officers' control of the funds in their keeping leads necessarily to divergencies in the apportionment of responsibility between different sets of sureties for the same person holding office for several successive terms.

§ 480. Adjustment of liability between sets of sureties.

It is a universal rule that sureties are only liable for the defaults of their principle during the term for which their bond was given and after it was given, unless it is retrospective in terms; for such contracts cannot be extended by construction.⁸³

⁸¹ *State v. Adams*, 101 Mo. App. 468.

⁸² *Hunter State Bank v. Mills*, 90 Ark. 10, 134 Am. St. 20, following *Jeffreys v. Malone*, 105 Ala. 489; *McDowell v. Burwell*, 4 Rand. 317.

⁸³ *Commonwealth v. Hinson*, 143 Ky. 428; *Wilkes-Barre v. Rockefeller*, 171 Pa. 177, 50 Am. St. 795, 30 L.R.A. 393; *Schoeneman v. Martyn*, 68 Ill. App. 412; *United States v. Boyd*, 15 Pet. 187, 10 L. ed. 706; *Farrar v. United States*, 5 Pet. 373, 8 L. ed. 159; *Patterson v. Freehold*, 38 N. J. L. 255; *State v. Paul*, 21 Mo. 51; *Myers v. United States*, 1 McLean 493; *United States v. Spencer*, 2 id. 405; *Jeffers v. Johnson*, 18 N. J. L. 382; *Stone v. Seymour*, 15 Wend. 19; *Bryan v. United States*, 1 Black 140; *United States v. January*, 7 Cranch 572, 3 L. ed. 443; *Same v. Eckford*, 1 How. 250, 11 L. ed. 120; *Same v. Linn*, 1 How. 104, 11 L. ed. 64; *Detroit v. Weber*, 29 Mich. 24; *Paw Paw v. Eggleston*, 25 id. 36; *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. 196; *Peppin v.*

Cooper, 2 B. & A. 431; *Townsend v. Everett*, 4 Ala. 607; *Postmaster-General v. Norvell*, 1 Gilpin 126; *Hart v. Guardians of the Poor*, 81 Pa. 466; *Mahaska County v. Ingalls*, 16 Iowa 81; *Miller v. Stewart*, 9 Wheat. 681; *Thompson v. Dickerson*, 22 Iowa 360; *Independent School Dist. v. McDonald*, 39 Iowa 504; *Bissell v. Saxton*, 67 N. Y. 55; *Vivian v. Otis*, 24 Wis. 518, 1 Am. Rep. 199; *Rogers v. State*, 99 Ind. 218; *Bartlett v. Wheeler*, 195 Ill. 445; *Grand Haven v. United States F. & G. Co.*, 128 Mich. 106, 92 Am. St. 446.

As to when the term ends in respect to sureties, see *State v. Wells*, 8 Nev. 105; *Placer v. Dickerson*, 45 Cal. 12; *Welch v. Sumner*, 28 Conn. 390; *Chelmsford Co. v. Demerest*, 7 Gray 1; *State v. Berry*, 50 Ind. 496; *Riddle v. School Dist.* 15 Kan. 168; 74 Am. Dec. 370; *People v. Alkenhead*, 5 Cal. 106; *Mayor v. Horn*, 2 Harr. 190; *Rany v. Governor*, 4 Blackf. 2; *State v. Bird*, 2 Rich. 99; *Milliken v. State*, 7 Blackf. 77; *Tuly v. State*, 1 Ind. 500; *Bigelow*

The doctrine is comprehensively stated by Mr. Justice Daniel of the federal supreme court: "This court has settled the law

v. Bridge, 8 Mass. 275; Commissioners v. Greenwood, 1 Desaus. 450; South Carolina Soc. v. Johnson, 1 McCord 41, 10 Am. Dec. 644; South Carolina Ins. Co. v. Smith, 2 Hill (S. C.), 589; Commonwealth v. Fairfax, 4 Hen. & M. 208; Governor v. Cobb, 2 Dev. 489; Atkins v. Baily, 9 Yerg. 111; State v. Lackey, 3 Ired. 25; Williams v. Miller, Kirby 189; State v. Crooks, 7 Ohio 573; Munford v. Rice, 6 Munf. 81; Hughes v. Smith, 5 Johns. 168; Supervisors v. Kaime, 39 Wis. 468; Winneshiek County v. Maynard, 44 Iowa 15; Middleton v. Colwell, 4 Bush 392; Newman v. Metcalf, id. 67; United States v. Cheeseman, 3 Sawyer 424; Wapello County v. Bigham, 10 Iowa 39; Trustees of Schools v. Cowden, 240 Ill. 39; State Treasurer v. Mann, 34 Vt. 371, 80 Am. Dec. 688.

An antedated bond does not bind the sureties for the period preceding the date of the delivery if its language is not retrospective. Hyatt v. Grover & B. S. M. Co., 41 Mich. 225.

Sureties are liable for their principal's term and for such further time as is reasonably sufficient for the election and qualification of his successor. Supervisors v. Kaime, 39 Wis. 468; Rahway v. Crowell, 40 N. J. L. 207, 29 Am. Rep. 224; Grand Haven v. Fidelity & G. Co., *supra*.

The rule of strict construction does not apply to a bond given by a bank to secure the payment of public funds deposited with it. Hence under a bond conditioned for the payment of any and all deposits of the county which may be deposited with the bank, the sureties are

liable for deposits made before, as well as after, the acceptance of the bond. Brown v. Wyandotte County, 58 Kan. 672; Myers v. Kiowa County, 60 Kan. 189; Sawyer v. Stilson, 146 Iowa 707.

Under a treasurer's bond conditioned for the payment to the proper person of all moneys he may receive and for the accounting for all balances remaining in his hands at the termination of the term, sureties are liable for a defalcation occurring after expiration of the term and before the qualification of the treasurer's successor. Plymouth County v. Kerseborn, 108 Iowa 304, 75 Am. St. 257. See Camden v. Greenwald, 65 N. J. L. 458.

A county treasurer whose authority is limited to receiving and distributing money of the county does not make his sureties liable by misappropriating money illegally borrowed for the county. Mason v. Com'rs, 104 Ga. 35, 48; Frost v. Mixsell, 38 N. J. Eq. 586; State v. Moore, 56 Neb. 82, citing many cases. *Contra*, Wylie v. Gallagher, 46 Pa. 205; Boehmer v. Schuylkill County, id. 452; Phillipsburg v. Degenhart, 30 Mont. 299.

It is not a defense to the sureties that the money which their principal has failed to account for was realized from illegal taxes. Adams v. Saunders, 89 Miss. 784, 119 Am. St. 720; Hartford v. Franey, 47 Conn. 76, 36 Am. Rep. 51; Anderson County v. Hays, 99 Tenn. 542. See State v. Weeks, 92 Mo. App. 359; § 486.

Retroactive effect will be given a bond according to its terms. Moulding v. Wilhartz, 169 Ill. 422, 61 Am. St. 185. See Kelly v. State,

to be that the responsibility of the separate sets of sureties must have reference to, and be limited by, the periods for which they respectively undertake by their contract, and that neither the misfeasance nor non-feasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have made themselves answerable.”⁸⁴ Where an officer is his own successor his sureties for either term are bound for him and should be held liable precisely as though the principal had succeeded some other person instead of being his own successor. Each set is required to account for all the public money that came to his hands during their term,⁸⁵ including what he was bound to collect⁸⁶ and moneys in his hands at the date the sureties assumed their obligations; such moneys being a part of the fund the bond was intended to secure, and having come to the hands of the obligor in the course of a pre-

25 Ohio St. 567; *McMullen v. Winfield B. & L. Ass'n*, 64 Kan. 298, 56 L.R.A. 924.

⁸⁴ *Jones v. United States*, 7 How. 681, 12 L. ed. 870; *Smith v. Paul*, 21 Mo. 51; *Draffin v. Boonville*, 8 Mo. 395; *Todd v. Boone County*, id. 431; *State v. Smith*, 26 Mo. 226, 72 Am. Dec. 204; *Drury v. Drury*, 36 Mo. 281; *State v. Atherton*, 40 Mo. 209; *Welch v. Seymour*, 18 Conn. 387; *Rochester v. Randall*, 105 Mass. 295, 7 Am. Rep. 519; *Board of Education v. Robinson*, 81 Minn. 305; *Gonser v. State*, 30 Ind. App. 508.

The bond of the treasurer of a corporation, whose term was for one year, provided for his honesty and faithfulness “during his continuance in office.” Held, not to cover defaults made after the expiration of that term and his re-election. *Ulster County Sav. Ins. v. Ostrander*, 163 N. Y. 430.

But where the bond was conditioned that if the obligor should be faithful “during his continuance in

office,” and it was understood that it should be binding while he held the office, though under successive appointments, it was the intention of the parties that it should be a continuing security, and a default which occurred when the obligor held over with the consent of the trustees and by virtue of his prior appointments, after the termination of the periods for which he had been appointed and reappointed, was covered by it. *Ulster County Sav. Inst. v. Young*, 161 N. Y. 23. See *Barnes v. Cushing*, 43 App. Div. (N. Y.) 158.

⁸⁵ *United States F. & G. Co. v. Faulkner*, 144 Ky. 629; *Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. 673, 32 L.R.A. 223; *Roberts v. Laramie County*, 8 Wyo. 177; *Board of Education v. Robinson*, 81 Minn. 305, 83 Am. St. 374; *Detroit v. Weber*, 29 Mich. 24; *Commonwealth v. Reitzel*, 9 W. & S. 109; *Freeholders v. Wilson*, 16 N. J. L. 110.

⁸⁶ *United States F. & G. Co. v. Board of Education*, 118 Ky. 355.

vious term.⁸⁷ The sureties upon a new bond given by a treasurer are liable for his default because of the failure of a bank in which the moneys were deposited, although such bank was insolvent when such bond was given.⁸⁸ Where a tax collector was elected for three years and required to give a bond each year as applicable to, and security for, the taxes of the year, the application of the moneys collected in one year in satisfaction of a balance due from him on the tax of the previous year was a misappropriation of such moneys and a breach of his bond for the year.⁸⁹

If the officer on the expiration of a term must turn over the funds with which he is charged to a successor, who is a different person, actual payment is required; if made, the sureties for the expired term are thus exonerated; if not made, the deficiency is at once manifest and there is a breach of the bond. Payment discharges the debt of the late incumbent if he held the funds as a debtor or banker; or fulfills the trust and performs the contract if he held them as agent or bailee. In either case the actual payment or the necessity of such payment prevents any uncertainty or confusion. The same result may be attained where the successor is the same person, if there is an actual identification and appropriation of funds to the amount charged, or a deficiency ascertained by an official settlement; but otherwise, the debt, which the state of the accounts for the earlier term shows, will not be satisfied or be the subject of a default until actual payment is subsequently called for. The theory that the officer is a debtor instead of a bailee postpones, in such a case, the exoneration of the sureties and apparently extends the period of their responsibility. But if the officer is a mere bailee their exoneration depends solely on the fact whether the public funds are in hand at the expiration of

⁸⁷ *Parsons v. Miller*, 46 W. Va. 334; *Hetten v. Lane*, 43 Tex. 279; *United States v. Dudley*, 21 D. C. 337; *Bruce v. United States*, 17 How. 437, 15 L. ed. 129.

Liability attaches for money received before the bond was given if it covers the whole term of the
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officer and the money was received during the term. *Hudson v. Miles*, 185 Mass. 582.

⁸⁸ *Oeltjen v. People*, 160 Ill. 409, 56 Ill. App. 138.

⁸⁹ *Hudson v. Miles*, 185 Mass. 582, 102 Am. St. 370; *Commonwealth v. Knette*, 182 Pa. 176.

their term; and the liability of the sureties for the next term depends on the same fact.⁹⁰ As between an officer who succeeds another, or one who is his own successor, and as between the state and the sureties of such an officer the acceptance or transfer of certificates of deposit issued by a bank in which public funds have been deposited is the equivalent of the payment of cash, notwithstanding the inability of the person accepting them to realize the money they call for because of the subsequent failure of the bank.⁹¹

Where a treasurer holds his office for several consecutive terms and is found to be a defaulter at the end of his last term it has been presumed, in the absence of proof to the contrary, that the entire default occurred in such term.⁹² The sureties in the last bond, when a final settlement is made, are *prima facie* liable for the amount thus shown to be in his hands. To render the sureties in a former bond liable it must be established that the money was converted during the period covered by their bond.⁹³ In case of the failure of an officer to turn over moneys

⁹⁰ *United States v. Boyd*, 15 Pet. 187, 10 L. ed. 706; *Broome v. United States*, 15 How. 143, 14 L. ed. 636; *Beyerle v. Hain*, 61 Pa. 226; *United States v. Eckford*, 1 How. 250, 11 L. ed. 120; *Thompson v. Dickerson*, 22 Iowa 360; *Commonwealth v. Reitzel*, 9 W. & S. 109; *Independent School Dist. v. McDonald*, 39 Iowa 564; *Creswell v. Nesbitt*, 16 Ohio St. 35; *Street v. Laurens*, 5 Rich. Eq. 227. See *Overacre v. Garrett*, 5 Lans. 156.

⁹¹ *State v. Hill*, 47 Neb. 456; *Bush v. Johnson County*, 48 Neb. 1, 32 L.R.A. 223, 58 Am. St. 673; *Paxton v. State*, 59 Neb. 460, 476; *Board of Education v. Robinson*, 81 Minn. 305. Compare *Hartford v. Franey*, 47 Conn. 76.

⁹² *Kelly v. State*, 25 Ohio St. 567; *Hetten v. Lane*, 43 Tex. 279; *Anderson County v. Hays*, 99 Tenn. 542; *McMullen v. Winfield B. & L. Ass'n*, 64 Kan. 298, 56 L.R.A. 924,

91 Am. St. 236; *Hartford v. Franey*, 47 Conn. 76, 36 Am. Rep. 51; *Bruce v. United States*, 17 How. 437, 15 L. ed. 129.

⁹³ *Board of Education v. Robinson*, *supra*; *Pine County v. Willard*, 39 Minn. 125, 1 L.R.A. 118, 12 Am. St. 622; *Hartford v. Franey*, *supra*; *McMullen v. Winfield B. & L. Ass'n*, 64 Kan. 298, 56 L.R.A. 924; *Trustees of Schools v. Peak*, 43 Ill. App. 50; *State v. Bobleter*, 83 Minn. 479; *State v. Paul*, 21 Mo. 51; *State v. Smith*, 26 Mo. 226, 72 Am. Dec. 204; *Alvord v. United States*, 13 Blatchf. 279; *Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592; *Bruce v. United States*, 17 How. 437, 443, 15 L. ed. 129, 132; *St. Joseph v. Merlatt*, 26 Mo. 233, 72 Am. Dec. 207; *Morley v. Metamora*, 78 Ill. 394, 20 Am. Rep. 266; *Snaggs v. Stone*, 7 Jones 382. See *Miller v. Macoupin County*, 7 Ill. 50; *Coons*

to his successor and the absence of proof as to when they were misappropriated it is presumed that the misappropriation occurred at the end of the term.⁹⁴

§ 481. **Same subject.** If the officer owns the funds which come into his hands officially his sureties are bound until he has paid the debt arising from such receipt. Although the identical funds so received may be in his hands at the expiration of his term, and at the beginning of the term next succeeding, in which he is his own successor, still, unless they are in some way identified as public funds in the latter term so that the sureties for that term become responsible for so much received then by the principal, the sureties for the former term must continue to be liable until the money is actually paid according to law.⁹⁵ On the other hand, if the officer is required to hold the specific funds which he receives, or if he is merely an agent of the public, so that all his acts in the management of the funds are official, whatever changes they undergo in his possession, his liability ceases on the expiration of his term if at that time none of them have been misapplied.

v. People, 76 Ill. 383; *Hetten v. Lane*, 43 Tex. 279.

The last previous report of the officer is binding upon those who subsequently become his sureties for a new term. *Cicero v. Grisko*, 240 Ill. 220.

⁹⁴ *Stoner v. Keith County*, 48 Neb. 279, citing *Heppe v. Johnson*, 73 Cal. 265; *United States v. Stone*, 106 U. S. 525, 27 L. ed. 163.

⁹⁵ In *Goodwine v. State*, 81 Ind. 109, at the close of the officer's first term he was chargeable with money which was invested in his private business; during his second term he made up the amount; at its close he failed to pay his successor all that was due. The suit was against the sureties on his second bond, who insisted that the defalcation occurred during the first term. The court said that the officer became a defaulter in his

first term, not because he invested money received from public sources in his private business, for that he had a right to do so long as he kept himself ready to pay out according to law all sums required for public use; but because, at the end of his term, he did not have in his hands to turn over to his successor (himself) the amount for which he was then accountable. And had he never made good this defalcation, his prior bondsmen, and not the appellants, would have been responsible therefor. He did, however, make it good. By the sale of his property he obtained money and replaced that for which he was in default, and when he did this the appellants (sureties on the second bond) became liable therefor as much as if another had been his predecessor in the office, and that other had been in like default and had afterwards made it

This difference in the principle of their liability is further illustrated by the decisions relative to the appropriation of payments made by the officer. On the principle that he owes a debt to the extent of his official receipts and that the title to the public funds vests in him personally, all the payments he makes must be deemed to be made out of his own funds whether derived from public or private sources. Therefore, he would have a right, if he chose, to apply all the moneys which came to him in one term to satisfy defalcations in another.⁹⁶ But if the officer is a mere trustee, having charge of and administering the funds of the public, of which he is the servant, he has no option to apply funds collected subsequently to the execution of the second bond to the discharge of the first, when the sureties are different.⁹⁷ Neither is such a right vested in the officers to whom the defaulting official makes payments. The law regulates their

good by payment to his successor of the amount due.

⁹⁶ Colerain v. Bell, 9 Metc. (Mass.) 499. The principle of this decision was approved and made the basis of the judgment in Hancock v. Hazzard, 12 Cush. 112, 59 Am. Dec. 171. See Steinback v. State, 38 Ind. 483; also Chapman v. Commonwealth, 25 Gratt. 721; Sandwich v. Fish, 2 Gray 298; Cook v. State, 13 Ind. 154; State v. Smith, 26 Mo. 226, 72 Am. Dec. 204; Wilson v. Burfoot, 2 Gratt. 134; Lyndon v. Miller, 36 Vt. 329; Seymour v. Van Slyck, 8 Wend. 403. See Henry County v. Salmon, 201 Mo. 136, for the rule applicable to depositaries of public funds.

⁹⁷ United States v. January, 7 Cranch 572, 3 L. ed. 443; Jones v. United States, 7 How. 681, 12 L. ed. 870; United States v. Eckford, 1 How. 250, 11 L. ed. 120; Myers v. United States, 1 McLean 493; United States v. Boyd, 15 Pet. 208, 10 L. ed. 713; Farrar v. United States, 5 Pet. 373, 8 L. ed. 159;

Mahaska County v. Ingalls, 16 Iowa 81; Bessinger v. Dickerson, 20 id. 260; Warren County v. Ward, 21 id. 85; Readfield v. Shaver, 50 Me. 36, 79 Am. Dec. 592; Thompson v. Dickerson, 22 Iowa 360; Paw Paw v. Eggleston, 25 Mich. 36; Porter v. Stanley, 47 Me. 515, 74 Am. Dec. 501; Mann v. Yazoo, 31 Miss. 574; Stone v. Lyman, 15 Wend. 19; Paducah v. Cully, 9 Bush 323; State v. Smith, 26 Mo. 226, 72 Am. Dec. 204; Newcomer v. State, 77 Tex. 286; Independent School Dist. v. McDonald, 39 Iowa 564.

In Miller v. Macoupin County, 7 Ill. 50, a school commissioner held office from 1834 to 1839 without any new appointment, being annually required to give, and giving, with fresh sureties, a new bond. He received money every year. On going out of office in 1839 he had not legally disbursed any portion of the school fund, nor did he pay over any to his successor. The county sued the bond for 1837. It was held that the sureties were liable

duties, and they cannot, by any exercise of discretion, enlarge or restrict the obligations assumed in the bond of another officer, or by keeping an account current in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties thereon.⁹⁸

It is a general rule that, where the law requires an officer to perform a duty which is special in its nature and provides for a special bond for its faithful discharge the sureties on such bond are solely liable for default in connection with those

for the moneys in his hands during the year 1837. Scates, J., said the case was distinguished from the cases where the same person holds the same office for several terms as successor to himself. "Here," he says, "was no reappointment, but a continuing term of office, with annual bonds conditioned for the faithful performance of the duties required or thereafter to be required by law. It was the duty of the commissioner by law to loan all moneys in his hands belonging to the county and several townships, and keep the same at interest, except such sums as might be directed by law to be disbursed from time to time. Now, he neither loaned, disbursed nor paid over to his successor any portion of these funds. He only brought forward and stated them in account from year to year. Thus, by including all previous receipts in the statement of each year's account, he showed the whole amount in his hands. But surely, no one can rationally contend that this is a payment. He was not reappointed annually; he did not succeed himself; it was but one term of office from 1834 to 1839. It might as reasonably be contended that one in default, having received a new appointment, by including the amount in default in stating an account, thereby paid it.

Such a position is not sustained by law, reason or justice. Not having therefore, made loans, disbursements or payments to his successor of any portion of the money received during the year 1837, the sureties are still liable to account for that sum." *Postmaster-General v. Munger*, 2 Paine C. C. 189; *Poole v. Cox*, 9 Ired. 69, 49 Am. Dec. 410; *Holeran v. School Dist.*, 10 Neb. 406.

⁹⁸ *United States v. Eckford*, 7 How. 688; *State v. Middleton*, 57 Tex. 185; *Newcomer v. State*, 77 id. 286; *Boring v. Williams*, 17 Ala. 510.

A treasurer who succeeded himself was a defaulter at the end of each of his two terms. Subsequently payments were made without any application thereof by any one. The funds paid were derived from loans and investments of the moneys for which he was in default, and also from sources having no connection with such moneys. The bonds for each term were equally good. In a suit on the earlier bond the payments were applied thus: the funds derived from the public money were applied to the term from the moneys of which the loans and investments were made, and those realized from other sources to the defalcation of the first term. *Rogers v. State*, 99 Ind. 218.

duties, in the absence of any declaration in the statute that liability shall attach to those who have signed the general bond.⁹⁹ Where the sureties were liable for one fund which came to the treasurer's hands but were not liable for another, and he had intermingled the two, the aggregate default being known, and the total amount of both funds, and of the fund for which they were not responsible, it was held that a *pro rata* of the loss was chargeable to each fund, and that the sureties were liable for the proportional loss of that for which they were responsible.¹ Though the law contemplates two bonds, if only one is given, and that is general in form and it was the intention of all the parties to give a security which would be sufficient in terms and amount to cover all moneys coming into the officer's hands, such purpose will not fail because of ignorance and mistake of fact or law in taking one bond instead of two, and in equity the sureties will be liable thereon for a misappropriation of funds as to which a special bond should have been given.² The rule which limits the liability of sureties to the letter of their obligation was strictly applied in a late case. By order of court a receiver was directed to collect and disburse a particular debt upon giving a bond conditioned for the faithful discharge of his duty under that or any future order of the court in that cause. Subsequently he collected other funds under orders issued in the cause after his bond was given. For the misappropriation of funds so collected his sureties were not liable, the clause in the first order referring to future orders being construed to refer to orders relating to the particular debt thereby directed to be collected.³ Where a wrongful sale was made by a sheriff

⁹⁹ *Columbia County v. Massie*, 31 Ore. 292; *Anderson v. Thompson*, 10 Bush 132; *County Board of Education v. Bateman*, 102 N. C. 52, 11 Am. St. 708; *Milwaukee County v. Ehlers*, 45 Wis. 281; *Crumpler v. Governor*, 1 Dev. 52; *Governor v. Barr*, id. 65; *Waters v. State*, 1 Gill 302; *Commonwealth v. Toms*, 45 Pa. 408; *State v. Corey*, 16 Ohio St. 17; *People v. Moon*, 4 Ill. 123; *State v. Johnson*, 55 Mo. 80; *Unit-*

ed States v. Cheeseman, 3 Sawyer 424; *State v. Young*, 23 Minn. 551; *Henderson v. Coover*, 4 Nev. 429; *Lyman v. Conkey*, 1 Metc. (Mass.) 317, 35 Am. Dec. 374; *Williams v. Morton*, 38 Me. 52.

¹ *Britton v. Fort Worth*, 78 Tex. 227.

² *Hall v. Lafayette County*, 69 Miss. 529.

³ *Ayers v. Hite*, 97 Va. 467.

after the term in which the property was levied upon the sureties for the term during which the sale was made were liable for the prescribed penalty and the damages caused by the sale.⁴

§ 482. **Neglect of duty by other officers.** Official bonds are construed, as has been shown, as requiring the custodians of public moneys to safely keep and administer them. This duty is absolute, and the funds are wholly at the risk of the officer to whose keeping they are committed. His sureties are bound for the safety of the money, as against the fault or wrong of the officer himself. Laws requiring that official examinations of his accounts at short and stated, or at irregular, periods shall be made are no part of the contract with the sureties. Such provisions are enacted for further security and protection of the public, and are not intended for their benefit.⁵ Such regulations may even impose the duty of active measures on the discovery of any defalcation for dismissal of the officer, or the recovery of moneys misapplied; but they are directory, and, if not complied with, the omission is no defense to an action against the sureties.⁶ The government can transact its business only through its agents; and its fiscal operations are so various and its agencies so numerous that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches or estoppel be applied to its transactions.⁷ Where a bank which had been designated as the depository of county

⁴ *Britannia M. Co. v. United States F. & G. Co.*, 43 Mont. 93.

⁵ *Anderson v. Blair*, 121 Ga. 120; *Bush v. Johnson County*, 48 Neb. 1, 32 L.R.A. 223, 58 Am. St. 373; *Anderson County v. Hays*, 99 Tenn. 542; *Campbell v. People*, 154 Ill. 595, 52 Ill. App. 338; *Loper v. State*, 48 Kan. 540; *Kelly v. Moody*, 12 Ky. L. Rep. 389 (Ky. Super. Ct.); *Winthrop v. Soule*, 175 Mass. 400; *Hall v. Lafayette County*, 69 Miss. 529; *Commonwealth v. Tate*, 89 Ky. 587; *Hart v. United States*, 95 U. S. 316, 24 L. ed. 379; *Ex parte Christian*, 23 Ark. 641; *Christian v. Ashley County*, 24 id. 142;

United States v. Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; *Same v. Van Zandt*, 11 id. 184, 6 L. ed. 448; *United States v. Nicholl*, 12 id. 505, 6 L. ed. 709; *People v. Jenkins*, 17 Cal. 500.

⁶ *Id.*; *United States v. Campbell*, 170 Fed. 318, 95 C. C. A. 114. See *Ramsay's Est. v. People*, 197 Ill. 572.

⁷ *State v. United States F. & G. Co.*, 81 Kan. 660, 26 L.R.A.(N.S.) 865; *State v. Pederson*, 135 Wis. 31; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199; *Black v. Queen*, 29 Can. Sup. Ct. 693.

funds became insolvent at a time when it was largely indebted to the county and a receiver was appointed for it, the neglect of the county officers to file the claim of the county against the bank did not release the sureties of the county treasurer either in whole or in part, they not having requested the officers to act.⁸ Irregularities in designating depositaries of public funds are not available to sureties; the obligations of the latter are continuing if their bond does not otherwise provide.⁹

Neither the neglect of one public servant to perform his duties, nor his malfeasance in office,¹⁰ can be set up as a reason why the sureties of another should be released from responsibility for the misconduct of their own principal, in no way caused by that neglect, and only made public later than it would have been if there had been no neglect or malfeasance.¹¹ The same doctrine has been applied in actions against sureties of agents and officers of private corporations.¹² "Neither the negligence nor failure of an obligee in a bond in the discharge of some duty to a third party, nor his negligence or laches in enforcing a compliance with its condition, will release the sureties

⁸ Board of County Com'rs v. Security Bank, 75 Minn. 174, 74 Am. St. 447.

⁹ Snattinger v. Topeka, 80 Kan. 341.

¹⁰ Waseca County v. Sheehan, 42 Minn. 57, 5 L.R.A. 785; Supervisors v. Otis, 62 N. Y. 88; Hudson v. Miles, 185 Mass. 582. See Board of Com'rs v. Sullivan, 94 Minn. 201.

The principle applies to bonds given by the officers of private corporations. McShane v. Howard Bank, 73 Md. 135, 10 L.R.A. 552.

¹¹ Silver Bow County v. Davies, 40 Mont. 418; Syracuse v. Roscoe, 66 N. Y. Misc. 317; Commonwealth v. Jimison, 205 Pa. 367; Same v. American B. & T. Co., 205 Pa. 372; American B. Co. v. Welts, 193 Fed. 978, 113 C. C. A. 598; People v. Foster, 133 Ill. 496; Commonwealth v. Tate, 89 Ky. 537; Jones v. United States, 18 Wall. 662, 21 L. ed.

867; Detroit v. Weber, 26 Mich. 184; Paducah v. Cully, 9 Bush 323; Ex parte Christian, 23 Ark. 641; Christian v. Ashley County, 24 Ark. 142; People v. Russell, 4 Wend. 570; People v. Foote, 19 Johns. 58. The doctrine of People v. Jansen, 7 id. 332, is disapproved in Supervisors v. Otis, 62 N. Y. 88.

¹² Fiala v. Ainsworth, 68 Neb. 308; State v. Atherton, 40 Mo. 209; Minor v. Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; State Bank v. Locke, 4 Dev. 529; Amherst Bank v. Root, 2 Met. 522; Morris C. & B. Co. v. Van Vorst, 21 N. J. L. 100. See Atlantic & P. Tel. Co. v. Barnes, 64 N. Y. 385, 21 Am. Rep. 621; Phillips v. Foxall, L. R. 7 Q. B. 666; Sanderson v. Ashton, L. R. 8 Ex. 73; McMullen v. Winfield B. & L. Ass'n, 64 Kan. 298, 56 L.R.A. 924.

from their obligation. Nothing less than the breach of a covenant which the obligee has made, or connivance at the principal's breach of the condition of the bond, or knowledge of such breach, and a continuance of his employment without communicating the fact to the sureties, or such a wilful shutting of the eyes to the evidences of the breach as warrants the inference of connivance, will have that effect."¹³

SECTION 3.

OTHER OFFICIAL BONDS.

§ 483. Scope of section. Many of the cases considered in writing this section were brought against officers alone, their sureties not being parties. The principles underlying the adjudications illustrate the extent of, and the limitations upon, the liability of sureties. The liability of officers for affirmative wrong-doing is considered in the chapters which treat of trespass, conversion and related topics. The liability of the sureties on the bonds of officers of private corporations are measured by the same standard as the liability of sureties on the bonds of public officers, and, generally, no distinction is made as to the cases bearing upon the different bonds. In the chapter on suretyship¹⁴ are noted very many cases bearing upon the construction of the undertakings of sureties; it has not been deemed advisable to go into that subject in this connection; hence that chapter and this should be read in connection each with the other.

§ 484. Right of action against officers. An individual who sustains special injury by the non-feasance of a public ministerial officer¹⁵ or an officer who acts in a ministerial capacity,

¹³ Williams v. Lyman, 31 C. C. A. 511, 88 Fed. 237.

A case not in accord with the foregoing has been recently decided in Iowa. The bond was given to secure deposits made by a county treasurer, which were limited to \$1,000 by the proper authorities. In fact more than that was deposit-

ed and lost. The sureties' liability was limited by the authority given the treasurer, though it was his act which resulted in the loss of the larger sum. Fremont County v. Fremont Co. Bank, 138 Iowa 167.

¹⁴ Post, Vol. 3, chap. XVII.

¹⁵ Official duty is ministerial

has a right of action against him,¹⁶ regardless of whether the officer was influenced by malice.¹⁷ If the act or omission complained of is made the basis of an action against the sureties on the bond of the officer it must be in regard to a matter of duty imposed upon him by law;¹⁸ and whether against him alone, or also against his sureties, must not have been directed or caused by the party who seeks redress for it.¹⁹ Such right of action is not affected by the imposition of a statutory penalty for the neglect of duty. "In cases where the public have an interest in the faithful discharge of official duty the penalty for neglect, unless the contrary appear, is for the protection of that interest, rather than to secure private rights; and in many cases the forfeiture is entirely inadequate for the latter purpose, and is not even available to the injured party."²⁰ The penalty is an additional remedy.²¹ Damages which result from the failure

when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion. Official action is ministerial when it is the result of performing a certain and specific duty arising from fixed and designated facts. *People v. Bartels*, 138 Ill. 322.

If the same officer is charged with the performance of both judicial and ministerial duties, when he exercises ministerial functions only he is not protected by the judicial privilege. *Id.*; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Wall v. Trumbull*, 16 Mich. 288, 97 Am. Dec. 141.

¹⁶ *Ewton v. McCracken*, 9 Ala. App. 619; *Davis v. Gott*, 130 Ky. 486; *Rising v. Dickinson*, 18 N. D. 478, 23 L.R.A.(N.S.) 127, 138 Am. St. 779; *Gutschenritter v. Whitmore*, 158 Iowa 252; *People v. Bartels*, *supra*; *Robinson v. Chamber-*

lain, 34 N. Y. 389; *Adsit v. Brady*, 4 Hill 630, 40 Am. Dec. 305; *West v. Brockport*, 16 N. Y. 168; *Hover v. Barkhoof*, 44 id. 113; *Farrant v. Barnes*, 11 C. B. (N. S.) 655; *Nowell v. Wright*, 3 Allen 166, 80 Am. Dec. 62; *Wall v. Trumbull*, 16 Mich. 288, 97 Am. Dec. 141.

A tax collector is liable for personal injuries inflicted by his deputy while in the discharge of his duties. *Case v. Hulsebush*, 122 Ala. 212.

¹⁷ *Brasyear v. Maclean*, 33 L. T. (N. S.) 1; *Brewer v. Watson*, 65 Ala. 88, 71 id. 299, 46 Am. Rep. 318.

¹⁸ *Jost v. King*, 166 Cal. 394; *Neal-Blun Co. v. Rogers*, 141 Ga. 808; *Taylor v. Morgan*, 43 Okla. 142; *People v. Gerken*, 152 Ill. App. 486; *Moore v. Pye*, 10 Kan. 247; *Kahl v. Love*, 37 N. J. L. 5.

¹⁹ *Thompson v. Goding*, 63 Me. 425.

²⁰ *Hayes v. Porter*, 22 Me. 371, 376; *Beckford v. Hood*, 7 T. R. 620.

²¹ *Farmers' T. Co. v. Coventry*, 10 Johns. 389.

to properly perform official duty at the instance of a citizen and which the law requires the officer to perform for a consideration moving from him who asks its performance flow not from the violation of a general duty, but from the breach of a special obligation, and arise *ex contractu*.²² Hence while a recorder of deeds is liable in damages for a false certificate of search for liens upon property his liability is limited to the party who asks and pays for the certificate; it does not extend to that party's assigns or alienee.²³

§ 485. **Construction of bonds.** There is no dissent from the principle that, so far as the liabilities of sureties are concerned, the bonds of public officers are *strictissimi juris*, and cannot be extended by construction or enlarged by the acts of others.²⁴ A distinction is taken, however, between such obligations and those which are wholly between individuals. The former are to be read as though the statutes defining the duties and liabilities of the officers for whose acts the sureties therein become responsible are embodied in them,²⁵ and also as if they expressly recognized the power of the legislature to add to or diminish the duties connected with the office,²⁶ or direct the tribunal in

²² *Brigham v. Bussey*, 26 La. Ann. 676; *Brown v. Penn*, 1 McGloin 265.

²³ *Commonwealth v. Kellogg*, 6 Phila. 90; *Houseman v. Girard B. & L. Ass'n*, 81 Pa. 256.

²⁴ *Davis v. Hall*, 72 Ore. 220; *Woodle v. Settlemeyer*, 71 Ore. 25, L.R.A.1915A 839; *Wilson v. State*, 67 Kan. 44; *Stephens v. Hendee*, 80 Neb. 754; *People v. Lucas*, 93 N. Y. 585. See § 480.

A very strict application of the rule was made in *Ayers v. Hite*, 97 Va. 467, stated in § 481.

Compensated corporate sureties, unlike individual sureties, cannot invoke the rule of *strictissimi juris* their business being essentially an insurance against risk. *Costello v. Bridges*, 81 Wash. 192, L.R.A.1915A 853.

²⁵ *United States F. & G. Co. v. United States*, 150 Fed. 550, 80 C. C. A. 446; *National S. Co. v. United States*, 129 Fed. 70, 63 C. C. A. 512, and cases cited; *State v. Henderson*, 120 Ga. 780; *Henry County v. Salmon*, 201 Mo. 136; *State v. Wotring*, 56 W. Va. 394; *Olean v. King*, 116 N. Y. 355; *People v. Pennock*, 60 N. Y. 426; *State v. Davis*, 96 Ind. 539; *Dawson v. State*, 38 Ohio St. 1; *Lowe v. Guthrie*, 4 Okla. 287; *Ramsay's Est. v. People*, 197 Ill. 572; *Growbarger v. United States F. & G. Co.*, 126 Ky. 118, 11 L.R.A.(N.S.) 758, 128 Am. St. 274; *United States F. & G. Co. v. Millstead (Ky.)*, 109 S. W. 875.

²⁶ *People v. Vilas*, 36 N. Y. 459.

The duty of preparing and keeping a general index of mortgages

which they shall be performed.²⁷ This power is not absolute, except so far as the added duties are of the same kind and nature as those previously required of the officer. The collection of license and docket fees from attorneys cannot be added to the duties of the clerk of a court so as to charge his sureties, whose obligation was previously assumed, with responsibility therefor;²⁸ nor can the legislature add to the duties of a prosecuting attorney, subsequent to his becoming such and giving the bond required, the duty of collecting delinquent taxes upon real estate; that duty is not so germane to the office as to render the sureties upon his bond liable for any misappropriation on his part of delinquent tax moneys.²⁹ In some states it is not competent for the legislature to extend the term of office of one whose bond was for two years and until the election and qualification of his successor, and make his sureties liable for his acts beyond the time stipulated in the bond.³⁰ The authorities upon this question and questions analogous to it are in conflict. Some courts hold that the bond is made in contemplation of the law and must be construed with reference to the law governing the office, and that where the law provides that the term of office shall continue until the successor is elected and qualified the

may be imposed by law enacted during an officer's term. *Norton v. Kumpe*, 121 Ala. 446.

²⁷ *Milwaukee v. United States F. & G. Co.*, 144 Wis. 603.

²⁸ *Denio v. State*, 60 Miss. 949; *Brown v. Sneed*, 77 Tex. 471; *State v. Cheaney*, 52 Mo. App. 258.

²⁹ *Spokane County v. Allen*, 9 Wash. 229, 48 Am. St. 830. See *Mechem on Public Officers*, §§ 305, 306; 2 *Brandt on Suretyship and Guaranty*, § 548.

³⁰ *Sparks v. Cherokee County*, 76 Kan. 280; *Brown v. Lattimore*, 17 Cal. 93; *King County v. Ferry*, 5 Wash. 536, 34 Am. St. 880, 19 L.R.A. 500; *Bigelow v. Bridge*, 8 Mass. 274; *Peppin v. Cooper*, 2 B. & Ald. 431; *Lord Arlington v. Merricke*, 2 Saund. 411; *Liverpool*

W. W. Co. v. Atkinson, 6 East 507; *Wardens, etc. v. Bostock*, 2 B. & P. N. R. 175; *Hassell v. Long*, 2 M. & S. 363; *State Treasurer v. Mann*, 34 Vt. 371; *Welch v. Seymour*, 28 Conn. 387; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199; *Chelmsford Co. v. Demarest*, 7 Gray 1; *Wappello County v. Bigham*, 10 Iowa 39, 74 Am. Dec. 370; *Dover v. Twombly*, 42 N. H. 59; *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. 196; *Patterson v. Freehold*, 38 N. J. L. 255.

The imposition upon an officer of a private corporation of other duties than the surety was informed of is immaterial if it did not interfere with those imposed when the security was given. *Harrisburg S. & L. Ass'n*, 197 Pa. 177.

bond is given not only for the statutory term, but for the further time which may elapse between the end of the expressed statutory term and the time of the election and qualification of the successor; that the law becomes incorporated into the bond; that the sureties are bound to know that the principal's right to the office may extend beyond the period specified in the bond, and that such extension is taken into consideration and provided for in the bond.³¹ There is also a conflict of authority as to the effect upon sureties of a statute extending the time for the collection of taxes by the collector and the settlement of his accounts. In Illinois, Tennessee and Missouri the passage of such an act, after the execution of the bond, and without the sureties' consent relieves them.³² This is denied in Mississippi, Virginia, Maryland and North Carolina.³³ The cases are also in conflict as to the liability of sureties for their principal's failure to pay over moneys he received otherwise than in pursuance of law.³⁴

³¹ *Aultman & T. Mach. Co. v. Burchett*, 15 Okla. 490; *State v. Berg*, 50 Ind. 502; *Commonwealth v. Drewry*, 15 Gratt. 1; *Pickering v. Day*, 3 Houst. 474; *State v. Kurtzeborn*, 78 Mo. 98; *Thompson v. State*, 37 Miss. 518; *McAffee v. Russell*, 29 Miss. 84; *Hughes v. Smith*, 5 Johns. 168; *People v. Beach*, 77 Ill. 52; *Kindle v. State*, 7 Blackf. 589; *Exeter Bank v. Rogers*, 7 N. H. 21; *State v. Daniels*, 6 Jones 444.

³² *Davis v. People*, 6 Ill. 409; *People v. McHatton*, 7 id. 638; *Johnson v. Harker*, 8 Heisk. 388; *State v. Roberts*, 68 Mo. 234.

³³ *State v. Swinney*, 60 Miss. 39; *Commonwealth v. Holmes*, 25 Gratt. 771; *Smith v. Commonwealth*, id. 780; *State v. Carleton*, 1 Gill 249; *Prairie v. Worth*, 78 N. C. 169.

³⁴ *Wilson v. State*, 67 Kan. 44; *Nolan v. Labatul*, 117 La. 431; *United States F. & G. Co. v. Board of Education*, 118 Ky. 355 (void

order levying tax and acceptance of bond void); *Lowe v. Guthrie*, 4 Okla. 287; *Salem v. McClintock*, 16 Ind. App. 656, 59 Am. St. 330. These cases favor the view that there is no liability in that event. Some cases to the contrary are cited in note to sec. 480.

Funds illegally borrowed by other officers for public uses and received by the treasurer with other funds do not enter into the liability of his sureties though he fails to properly disburse the former. *Frost v. Mixsell*, 38 N. J. Eq. 586. *Contra*, *Boehmer v. County of Schuylkill*, 46 Pa. 452; *Wylie v. Gallagher*, id. 205.

An officer who is authorized to receive money only cannot impose liability upon his sureties for an extra-official act, as by giving public debtors credit for goods supplied him. *Hartford v. Franey*, 47 Conn. 76, 51 Am. Rep. 51.

An officer may decline to collect

§ 486. **Mode of redress for official dereliction.** The chief object of other official bonds than those of fiscal officers is to provide additional security for the faithful performance of official duties at the instance or for the benefit of private individuals. And in some form the persons who suffer injury by the neglect or misconduct of the officer may severally resort to the bond by independent proceedings for redress in damages. In some states the judgment is given for the penalty once for all; the party for whose benefit the action is instituted assigns such breaches as have affected him, and damages are assessed thereon and collected for his benefit; other breaches may be afterwards assigned by him and by others who have cause to complain until the aggregate recoveries equal the penalty.³⁵ In other jurisdictions judgment may be recovered in each individual case for the penalty to be discharged by payment or collection of special damages assessed on the breaches assigned.³⁶ And in others the judgment is rendered directly for the damages awarded for

a tax illegally levied; but if he collects it it must be paid over. *Olean v. King*, 116 N. Y. 355, and cases cited.

³⁵ *Taylor v. Blyth*, 9 Colo. App. 81; *People v. Birdsall*, 20 Johns. 297; *People v. Mathewson*, id. 300; *Richardson v. Smith*, 2 Jones 8; *Mitchell v. Laurens*, 7 Rich. 109; *Ridener v. Rogers*, 6 B. Mon. 594; *Skinner v. Phillips*, 4 Mass. 68; *McGuire v. Justices*, 7 B. Mon. 340; *Fuller v. Holmes*, 1 Aik. 111; *Rodes v. Commonwealth*, 6 B. Mon. 359; *Hartz v. Same*, 1 Grant's Cas. 359; *Jackson v. Rundlet*, 1 Wood. & M. 381; *Eason v. Sutton*, 4 Dev. & Batt. 484; *Gibson v. Martin*, 7 Humph. 127; *Wells v. Commonwealth*, 8 B. Mon. 459; *Trice v. Turrentine*, 13 Ired. 212; *Norton v. Mulligan*, 4 Strobb. 355; *Gwin v. Barton*, 6 How. 7, 12 L. ed. 321; *Stephens v. Crawford*, 3 Ga. 499; *Harrison v. Brown*, 1 Swan 272; *Wilson v. Cantrell*, 19 Ala. 642;

State v. McAlpin, 6 Ired. 347; *Shepard v. State*, 3 Gill 289; *White v. Wilkins*, 24 Me. 299; *Commonwealth v. Straub*, 35 Pa. 137; *Lynch v. Commonwealth*, 16 S. & R. 368, 16 Am. Dec. 582; *Campbell v. Same*, 8 S. & R. 414; *People v. Holmes*, 2 Wend. 281; *Lawton v. Erwin*, 9 id. 233; *Treasurers v. Ross*, 4 McCord 273; *Hernandez v. Montgomery*, 14 Martin 422. But see *Hatch v. Attleborough*, 97 Mass. 533.

³⁶ *United States v. American S. Co.*, 163 Fed. 228, 89 C. C. A. 658; *Sangster v. Commonwealth*, 17 Gratt. 124; *Skinner v. Phillips*, 4 Mass. 68.

When a private person brings a suit against a United States marshal and the sureties on his bond for official default, the judgment should be, under secs. 784, 785, R. S. of U. S., not for the penalty but for the plaintiff's damages. *Hagood v. Blythe*, 37 Fed. 249.

breach of the condition; and to some extent by summary proceedings on motion.³⁷ The person who first sues and obtains judgment is entitled to the whole penalty if his demand amount to so much, in exclusion of other claimants.³⁸ And the same rule holds though the party who first sues is prevented from obtaining judgment by a stay of proceedings on the defendants paying into the courts the penalty of the bond.³⁹ And where, after one suit on such bond, several sue on it at the same term the surplus will be divided among them *pro rata*; but if, instead of suing, they apply to the courts to come in under the first suit he who first applies will be entitled to priority of payment.⁴⁰ Such bonds are given for the benefit of all persons who may be aggrieved by the negligence or misconduct of the officer; and no individual can receive voluntary payment of the amount of it, and no payment to an individual will exonerate the obligor. Faithfully accounting for moneys to the amount of the penalty will not satisfy an official bond. It will stand good for losses and defalcations to that amount. For this reason it is unnecessary, in a declaration upon such a bond, to aver the non-payment of the penalty.⁴¹

§ 487. What private injuries covered by official bonds. In such actions damages may be recovered by any person suffering injury from neglect to perform, or negligent performance of, official acts which he had a right to require and have performed for his private benefit;⁴² or from torts committed by virtue or

³⁷ *Wolverton v. Commonwealth*, 7 S. & R. 273; *Withrow v. Same*, 10 id. 231; *Adler v. Newcomb*, 2 Dill. 45; *Hendricks v. Shoemaker*, 3 Gratt. 197; *Tyree v. Donnally*, 9 id. 64; *Graham v. Chandler*, 12 Ala. 829; *Camp v. Watt*, 14 id. 614; *Collier v. Powell*, 23 id. 579; *McCrosky v. Riggs*, 12 Sm. & M. 712; *Young v. Hare*, 11 Humph. 303.

³⁸ *Dallas v. Chaloner*, 3 Dall. 501, note, 1 L. ed. 696, 4 id. 106, note; *Christman v. Commonwealth*, 17 S. & R. 381; *Glidewell v. McGaughey*, 2 Blackf. 357.

³⁹ *McKean v. Shannon*, 1 Bin.

370. See *State v. Wayman*, 2 Gill & J. 254. Compare *State v. Ford*, 5 Blackf. 393.

⁴⁰ *McKean v. Shannon*, 1 Bin. 370.

⁴¹ *State v. M'Clane*, 2 Blackf. 192; *Potter v. Titcomb*, 7 Me. 319; *Commonwealth v. Montgomery*, 31 Pa. 519.

⁴² *Kendall v. Lyman*, 161 Fed. 652; *Crosthwait v. Pitts*, 139 Ala. 421; *Payne v. Baehr*, 153 Cal. 441; *Edwards v. Boyd*, 136 Ga. 733; *Nolan v. Labatut*, 117 La. 431; *State v. Turner*, 101 Md. 584; *Steadley v. Stuckey*, 113 Mo. App.

under color of office,⁴³ and which are specially injurious to him.⁴⁴ On making an arrest, by virtue of his office, a sheriff is

582; *Huddleson v. Polk*, 70 Neb. 492; *Norton v. Kumpe*, 121 Ala. 446; *State v. Gobin*, 94 Fed. 48; *Hixon v. Cupp*, 5 Okla. 545; *Asker v. Cabell*, 1 C. C. A. 693, 50 Fed. 818; *Howard v. United States*, 184 U. S. 676, 46 L. ed. 754; *State v. Wall*, 9 Ired. 20; *State v. Johnson*, 7 id. 77; *Wyche v. Myrick*, 14 Ga. 584; *Treasurers v. Ross*, 4 McCord 273; *Rowland v. Wood*, 4 Dana 194.

The sureties on a sheriff's bond are not liable to a printer for advertising notices, rules, audits, inquisitions and sales ordered by the sheriff, though it was part of his official duty to cause such advertisements to be made and for neglect of which they would have been responsible. The duty to pay in such case is not official. *Commonwealth v. Swope*, 45 Pa. 535; *Allen v. Ramey*, 4 Strobh. 30; *Crocker v. Fales*, 13 Mass. 260; *Wilson v. State*, 13 Ind. 341; *Brown v. Phipps*, 6 Sm. & M. 51.

The neglect or refusal of a sheriff to preserve the public peace is not ground for a private action by one who suffered great wrong and injury from a mob. *South v. State*, 18 How. 396, 15 L. ed. 433.

Where the rule prevails that the record of any instrument which is entitled to be recorded is only notice of the existence and record of the thing itself and not of the original, a mistake in recording a deed containing the grantee's contract to assume and pay \$500 as a part of the mortgage debt on the land conveyed, by which the record shows the assumption of only \$200 of such debt, renders sureties liable for the damages resulting to the

grantor in the deed by reason of such mistake. *State v. Davis*, 96 Ind. 539.

The liability of sureties does not extend beyond nominal damages unless there is proof that the plaintiff cannot collect the full amount due from the person who assumed the payment of the lien. *State v. Davis*, 117 Ind. 307.

The owner of a judgment is aggrieved by the misfeasance of the sheriff in failing to make the money on an execution issued thereon, and may sue on the sheriff's bond in his own name. *Burns v. George*, 119 Ala. 504.

⁴³ In Indiana there is no distinction, so far as the liability of sureties is concerned, between acts done by color of office and those done by virtue of office. *State v. Walford*, 11 Ind. App. 392; *State v. White*, 88 Ind. 587, 593.

⁴⁴ *People v. Schwartz*, 151 Ill. App. 190. See *McGuire v. Skelton*, 36 Okla. 500. It has been repeatedly held that where a sheriff, or like officer, with process authorizing a seizure of A.'s property, takes B.'s, the latter may recover damages therefor upon such officer's official bond. *Lammon v. Fusier*, 111 U. S. 17, 28 L. ed. 337; *Thomas v. Markman*, 43 Neb. 823; *Welter v. Jacobson*, 7 N. D. 32; *Norris v. Mersereau*, 74 Mich. 687; *Norwalk v. Ireland*, 68 Conn. 1; *Hill v. Ragland*, 24 Ky. L. Rep. 1053; *State v. Jennings*, 4 Ohio St. 418; *Sangster v. Commonwealth*, 17 Gratt. 124; *Archer v. Noble*, 3 Me. 418; *Harris v. Hanson*, 11 Me. 241; *Carmack v. Commonwealth*, 5 Bin. 184; *Skinner v. Phillips*, 4 Mass. 184; *Schloss v. White*, 16 Cal. 65; *Halli-*

bound to exercise ordinary and reasonable care for the preservation of the health and life of his prisoner. That duty he owes the prisoner, and for a breach of it he and his sureties are responsible in damages on the bond, notwithstanding the act complained of was a crime.⁴⁵ A United States marshal who, knowing that certain lawless persons are hostile to a prisoner

man v. Carroll, 27 Tex. 23, 84 Am. Dec. 606; Commonwealth v. Stockton, 5 Mon. 192; Forsythe v. Ellis, 4 J. J. Marsh. 299, 20 Am. Dec. 218; People v. Schuyler, 4 N. Y. 173, reversing 5 Barb. 156, and overruling Ex parte Reed, 4 Hill 572; Van Pelt v. Little, 14 Cal. 194; Tracy v. Goodwin, 5 Allen 409; Dennison v. Plumb, 18 Barb. 89; State v. Moore, 19 Mo. 369, 61 Am. Dec. 563; State v. Farmer, 21 Mo. 160; McElthaney v. Gilliland, 30 Ala. 183; Commonwealth v. Williams, 4 Litt. 335; Brunott v. McKee, 6 W. & S. 513; Gilbert v. Isham, 16 Conn. 525; Strunk v. Ocheltree, 11 Iowa 158; Charles v. Haskins, id. 329; Greenfield v. Wilson, 13 Gray 384; Dane v. Gilman, 49 Me. 173. Compare State v. Brown, 11 Ired. 141, and State v. Conover, 28 N. J. L. 224, 75 Am. Dec. 54, also Taylor v. Parker, 43 Wis. 78; Cairnes v. O'Brien, 40 id. 470; Gerber v. Ackley, 37 id. 43, 19 Am. Rep. 751; State v. Mann, 21 Wis. 684; Slaterry v. Schapero, — Mass. —, 104 N. E. 440.

The same rule applies where the wrong person is arrested under a warrant. West v. Cabell, 153 U. S. 78, 38 L. ed. 643.

The judgment recovered against an officer who has levied on the property of one not a party to the writ is *prima facie* evidence in an action against the officer and his sureties as to the ownership of the property and the amount of the

damages and costs resulting from the wrong done. Barker v. Wheeler, 60 Neb. 470, 83 Am. St. 541, overruling Thomas v. Markman, 43 Neb. 823, and Lewis v. Mills, 47 Neb. 910, which latter cases held such a judgment conclusive, no fraud or collusion in obtaining it being shown.

Under a bond conditioned for the faithful performance of duty, as well with respect to all persons concerned as the state, the wrongful entry of the cancelation of a mortgage gives a right of action to a purchaser of the mortgaged premises who searched the registry and found such entry therein and relied upon it, although he did not employ the officer who made it to make a search of the record. Appleby v. State, 45 N. J. L. 161.

⁴⁵ State v. Cunningham, — Miss. —, 65 So. 115; Growbarger v. United States F. & G. Co., 126 Ky. 118, 11 L.R.A. (N.S.) 758, 128 Am. St. 274; Moore v. Lindsay, 31 Tex. Civ. App. 613; Black v. Moore, 35 Tex. Civ. App. 613; State v. Gobin, 94 Fed. 48; Hixon v. Cupp, 5 Okla. 545; Shields v. Pflanz, 19 Ky. L. Rep. 648.

Under statutes in Kentucky a town marshal's sureties must answer for his wanton or malicious use of fire arms upon a prisoner while in his custody. Growbarger v. United States F. & G. Co., 126 Ky. 118, 128 Am. St. 274, 11 L.R.A. (N.S.) 758.

in his custody, delivers him for transport, shackled to a deputy whom he knows to be incompetent and unfit, is liable on his bond, because of his own negligence, for the killing of such prisoner by a mob through the deputy's unfitness.⁴⁶ The duty to safely keep prisoners is not direct to a party who has entitled himself to a reward for arresting them; hence there cannot be a recovery on the bond of a sheriff for the loss of such reward offered by a third party.⁴⁷ In many jurisdictions the acts of an officer under a void process or without any pretended process are trespasses for which he alone is responsible.⁴⁸ In others the sureties of a sheriff are liable for money collected by him under color of his office, although the writ may have been erroneous or illegal.⁴⁹ But it has been held that money received by a sheriff on account of an execution after the return day is not officially received, and a failure to pay it over is not a breach of his official bond.⁵⁰ So, where a defendant in an execution paid to the sheriff the amount thereof in depreciated currency, adding a sum to make it equal to par, and the plaintiff in the execution refused to receive it, so that the defendant was com-

⁴⁶ *Asher v. Cabell*, 1 C. C. A. 693, 50 Fed. 818.

A statute making carriers liable for the death of any person caused by their negligence or carelessness "or by the unfitness or gross negligence or carelessness of their servants or agents," and which, in a subsequent section, imposes such liability "when the death of any person is caused by the wrongful act, negligence, unskilfulness or default of another," does not make the sureties on the bond of a sheriff responsible for the act of a deputy sheriff in killing a prisoner who was attempting to escape. *Hendrick v. Walton*, 69 Tex. 192.

Where the sheriff's deputies killed a man believing him to be one whom they were ordered to arrest for a felony, the sureties on the sheriff's bond were liable. *John-*

son v. Williams, 54 L.R.A. 220, 98 Am. St. 416.

⁴⁷ *McPhee v. United States F. & G. Co.*, 52 Wash. 154, 21 L.R.A. (N.S.) 535, 132 Am. St. 958.

⁴⁸ *Inman v. Sherrill*, 29 Okla. 100; *Jordan v. Henderson*, 39 Tex. Civ. App. 89; *Allison v. People*, 6 Colo. App. 80; *State v. McDonough*, 9 Mo. App. 63; *McLendon v. State*, 92 Tenn. 520, 21 L.R.A. 738; *State v. Timmons*, 90 Md. 10; *Marquis v. Willard*, 12 Wash. 528, 50 Am. St. 906.

⁴⁹ *Rollins v. State*, 13 Mo. 437, 53 Am. Dec. 151; *Treasurers v. Buckner*, 2 McMull. 32.

⁵⁰ *Dean v. Governor*, 13 Ala. 526; *Fitzpatrick v. Branch Bank*, 14 Ala. 533; *Commonwealth v. Cole*, 7 B. Mon. 250; *Radford v. Hull*, 30 Miss. 712. But see *Widener v. State*; *Bosley v. Smith*, *infra* this section.

pelled to pay the amount in other funds; and the sheriff, on demand, failed to repay him the depreciated funds, the sheriff and his sureties were not liable therefor on his official bond, although the sheriff would be individually liable.⁵¹ Money paid a sheriff by consent of the parties to a sale made by him, though received in advance of the time fixed by the order of sale for its payment, is presumed to have been received by him in his official capacity.⁵² The act of a constable in receiving money from an execution debtor under a contract not to serve an execution upon him and to repay the money if the judgment should be reversed, is not one for which his sureties are liable.⁵³ The failure of an officer to return money deposited with him by an execution plaintiff in lieu of a bond to protect him against liability for making a levy is not a breach of the official bond.⁵⁴ The sureties on the bond of a sheriff who has tendered moneys to be received on redemption from a foreclosure sale to the agent of the plaintiff, who was authorized to demand, receive and receipt for the same, and who, without reason, refused to accept or receive the money, are thereby released from liability for the money tendered, notwithstanding the plaintiff subsequently demanded the money from the sheriff, who refused to pay it. The bond was not a continuing guaranty, and the refusal to pay on the demand of the plaintiff was not a new breach of its conditions.⁵⁵ Without giving any reasons for doing so it has been ruled in Indiana that if a note is received by a justice of the peace in his official capacity and he collects it without issuing process or rendering judgment, and appropriates the proceeds to his own use the sureties on his bond are liable.⁵⁶ According to several courts an action will not lie on an officer's

⁵¹ *Brown v. Mesely*, 11 Sm. & M. 354.

⁵² *State v. Cayce*, 85 Mo. 456.

⁵³ *Feller v. Gates*, 40 Ore. 543, 56 L.R.A. 630.

⁵⁴ *De Sisto v. Stimmel*, 58 App. Div. (N. Y.) 486.

⁵⁵ *Hull v. Chapel*, 77 Minn. 159, 77 Am. St. 666. The court disapproved *State v. Alden*, 12 Ohio, 59,

which determined that a sheriff who absconded with money in his possession, after having previously tendered it to the party entitled to it and who refused to receive it, violated his bond and that his sureties were liable.

⁵⁶ *Widener v. State*, 45 Ind. 244. See *Bosley v. Smith*, 3 Humph. 406.

bond, given for the faithful performance of the duties of his office, for an act which is beyond the scope of his authority, although done under color of his office.⁵⁷ But there are authorities which pointedly hold that an officer's sureties are liable for his illegal acts done *colore officii*, and not as an individual. This view is thus enforced. But it is insisted that, as the constable is shown to have had no lawful authority to arrest the plaintiff, his act was, therefore, not done in the line of his duty, but was illegal because it was in excess of his duty. In truth his act was in the line (direction) of official duty, but was illegal because it was in excess of his duty. In the discharge of official functions he violated his duty and oppressed the plaintiff. If, in exercising the functions of his office, the defendant is not liable for acts because they are illegal or forbidden by law, and, for that reason, are trespasses or wrongs, he cannot be held liable on the bond at all for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in the discharge of his duty he, of course, is not liable. It follows that, if the defendant's position be sound, no action can be maintained upon the bond in any case.⁵⁸ Where a sheriff sold property taken on attachment

⁵⁷ Taylor v. Morgan, 43 Okla. 142; People v. Pacific S. Co., 50 Colo. 273; People v. Beach, 49 Colo. 516, 37 L.R.A.(N.S.) 873; Cambridge v. Foster, 195 Mass. 411; State v. Schaper, 152 Mo. App. 538; Stephens v. Hendee, 80 Neb. 754; State v. Meyer, 138 Mo. App. 507; Gold v. Campbell, 54 Tex. Civ. App. 269; Rice v. Vasmer, 51 Tex. Civ. App. 167; Sneed v. McFathridge, 43 Tex. Civ. App. 592; State v. Barnes, 52 W. Va. 85; State v. Dayton, 101 Md. 598 (as where an assault is made on a third party while levying an execution); Jewell v. Mills, 3 Bush 62; Barnes v. Whitaker, 45 Wis. 204; Taylor v. Parker, 43 id. 78; People v. Foster, 133 Ill. 496; State v. McDonough, 9 Mo. App. 63; Kerr v. Brandon, 84

N. C. 128; Furlong v. State, 58 Miss. 717; People v. Gardner, 55 Cal. 304; Lowe v. Guthrie, 4 Okla. 287; Chandler v. Rutherford, 43 C. C. A. 218, 101 Fed. 774; Commonwealth v. Cole, 7 B. Mon. 250; Eaton v. Kelly, 72 N. C. 110; Allison v. People, 6 Colo. App. 80.

⁵⁸ Greenberg v. People, 225 Ill. 174, 8 L.R.A.(N.S.) 1223, 116 Am. St. 127 (holding sureties liable for an assault made upon the wife of an execution debtor who was assisting him in the preparation of a schedule of exempt property which had been levied upon); Carlisle v. Silver Creek, 85 Miss. 380; Lee v. Charmley, 20 N. D. 570, 33 L.R.A.(N.S.) 275; Richland County v. Owens, 86 S. C. 545; Clancy v. Kenworthy, 74 Iowa 740, 7 Am. St.

pursuant to an agreement between the plaintiff and defendant and without an order of court, his sureties were liable for his failure to pay over the money.⁵⁹ The bond of a clerk of court was conditioned for the faithful performance of the duties required of him by law; but it was held not a part of his duty to collect the fees of other officers of the court, and that he could not be held liable on his bond for not paying over such fees if he had received any.⁶⁰ Under a bond conditioned that the clerk of a court will account for and pay over, as required by law, all money which may come to his hands by virtue of his office his sureties are not liable for money paid to him in vacation, such payment not being equivalent to the payment of money into court.⁶¹ The bond of the clerk of a federal court covers liability for money paid him with the sanction of the court in a pending cause to be deposited as required by law.⁶² The clerk of a court or a notary public is liable for falsely certifying in his certificate of the acknowledgment to a forged deed or mortgage that the person whose name appears as having executed the same is personally known to him, the holder of such instrument having by means of the certificate negotiated a loan from an innocent person who had no notice of the facts; or obtained money for the land covered by the deed;⁶³ and to an assignee of a mortgage for the loss of his lien where that re-

508; *Rollins v. State*, 13 Mo. 437, 53 Am. Dec. 151; *State v. McDaniel*, 78 Miss. 1, 50 L.R.A. 118, 84 Am. St. 618; *Turner v. Sisson*, 137 Mass. 191; *Brown v. Weaver*, 76 Miss. 7, 71 Am. St. 512, 42 L.R.A. 423; *Yount v. Carney*, 91 Iowa 559; *Johnson v. Williams*, 111 Ky. 289, 54 L.R.A. 220, 98 Am. St. 416.

The sureties of a bank cashier are liable for exercise of unauthorized power in changing the bank's securities. *Barrington v. Bank*, 14 S. & R. 405.

⁵⁹ *Governor v. Perrine*, 53 Ala. 807.

⁶⁰ *Matthews v. Montgomery*, 25 Miss. 150.

As to the liability of the sureties of the clerk of the common pleas courts under the Ohio statutes, see *State v. Hobson*, 5 Ohio Dec. 442.

⁶¹ *State v. Enslow*, 41 W. Va. 744; *Stewart v. Madison*, 1 Call 416; *Mazyck v. McEwen*, 2 Bailey 28; *Keith v. Smith*, 1 Swan 92; *Currie v. Thomas*, 8 Port. 293; *Jenkins v. Lemonds*, 29 Ind. 294.

⁶² *Howard v. United States*, 184 U. S. 676, 46 L. ed. 754.

⁶³ *People v. Bartels*, 138 Ill. 322; *Kleipeter v. Castro*, 11 Cal. App. 83; *Harz v. Gowland*, 126 La. 674; *Barnard v. Schuler*, 100 Minn. 289.

sulted from a false certificate of acknowledgment.⁶⁴ The sureties of a notary are liable for his failure to do what is necessary to secure the cancellation of a mortgage and for his fraud upon the person who employed him to do so.⁶⁵ There is no liability for misconduct on the part of the principal unless it is the proximate cause of the damage sustained.⁶⁶ Where a party arrested gave bail, which was objected to for insufficiency, and to obviate the objection made a deposit of money with the sheriff, his sureties were not liable for it.⁶⁷ If an act done by an officer under color of authority is in part in excess of his power and in part within it, his sureties will be liable for the latter part.⁶⁸ If the injury done resulted proximately from the acts of the officer as an individual his sureties will not be responsible though his official misconduct concurred in producing it. Thus, where a notary public in his individual capacity acted as agent of another and embezzled money, and also attempted to cover such embezzlement by delivering to his principal notes and deeds of trust to which he had forged the names of non-existent persons and had, as notary, attached false certificates of acknowledgments to such deeds, the embezzlement was the direct cause of loss, and his sureties were not liable.⁶⁹ The use of excessive and unnecessary force by an officer in making a lawful arrest is an act for which his sureties are liable.⁷⁰

⁶⁴ *Wilson v. Gribben*, 152 Iowa 379.

⁶⁵ *Stork v. American S. Co.*, 109 La. 713.

⁶⁶ *Terrell v. McLean*, 130 Ga. 633.

⁶⁷ *State v. Long*, 8 Ind. 415. See *Beals v. Commonwealth*, 7 Watts 183; *Bosley v. Smith*, 3 Humph. 406; *State v. Daly*, 3 Ind. 431; *Boehmer v. Schuykill*, 46 Pa. 452; *Governor v. Pearce*, 31 Ala. 465; *State v. White*, 10 Rich. 442; *Webb v. Anspach*, 3 Ohio St. 522; *State v. Rollins*, 29 Mo. 267; *Mills v. Allen*, 7 Jones 564, 78 Am. Dec. 265; *Hinekler v. County Court*, 27 Ill. 39; *Boston v. Moore*, 3 Allen

123; *Brooks v. Gibbs*, 2 Jones 326; *Smith v. Berry*, 37 Me. 298; *Hardin v. Carico*, 3 Met. (Ky.) 289.

A constable gave a bond conditioned "well and truly to demean himself in office." He and his sureties were responsible for not paying over money collected as constable and retained by him though the collection was made without process. *Bosley v. Smith*, 3 Humph. 406.

⁶⁸ *Kendall v. Aleshire*, 28 Neb. 707, 26 Am. St. 367.

⁶⁹ *State v. Boughton*, 58 Mo. App. 155.

⁷⁰ *Towle v. Matheus*, 130 Cal. 574; *State v. Walford*, 11 Ind. App. 392.

The sureties on the bond of a *de facto* officer are not liable to the *de jure* officer, upon his recovery of the office, for the fees or salary received by the intruder.⁷¹

§ 488. **Measure of damages against sureties.** The measure of damages for which the sureties on official bonds are bound, in the absence of any statutory rule, is just compensation for the injury actually sustained,⁷² in addition to nominal damages

⁷¹ *Curry v. Wright*, 86 Tenn. 636; *Rowlett v. White*, 18 Tex. Civ. App. 688.

⁷² *United States v. American S. Co.*, 163 Fed. 228, 89 C. C. A. 658; *Burton v. Dangerfield*, 141 Ala. 285; *Sheldon v. Upham*, 14 R. I. 493; *Boyd v. Desmond*, 79 Cal. 250; *Ivey v. Colquitt*, 63 Ga. 509; *Commonwealth v. Harmer*, 6 Phila. 90; *Brobst v. Skillen*, 16 Ohio St. 382; *Hill v. Lowry*, Tappan 149; *State v. Lawson*, 2 Gill 62; *State v. Johnson*, 7 Ired. 77; *State v. Watson*, id. 289; *Sedam v. Taylor*, 3 McLean 547; *Crawford v. Andrews*, 6 Ga. 244; *Ziegler v. Commonwealth*, 12 Pa. 227; *Bevans v. Ramsey*, 15 How. 179, 14 L. ed. 652; *Karch v. Commonwealth*, 3 Pa. 269; *Brooks v. Governor*, 17 Ala. 206; *Wyche v. Myrick*, 14 Ga. 584; *Taylor v. Johnson*, 17 Ga. 521; *Dobbs v. Justices*, 17 Ga. 624; *Chapman v. Smith*, 16 How. 114, 14 L. ed. 868; *Reed v. Goettie*, 7 Rich. 126; *Carpenter v. Doody*, 1 Hilt. 465; *State v. Atkinson*, 17 Ind. 26; *Governor v. Evans*, 1 Dev. & Bat. 243; *Governor v. Matlock*, 1 Hawks 425; *Treasurers v. Clowney*, 2 McMull. 510; *Anderson v. Joliet*, 14 La. Ann. 114; *Bennett v. Vingard*, 34 Mo. 216; *Lowell v. Parker*, 10 Metc. (Mass.) 309, 43 Am. Dec. 436; *Commonwealth v. Allen*, 30 Pa. 49; *Findley v. Hutzell*, 29 id. 337; *Perkins v. Giles*, 9 Leigh 397, 33 Am. Dec. 249; *Griffin v. Underwood*,

16 Ohio St. 389; *Commonwealth v. Bradley*, 1 Litt. 48; *Same v. Sayres*, 1 Miles 235; *United States v. Moore*, 2 Brock. 317; *Johnson v. Williams*, 23 Ky. L. Rep. 578, 54 L.R.A. 220; *State v. Ryland*, 163 Mo. 280; *Barrington v. Bank*, 14 S. & R. 405; *Frazier v. Laughlin*, 6 Ill. 347. See *Crawford v. Ward*, 7 Ga. 445.

In assessing damages on a sheriff's bond for breach in not returning an execution interest will not be computed on the aggregate of the debt and interest in the execution. *Norris v. State*, 22 Ark. 524; *Henry v. Ward*, 4 Ark. 151. See *Gibson v. Governor*, 11 Leigh 600.

The liability of a surety company which has bound itself for the faithful performance of his duties by a postal clerk is not limited to the indemnity payable by virtue of statute by the government to the sender of the letter, the contents of which such clerk embezzled, but extends to the full sum embezzled. *Opinion of Attorney-General Knox*, 18 Bank. L. J. 763, 23 *Opinions of Att'ys Gen.* 476.

The neglect of a principal to have a note protested does not charge his sureties with liability for the amount of it; they may show that the endorser was not thereby discharged or that the parties assumed to be liable were insolvent. *Union Bank v. Thompson*, 8 Rob. (La.) 227.

which follow the breach of such bonds.⁷³ Sureties are not subject to exemplary damages as a rule, nor to penalties imposed by statute upon their principal.⁷⁴ It has been said their liability is measured by the sum necessary, within the limits of the bond, to compensate the plaintiff for all the detriment proximately caused by their principal, whether it could have been foreseen or not.⁷⁵ If an illegal arrest is made there may be a recovery for mental suffering and injury to the feelings although neither fraud nor malice is shown.⁷⁶ Such suffering is an element of damage where an officer commits a trespass under color of his office.⁷⁷ The natural and proximate consequence of the wrongful entry of the cancellation of a mortgage to the purchaser of the premises affected by it, who bought them at their full value, is the amount he was afterwards obliged to pay to relieve the property from the lien, and for that amount the officer's sureties are liable.⁷⁸ If in consequence of the neglect of a register of deeds to include in a tract index, which he is

⁷³ *Higdon v. Fields*, 6 Ala. App. 281; *State v. Fralick*, 154 Mo. App. 690; *State v. Miles*, 149 Mo. App. 638; *State v. Dickmann*, 146 Mo. App. 396. It is said in *State v. Green*, 112 Mo. App. 108, that nominal damages are not recoverable on an official bond given as an indemnity unless a substantial injury is shown. See ch. 2.

⁷⁴ *United States v. Ballantine*, 138 Fed. 312, 70 C. C. A. 602; *Growbarger v. United States F. & G. Co.*, 126 Ky. 118, 11 L.R.A.(N.S.) 758, 128 Am. St. 274; *Same v. Milstead*, 33 Ky. L. Rep. 186; *Eccles v. Walker*, 75 Neb. 722, disapproving *Eccles v. United States F. & G. Co.*, 72 Neb. 734, 117 Am. St. 830, and distinguishing local cases; *Hixon v. Cupp*, 5 Okla. 545; *State Bank v. Brennan*, 7 Colo. App. 427; *De La Garza v. Booth*, 28 Tex. 478; *Johnson v. Williams*, 54 L.R.A. 220, 98 Am. St. 416; *Glascock v. Ashman*, 52 Cal. 493; *Boyd v. Desmond*, 79

id. 250; *Brooks v. Governor*, 17 Ala. 806; *Wyche v. Myrick*, 14 Ga. 584; *McDowell v. Burwell*, 4 Rand. 317; *Fletcher v. Chapman*, 2 Leigh 565; *Treasurers v. Buckner*, 2 McMull. 323; *Treasurers v. Hilliard*, 8 Rich. 412; *Foote v. Van Zandt*, 34 Miss. 40; *Gwin v. Barton*, 6 How. 7. *Contra*, *Christian v. Ashley County*, 24 Ark. 142. See *Lawson v. Pulaslaski*, 3 *id.* 1; § 390, note; *Sanders v. Bank*, 2 Met. (Ky.) 327; *Ewton v. McCracken*, 9 Ala. App. 619.

⁷⁵ *Gomez v. Scanlan*, 155 Cal. 528.

The failure to record a mortgage is not the proximate cause of loss to a mortgagee who made the loan with notice that the mortgagor had no title to the land. *Terrell v. McLean*, 130 Ga. 633.

⁷⁶ *Yount v. Carney*, 91 Iowa 559.

⁷⁷ *People v. Schwartz*, 151 Ill. App. 190.

⁷⁸ *Appleby v. State*, 45 N. J. L. 161.

required to keep, a mortgage on a parcel of land it is bought without knowledge of the mortgage the purchaser of the land may buy such mortgage and, having exhausted his remedy to obtain reimbursement of his expenditures against his covenantor and against the mortgagor, may recover from the sureties on the register's bond the residue of such expenditures and interest thereon;⁷⁹ and if the purchaser is made a party to foreclosure proceedings he may recover the amount of the mortgage, interest, costs and attorney's fees for defending the suit.⁸⁰ The sureties of a notary public who fraudulently attaches to counterfeit mortgages certificates of their due acknowledgment are liable to one who loans money upon the faith of the instruments for the value they would have had if they were valid; such value to be determined with reference to the apparent worth of the property pretended to be mortgaged.⁸¹ If a notary makes a false certificate of acknowledgment to a forged deed his sureties are liable to an innocent grantee for the money paid on account of it, that being the value of the land described in it⁸² and for interest from the date of the fraudulent act.⁸³ One who, through the fault of a notary, acquires a second mortgage instead of a first, may not recover the full value of the note given for the debt, but the actual sum he paid for it and the money paid on the theory that the mortgage was such as was contemplated.⁸⁴ Neglect to cast up the returns of an election is attended with liability for the loss of the salary by the person shown thereby to have been elected.⁸⁵ Making an erroneous survey of a lot with knowledge of the kind of a building to be

⁷⁹ *Johnson v. Brice*, 102 Wis. 575; *Wacek v. Frink*, 51 Minn. 282, 38 Am. St. 502; *Chase v. Heaney*, 70 Ill. 268; *Norton v. Kumpe*, 121 Ala. 446; *Rising v. Dickinson*, 18 N. D. 478, 23 L.R.A. (N.S.) 127.

In Oregon sureties who deny liability are not liable for interest though they admit the extent of their principals' defalcation. *Baker County v. Huntington*, 48 Ore. 593.

⁸⁰ *Title G. & S. Co. v. Commonwealth*, 141 Ky. 570.

⁸¹ *State v. Hallen*, 165 Mo. App. 422; *Heidt v. Minor*, 89 Cal. 115; *McAllister v. Clement*, 75 Cal. 182; *Mahoney v. Dixon*, 31 Mont. 107. See *Doran v. Butler*, 74 Mich. 643.

⁸² *Joost v. Craig*, 131 Cal. 504, 82 Am. St. 734.

⁸³ *Harz v. Gowland*, 126 La. 674.

⁸⁴ *Harz v. Gowland*, 133 La. 27.

⁸⁵ *Steadley v. Stuckey*, 113 Mo. App. 582.

erected upon it carries liability for all the resulting consequences.⁸⁶ The expese of removing a cloud upon the title of a homestead is recoverable without diminution because of the judgment and costs under which the sale was made.⁸⁷

If a legatee fails to receive a legacy because of the neglect of a notary to properly state the residence of the witnesses who attested the will, the sureties are liable for the amount which the legatee would have received after the payment of succession debts and privileges.⁸⁸ If exempt property sold has been returned to the owner the damages are mitigated, and the measure of liability is the expense of procuring its return with interest, and any special damage which may be proven. If there was sold with such property other property which was not exempt the whole sum paid for the repurchase of the exempt, whose value is sued for, and of the non-exempt property sold therewith, should be apportioned between them according to their relative value, and the recovery should be limited to the sum apportioned to the exempt property, with interest and special damages.⁸⁹ An indemnity mortgagee may recover from the sureties of an officer who has sold the mortgaged chattels upon execution under a lien junior to that of the mortgage the value of the property if that is less than the amount of the debt, or, if it is more than such amount, the amount of the indebtedness.⁹⁰ Where the sheriff returned what purported to be a forthcoming bond for property levied on and, upon default, an execution was issued thereon, which was quashed because the obligors did not execute the bond, the costs and attorney's fees incurred by the plaintiff in defending the proceedings to quash the execution were the natural and proximate result of the sheriff's act, and his sureties were liable therefor.⁹¹ The neglect of an assignee in insolvency to file the assignment and have it recorded is followed

⁸⁶ Taft v. Rutherford, 66 Wash. 256, 38 L.R.A. (N.S.) 1043;

⁸⁷ State v. Dickman, 124 Mo. App. 653.

⁸⁸ Weintz v. Kramer, 44 La. Ann. 35.

⁸⁹ Blewett v. Miller, 131 Cal. 149, 82 Am. St. 338.

⁹⁰ Collins v. State, 3 Ind. App. 542, 50 Am. St. 298.

⁹¹ Burns v. George, 119 Ala. 504.

by liability for the pro rata share of the creditor's loss as compared with the claims of other creditors who would have been entitled to share in the assigned property.⁹² A cause of action upon the bond of a constable for failing to take a sufficient replevin bond accrues when the suit is ended and a *retorno* awarded. If the property is returned and there has been no depreciation in value the damages are limited to the value of its use or the value of the right to sell the property during the time it was detained. The value of the property as stated in the affidavit is not necessarily the measure of damages, though the plaintiff in the replevin suit cannot deny that the property replevied was of less value than was stated in his affidavit.⁹³ Liability for closing rented premises by virtue of an execution against the lessee is a basis for the recovery of the rent; if property is converted its value is recoverable, and if the lessee was deprived of the benefit of a license for carrying on business he may recover its value during the time the business was suspended and also the expenses he was compelled to pay during that time.⁹⁴

The sureties on the bond of a justice of the peace are only liable for his misconduct or defaults in respect to his ministerial duties; they are not liable for errors of a judicial character.⁹⁵ A justice acts ministerially in making a return to an appeal, and is liable for the damage sustained by making a false one.⁹⁶ Where such a return affected a question of law and prevented a reversal of the judgment the justice was liable for the amount awarded by it and the costs.⁹⁷ For neglecting to issue an execution the damages are *prima facie* the amount of the judgment,⁹⁸ but the cost of levying a void execution, or loss incurred in attempting to enforce it, cannot be recovered.⁹⁹ The justice may show in mitigation of damages that the debtor does not

⁹² Huddleson v. Polk, 70 Neb. 492.

⁹⁶ Brooks v. St. John, 25 Hun

⁹³ Love v. People, 94 Ill. App.

540.

237.

⁹⁴ Hooks v. Pafford, 34 Tex. Civ.

⁹⁷ MacDonell v. Buffum, 31 How. Pr. 158.

App. 516.

⁹⁵ McGrew v. Governor, 19 Ala.

⁹⁸ Nixon v. Hill, 2 Allen 215; Carpenter v. Warner, 38 Ohio St. 416.

⁸⁹. See Guesdorf v. Gleason, 10 Iowa 495.

⁹⁹ Nixon v. Hill, 2 Allen 215.

own sufficient property to satisfy the judgment.¹ The liability of a judge who accepts insufficient sureties from a guardian is ascertainable by proof of the sum the latter received, the rate of interest for which he is liable and the legality of his expenditures.² The value of property taken from a letter to be registered measures the liability of the sureties on the bond of the carrier, regardless of whether the owner had made a demand against the government because of its loss.³

A party who applies to the clerk of a court for process is not bound to see that he issues it, and if the failure to perform that duty deprives such party of the legal right to contest the question of his liability to another the sureties of the clerk are responsible for the resulting damages. They cannot rely on the presumption that the judgment of the trial court is correct, and thus escape with nominal damages. The court said: "There is but one case in point, and that only a *nisi prius* ruling. In *Cohen v. Marchant*⁴ the action was against a justice of the peace for failing to date properly the appeal bond, whereby the right of appeal was lost. Judge Storer told the jury that they might measure the damages by the amount of the judgment. It is a rule in actions for negligence in issuing execution on a judgment, or for negligence in allowing the escape of one whose body is taken in execution that the amount of injury is *prima facie* measured by the face of the judgment, and that the burden is on the negligent officer to reduce the recovery by showing the insolvency of the defendant.⁵ As against a public officer who negligently deprives another of his right to be heard in a suit against him we think the same rule of evidence should prevail, and that the plaintiff should be entitled to recover all that the negligence of the defendant has caused him to pay unless the officer can show that, even if he had not been negligent, the complaining litigant would have had ultimately to pay the same amount." It having been found by the court below that there

¹ *Id.*; *Carpenter v. Warner, supra*. States, 129 Fed. 70, 63 C. C. A. 512.

⁴ 1 Disney 113.

² *Commonwealth v. Lee*, 120 Ky. 433.

⁵ *Carpenter v. Warner*, 38 Ohio

³ *National Surety Co v. United* St. 416.

was reversible error in the record, and no evidence being given to show that on a new trial a similar verdict would have been reached, judgment was entered for the amount paid on the judgment, with interest and costs.⁶ The neglect to enroll a judgment in consequence of which it loses its rank as a senior lien is not necessarily attended with liability for the sum specified in it; the loss to the plaintiff depends upon that fact, the amount of the other liens and the financial ability of the judgment debtor.⁷

It is not a part of the contract of the sureties on an official bond that, before they shall become liable, their principal shall strictly comply with all the requirements of law so as to constitute himself, before entering upon the duties of his office, in all respects and in every particular an officer *de jure*, and not an officer *de facto* merely. Hence it is not a defense to them that he did not obtain his commission within the time limited by law, that he did not take, subscribe and indorse thereon the proper oath of office, that his bond was not approved and deposited within the prescribed time, nor that his commission was not sealed.⁸ It follows that responsibility for the principal's acts is assumed at the date he enters upon the discharge of his duties unless the bond by its terms extends to past transactions,⁹ and that it does not continue beyond the official term for which it was made except in respect to such duties or business of that term as the incumbent is required to perform and complete afterwards.¹⁰ When the law provides that an officer shall hold until his successor is qualified his bond

⁶ *Baltimore & O. R. Co. v. Weedon*, 24 C. C. A. 249, 2 Am. Neg. Rep. 688; 78 Fed. 584.

⁷ *Strain v. Babb*, 30 S. C. 342, 14 Am. St. 905.

⁸ *State v. Toomer*, 7 Rich. 216; *Stevens v. Treasurers*, 2 McCord 107; *Ramsay's Est. v. People*, 197 Ill. 572.

⁹ *Rochester v. Randall*, 105 Mass. 295, 7 Am. Rep. 519.

The liability of sureties upon a liquor seller's bond attaches when

it is accepted and approved though it is not filed in the designated office until thereafter. *Brockway v. Petted*, 79 Mich. 620, 7 L.R.A. 740; *People v. Laning*, 73 Mich. 284.

¹⁰ *People v. Toomey*, 122 Ill. 308; *King County v. Ferry*, 5 Wash. 536, 550, 34 Am. St. 880, 19 L.R.A. 500 (extension of term by statute); *People v. Foster*, 133 Ill. 496; *Tyree v. Wilson*, 9 Gratt. 59; *Ingram v. McComb*, 17 Mo. 558; *Dumas v.*

covers his acts as long as he so holds.¹¹ And where new bonds are required to be given periodically during an official term all such given during the same term are usually treated as cumulative.¹² The sureties on each are bound for so much of the term as is subsequent to its execution.¹³ It is otherwise, of course, where on the execution of a new bond the sureties in the preceding one are in form or by implication released.¹⁴ And a substituted surety in an existing bond will be liable for past as well as subsequent transactions covered by it as executed by the original surety.¹⁵

Patterson, 9 Ala. 484; State v. Johnson, 7 Ired. 77; Poole v. Cox, 9 id. 69, 49 Am. Dec. 410; Warren v. State, 11 Mo. 583; Faulkner v. State, 9 Ark. 14; State v. Van Pelt, 1 Ind. 304; Evans v. Bank, 15 Ala. 81; Dixon v. Caskey, 18 Ala. 97; Marney v. State, 13 Mo. 7; State v. Wall, 9 Ired. 20; State v. Roberts, 12 N. J. L. 114, 21 Am. Dec. 62; People v. Ring, 15 Wend. 623; People v. Ten Eyck, 13 id. 448; Tyler v. Nelson, 14 Gratt. 214; Low v. Cobb, 2 Sneed 18; Latham v. Fagan, 6 Jones 62; Collyer v. Higgins, 1 Duvall 6, 85 Am. Dec. 601.

Under a bond conditioned to well and faithfully execute and return all writs to the sheriff directed a writ attaches itself to the bond in force when it is delivered to him. State v. Turner, 8 G. & J. 125. *Contra*, Sherrell v. Goodrum, 3 Humph. 419. See Wood v. Lowden, *infra*. Larned v. Allen, 13 Mass. 295; United States v. Giles, 9 Cranch 212, 3 L. ed. 708; Elkin v. People, 4 Ill. 207, 36 Am. Dec. 541; People v. McHenry, 19 Wend. 482; Bruce v. State, 11 Gill & J. 382; Robey v. Turner, 8 id. 125; United States v. Spencer, 2 McLean 405; State Treasurer v. Mann, 34 Vt. 371; Wapello v. Bigham, 10 Iowa 39, 74 Am. Dec. 370; Manufactur-

ers' & M. S. & L. Co. v. Odd Fellows' Hall Ass'n, 48 Pa. 446; State v. Grimsley, 19 Mo. 171; Welch v. Seymour, 28 Conn. 387; Dover v. Twombly, 42 N. H. 59; Thomas v. Summey, 1 Jones 554; King v. Nichols, 16 Ohio St. 80; McCormick v. Moss, 41 Ill. 352. See Governor v. Robbins, 7 Ala. 79; Sherrell v. Goodrum, 3 Humph. 419; Butler v. State, 20 Ind. 169.

¹¹ Thompson v. State, 37 Miss. 518; State v. Berg, 50 Ind. 502; Commonwealth v. Drewry, 15 Gratt. 1; Pickering v. Day, 3 Houst. 474; State v. Kurtzeborn, 78 Mo. 98; Hughes v. Smith, 5 Johns. 168; People v. Beach, 77 Ill. 52; Exeter Bank v. Rogers, 7 N. H. 21; State v. Daniels, 6 Jones 444.

¹² Poole v. Cox, 9 Ired. 69, 49 Am. Dec. 410; Postmaster General v. Munger, 2 Paine C. C. 189; Miller v. Macoupin County, 7 Ill. 50; State v. Crooks, 7 Ohio 573; Governor v. Robbins, 7 Ala. 79. Compare Hewett v. State, 6 Harr. & J. 95, 14 Am. Dec. 259; Ewing v. United States, 11 Ariz. 1.

¹³ *Id.*

¹⁴ Miller v. Moore, 3 Humph. 189.

¹⁵ Treasurers v. Taylor, 2 Bailey 524.

The sureties on a bond which recites that it is given in lieu of a

Where the same official duty is neglected continuously from one term into another, by the same officer succeeding himself,—as where an execution is delivered to a sheriff near the close of his term and he neglects to execute it, and by law it passes to the incumbent of the succeeding term, for which the same person is re-elected, who after his re-election continues his neglect to serve the writ,—the party injured may sue the sureties in the bond for either term at his election.¹⁶ And the circumstance that he might recover on the second, if he had chosen to do so, will not go even in mitigation in an action on the first bond.¹⁷ A sheriff who has attached animals shortly before the expiration of his first term, some of which died by reason of his neglect during his second term, commits, during the latter, the act which makes his sureties therefor liable.¹⁸ Where a sheriff going out of office is bound to proceed with the execution of writs in his hands as if his term was not about to expire and is not required to turn over the money realized therefrom to his successor, the sureties on his bond at the time he realizes money from a sale under a writ of attachment, his term expiring after the sale and a new bond being given by him as his successor to himself, are liable for his wrongful act in defaulting in the payment of such money.¹⁹

A bond given by a public officer is only a collateral security for the faithful performance of his official duties. This collateral obligation can exist no longer than the liability it was created to secure. It is of the essence of the contract of suretyship that there be a subsisting valid obligation of the principal debtor. Whatever, therefore, amounts to a good defense to the

former bond are liable for the acts of their principal from the beginning of his term. *State v. Finn*, 23 Mo. App. 290.

¹⁶ *State v. Roberts*, 12 N. J. L. 114.

¹⁷ *State v. Wall*, 9 Ired. 20.

If a deputy-sheriff neglects to execute process which is placed in his hands while he is acting as such

for one sheriff, and such deputy is reappointed by the former sheriff's successor and his neglect continues under his re-appointment, the last sheriff is responsible for it. *Simmonds v. Henchy*, 16 L. R. Ire. 467.

¹⁸ *Wood v. Lowden*, 117 Cal. 232.

¹⁹ *People v. Kendall*, 14 Colo. App. 175.

original liability of the principal is such for the sureties.²⁰ The liability of the sureties of a custodian of public moneys for the federal government is measured by the face value of the treasury notes lost, and not by the cost of replacing them.²¹ The failure of a tax collector to return the tax warrant delivered to him is cause for holding his sureties liable for the amount of the uncollected taxes, it being impossible for the alternative methods provided for their collection to be enforced in the absence of the warrant.²² The neglect to cancel paid warrants which are taken, without the officer's fault or neglect from his office, and put into circulation, must be answered for to the extent of their face value.²³ The value of the property which ought to have been exposed pursuant to an execution, and not the sum specified therein, is the measure of liability for the failure to make return thereof.²⁴ In some cases the damages for failing to levy an execution are not estimated upon the sum named in it, or the value of the property if that is less than such sum; but upon the loss sustained by the creditor, which is a question of fact.²⁵ Under a statute providing that on failure of a marshal to return an execution within a specified time he and the sureties on his bond shall be liable for the amount of the execution, the amount of recovery on the bond is not limited to the actual injury sustained by the execution creditor.²⁶ The reasonable expense incurred by the government in securing the performance of the duties imposed upon a negligent officer may be recovered from his sureties, but not an extravagant sum.²⁷

If a town which sues the sureties on an officer's bond is indebted to the officer upon an implied contract for services which grew out of and are connected with the claim made, the

²⁰ *State v. Blake*, 2 Ohio St. 147;
Mt. Pleasant Bank v. Conway, 18
Ohio 234.

²¹ *Smythe v. United States*, 188
U. S. 156, 47 L. ed. 425.

²² *Olean v. King*, 116 N. Y. 355.

²³ *Johnson County v. Hughes*, 12
Iowa 360.

²⁴ *Johnston v. Governor*, 2 Bibb
186, 4 Am. Dec. 694; *Ohio v. Myers*,
14 Ohio 538.

²⁵ *Arnold v. Commonwealth*, 8 B.
Mon. 109. See § 490.

²⁶ *A. F. Shapleigh Hardware Co.
v. Pritchard*, 42 Okla. 252.

²⁷ *United States v. Wann*, 3 Mc-
Lean 179.

damages which the town has suffered are lessened to the extent of the value of such services, and the sureties are entitled to the benefit of it in mitigation of their liability.²⁸ No allowance will be made in favor of the sureties because their principal rendered public service without compensation, he not having demanded that the authorities exercise their power to fix it.²⁹

§ 489. **Measure of damages against officers for neglect of duty; nominal damages.** The measure of damages for negligent escapes is not uniform in the several jurisdictions; there is also some variance as to the burden of proof. In Ohio, on proving his judgment against the escaped debtor, the plaintiff in an action against the sheriff is *prima facie* entitled to recover the whole amount of his debt. To reduce the recovery below that the burden is upon the defendant, who may not show that the amount is still collectible from the debtor, but may show his partial or total insolvency at the time he made his escape. The plaintiff is entitled to recover at least nominal damages. If the officer permitted the escape through fraud, malice or corruption exemplary damages may be awarded against him.³⁰ In Vermont an officer who holds final process against a debtor's body and neglects an opportunity to serve it or to arrest him is absolutely liable for the debt.³¹ The same result follows there and in Pennsylvania when the debtor escapes from the liberties of the jail by reason of the insufficiency of the security taken by the sheriff or the neglect of the prison officials.³² In Connecticut the damages recoverable by a sheriff on the security taken by him for prison liberties include the debt, costs of the execution and interest.³³ Ordinarily the amount

²⁸ Brunswick v. Snow, 73 Me. 177; State v. Hobson, 5 Ohio Dec. 442.

²⁹ School Dist. v. McDonald, 39 Iowa 564.

³⁰ Hootman v. Shriner, 15 Ohio St. 43; Carpenter v. Warner, 38 id. 416.

In England the plaintiff has the burden of proof. See Starkie's Ev., vol. 2, 1016. In New York the defendant must show the facts which

exonerate him from liability. Patterson v. Westervelt, 17 Wend. 543. See Sheldon v. Upham, 14 R. I. 493; Crawford v. Andrews, 6 Ga. 244.

³¹ Goodrich v. Starr, 18 Vt. 227.

³² Wheeler v. Pettes, 21 Vt. 398; Saunders v. Smith, 6 Pa. Co. Ct. 257; Saunders v. Quigg, 112 Pa. 546.

³³ Seymour v. Harvey, 8 Conn. 63.

of damage is *prima facie* established by proof of the judgment in the former action and of the plaintiff's inability to collect it. But where the officer's neglect of duty makes such evidence impossible the plaintiff may prove what judgment he might or could have obtained in the former action but for such neglect.³⁴ In Massachusetts the plaintiff is entitled to nominal damages on proof of an escape, but he cannot recover anything beyond that except an actual loss be shown. The officer may show in mitigation that the debtor was unable to pay the debt,³⁵ or that it was barred by the statute of limitations.³⁶ The burden of proving that he had a valuable debt against the person who has escaped is upon the plaintiff; this is not established by showing that he holds a note signed by him, if on its face it appears that it was barred when the escape was consummated.³⁷ In North Carolina, according to the later case, only the actual damages can be recovered.³⁸ The liability for an escape on final process is *prima facie* the original debt; the officer may show that the debt could not have been made out of the debtor.³⁹ This is the rule in Arkansas,⁴⁰ and in Maryland,⁴¹ where the escaped debtor is confined on final process.

The common-law rule that the insolvency of the debtor was provable by the sheriff in mitigation⁴² has been changed by legislation in New York.⁴³ Under a statute which declares that the undertaking of the bail is "that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein," and the liability of

³⁴ *Swan v. Bridgeport*, 70 Conn. 143.

³⁵ *Weld v. Bartlett*, 10 Mass. 470; *Brooks v. Hoyt*, 6 Pick. 468; *Woods v. Varnum*, 21 id. 165.

³⁶ *Slocum v. Riley*, 145 Mass. 370.

³⁷ *Id.*

³⁸ *State v. Falls*, 63 N. C. 188. See *Adams v. Turrentine*, 8 Ired. 147.

³⁹ *Crawford v. Andrews*, 6 Ga. 244.

⁴⁰ *Faulkner v. State*, 6 Ark. 150.

⁴¹ *State v. Baden*, 11 Md. 317.

⁴² *Patterson v. Westervelt*, 17 Wend. 543.

⁴³ *Dunford v. Weaver*, 84 N. Y. 445.

The same rule applies where an undertaking has been given to admit a judgment debtor to the jail liberties. *Flynn v. Union S. & G. Co.*, 61 App. Div. (N. Y.) 170.

the sheriff to be that, "if, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail," an officer cannot mitigate the damages if bail is not put in by proof of the debtor's insolvency.⁴⁴ Such proof was not admissible on behalf of the bail under the English statutes.⁴⁵ In Indiana the liability of the sureties of a sheriff who voluntarily permits an escape does not extend beyond the actual damages,⁴⁶ but the officer himself is liable for the amount of the judgment notwithstanding the insolvency of the prisoner;⁴⁷ and, *prima facie*, the same measure of liability attaches to a constable who purposely allows a defendant to escape after a preliminary examination in a bastardy proceeding and before final judgment.⁴⁸ If the escape was the result of mere negligence the prisoner's inability to satisfy the judgment may be shown to mitigate the damages;⁴⁹ and if he is re-arrested and held in custody under a judgment recovered against him while he was at large the sheriff's liability is confined to the actual damages.⁵⁰ In England the damages are to be measured by "the value of the custody of the debtor at the moment of escape."⁵¹ In equity the sheriff is charged with the whole debt and has the burden of proving that less would have been recovered if the prisoner had not escaped, in answer to which the plaintiff may show what sources of payment were open to him.⁵² On this question the jury may take into consideration not only the debtor's own resources, but all reasonable probabilities, founded upon his position in life and surrounding circumstances, that the debt or any portion of it would have been paid if he had remained in custody, as that the debtor was an only son and his father was wealthy and very old and that

⁴⁴ Metcalf v. Stryker, 31 N. Y. 255; Bensel v. Lynch, 44 id. 162.

⁴⁵ Beddome v. Holbrooke, 1 B. & P. 450, n.; Maurice v. Partridge, 14 East 599; Rooksby v. State, 92 Ind. 71; Turner v. State, 66 id. 210.

⁴⁶ State v. Johnson, 1 Ind. 158.

⁴⁷ State v. Hamilton, 33 Ind. 502; State v. Mullen, 50 id. 598.

⁴⁸ Lakin v. State, 89 Ind. 68.

⁴⁹ State v. Mullen, 50 Ind. 598.

⁵⁰ State v. Newcomer, 109 Ind. 243; State v. Caldwell, 115 Ind. 6.

⁵¹ Arden v. Goodacre, 11 C. B. 371.

⁵² Moore v. Moore, 25 Beav. 8.

the debtor's solicitor had made an offer to compromise the debt of his client.⁵³ There is not entire agreement concerning the liability of officers who neglect their duty for nominal damages. In Ohio and Massachusetts, as has been noted, such liability is favored.⁵⁴ The same rule has been laid down in Vermont and Missouri;⁵⁵ in Michigan, Georgia and Louisiana⁵⁶ the opposing view is declared. In England the affirmative view has been held, the judge who gave the opinion saying there is no authority to the contrary.⁵⁷ On the principles which govern the allowance of such damages generally,⁵⁸ there seems to be no good reason why they should not be recovered against officers who fail to perform their duties.

§ 490. *Same subject.* Some of the early American cases applied a very harsh measure of liability to officers who refused or neglected to serve final process. Such conduct made the debt upon which the process was issued the officer's own, and he was liable for the full amount of it, notwithstanding the debtor was unable to pay it or any part of it.⁵⁹ But the later cases establish the reasonable and just rule that the measure of liability, if the officer acts in good faith, is the actual damages the plaintiff sustains,⁶⁰ which is, *prima facie*, the amount of the debt due.⁶¹ The value of property lost by reason of a void levy

⁵³ *Macrae v. Clark*, L. R. 1 C. P. 403.

⁵⁴ See, in addition to the cases cited from the states named, *Laffin v. Willard*, 16 Pick. 64, 26 Am. Dec. 629.

⁵⁵ *Kidder v. Barker*, 18 Vt. 454; *Metzner v. Graham*, 66 Mo. 653.

⁵⁶ *Amperse v. Winslow*, 75 Mich. 234, 13 Am. St. 432; *Dwyer v. Woulfe*, 40 La. Ann. 46. See § 490 for Georgia cases.

⁵⁷ *Clifton v. Hooper*, 6 Q. B. 468.

⁵⁸ See ch. 2.

⁵⁹ *Turner v. Lowry*, 2 Aik. 72; *Hall v. Brooks*, 8 Vt. 485, 30 Am. Dec. 485; *Crawford v. Chandler*, 5 Ala. 61; *Reid v. Dunklin*, id. 205; *Helm v. Gridley*, Walk. (Miss.) 511

(also interest and statutory damages).

⁶⁰ *Blodgett v. Brattleboro*, 30 Vt. 579; *McKinney v. Blakely*, 87 Ark. 405; *Grafton Bank v. White*, 17 N. H. 389; *Hamilton v. Ward*, 4 Tex. 356.

⁶¹ *Beck & G. H. Co. v. Knight*, 121 Ga. 287, 3 L.R.A.(N.S.) 420; *Gilbert v. Watts-De G. Co.*, 66 Ill. App. 625, 169 Ill. 129, 61 Am. St. 154.

The value of pledged property, and not the amount for which it was pledged, is the measure of recovery against an officer in an action of trespass for seizing and selling it on execution. *Soule v. White*, 14 Me. 436.

is the measure of damages,⁶² not its appraised value, though the officer's return shows that value.⁶³ The value is to be determined by what the property would have brought at such a sale as the officer was to have made.⁶⁴ As in other cases of breach of duty an officer is liable at least for nominal damages for failing to levy or return an execution.⁶⁵ And if the judgment debtor has sufficient non-exempt property to satisfy it the sheriff is liable for the amount, unless he shows some reason for not making the levy,⁶⁶ as that the debt was not collectible on account of the debtor's insolvency; ⁶⁷ that the property was not subject to execution, or was owned by a third person,⁶⁸ but he cannot relieve himself from liability by showing that the judgment may yet be collected.⁶⁹ The statutory damages for not returning an execution cannot be recovered in a common-law action on the sheriff's bond. In such an action there can be no recovery of more than nominal damages unless the proof shows that greater damages were sustained.⁷⁰

If there is needless delay in executing a writ of assistance as the result of which the parties in possession of the property

⁶² Hurlock v. Reinhardt, 41 Tex. 580; French v. Snyder, 30 Ill. 339, 83 Am. Dec. 193.

⁶³ Parker v. Peabody, 56 Vt. 221.

The return of an attaching officer who has taken a receipt for the property is conclusive upon him as to its value in an action for failure to deliver the property or the receipt. Allen v. Doyle, 33 Me. 420.

⁶⁴ Harris v. Murfree, 54 Ala. 161.

⁶⁵ Gallup v. Robinson, 11 Gray 20; Coe v. Peacock, 14 Ohio St. 187; Coopers v. Wolf, 15 id. 523. See § 489 for opposing authorities.

⁶⁶ Bank v. Curtis, 1 Hill 275; Pardee v. Robertson, 6 id. 550; Swezey v. Lott, 21 N. Y. 481, 78 Am. Dec. 160; Dunphy v. Whipple, 25 Mich. 10; Wilkin v. American F. L. M. Co., 106 Ga. 182; Brannon v. Barnes, 111 Ga. 850.

⁶⁷ Crooker v. Melick, 18 Neb. 227; Hellman v. Spielman, 19 Neb. 152; Ledyard v. Jones, 7 N. Y. 550; Abbott v. Gillespy, 75 Ala. 180; State v. Dixon, 80 Ind. 150; Collier v. State, 10 id. 58.

The reputed financial condition is not material; actual insolvency must exist. State v. Edwards, 10 Ired. 242.

In some states constables are by statute made absolutely liable for the amount of the debt for neglecting to return an execution. Robertson v. County Com'rs, 10 Ill. 559; Limpus v. State, 7 Blackf. 43; Bachman v. Fenstermacher, 112 Pa. 331.

⁶⁸ Snoddy v. Foster, 1 Met. (Ky.) 160.

⁶⁹ Ledyard v. Jones, 7 N. Y. 550.

⁷⁰ Marcum v. Burgess, 67 Ala. 556.

wilfully and maliciously injure or destroy it, the officer's negligence is the proximate cause of their acts and he is liable for the consequences.⁷¹ Substantial damages may be recovered for wrongfully refusing to execute a writ of possession, including, it seems, the value of the rents and profits of the premises from the date of the return of the writ to the time of judgment in the action in which the writ was issued, subject to deduction on the principle requiring the plaintiff to do his duty by exercising reasonable diligence to minimize the loss.⁷²

In Connecticut the early cases held an officer who neglected to serve *mesne* process liable for the plaintiff's whole debt.⁷³ In a later case it is said that it is peculiarly the province of the jury to assess the damages, "and in doing so they are not limited to any precise sum. They may even give more than the plaintiff's original debt. Where that debt has been lost by the wilful misconduct or negligence of the officer they may add to it the costs and charges of a second suit. And as the jury may give more than the debt, so they may give less. And if it should be found by them that the failure of the officer to return the writ was owing to a mere mistake in consequence of which the party had suffered nothing, they might give, and indeed it would be their duty to give, only nominal damages."⁷⁴ But the right to recover even to that extent has been denied. "There is no contract between the citizen and the officer, and therefore the private citizen cannot sue for a mere breach of duty. There must be injury."⁷⁵

In the absence of bad faith or other aggravating circumstances the measure of liability for the failure to attach property is the damage sustained,⁷⁶ which is according to some courts, *prima*

⁷¹ Chapman v. Thornburgh, 17 Cal. 87, 76 Am. Dec. 571.

⁷² State v. Harrington, 41 Mo. App. 439.

⁷³ See Gleason v. Chester, 1 Day 152; Hubbard v. Shaler, 2 id. 195.

⁷⁴ Clark v. Smith, 10 Conn. 1, 6, 25 Am. Dec. 47.

It may be shown in an action for making a false return of *mesne* process that the plaintiff owed the

sum for which a recovery had been had and which was lost by the officer's neglect. State v. Dickmann, 146 Mo. App. 396.

⁷⁵ Beck & G. Hdw. Co. v. Knight, 121 Ga. 287, 3 L.R.A.(N.S.) 420; Crawford v. Andrews, 6 Ga. 244.

⁷⁶ Farmers' & Merchants' Bank v. Maines, 183 Fed. 37, 105 C. C. A. 329; Ransom v. Halcott, 18 Barb. 56; Perkins v. Pitman, 34 N. H. 261.

facie the amount of the judgment and costs, with interest on the former.⁷⁷ The sufficiency of the levy made is to be determined by the result of the sale, not by an appraisement made subsequent to the attachment.⁷⁸ If by reason of the officer's neglect a subsequent writ is first levied and a part of the debtor's property is not covered by it the damages against the officer may be mitigated to the extent of the value of that portion if the creditor might have levied upon it.⁷⁹ If the attachment plaintiff knows of the officer's neglect to serve the writ and the property remains in the same situation as before he cannot decline to have a second issued and after its attachment by another creditor recover the value of the property from the officer.⁸⁰ But in Massachusetts a creditor whose lien is lost through an officer's neglect in levying an execution is not bound to waive his rights against the latter and take out another writ unless on request of an offer of indemnity; the officer is liable for the value of the lien that would have been obtained but for his dereliction.⁸¹ An action for the unauthorized release of attached property is for a tort, and the sheriff may show that the released attachment was levied subject to other attachments and that the property attached was delivered to a receiver who held it subject to the liens created by the prior attachments.⁸² The damages recoverable for the negligent entry on the record of satisfaction of a mortgage on land which was subsequently sold on foreclosure and lost to the purchaser are the sum necessary to have satisfied it.⁸³

§ 491. **Same subject.** If property held under process is released by the officer without the approval of the bond by the creditor and the sureties are insolvent, the officer must respond for the resulting loss.⁸⁴ And if property in the officer's custody

⁷⁷ Springett v. Colerick, 67 Mich. 362, 370.

⁷⁸ Ransom v. Halcott, 18 Barb. 56.

⁷⁹ Townsend v. Libbey, 70 Me. 162.

⁸⁰ Clark v. Smith, *supra*; Blodgett v. Brattleboro, 30 Vt. 579; French v. Willett, 10 Bosw. 566.

⁸¹ Franklin County Nat. Bank v. Kimball, 152 Mass. 331. Compare Blodgett v. Brattleboro, 30 Vt. 579; French v. Willett, 10 Bosw. 566.

⁸² Lowenberg v. Jefferies, 74 Fed. 385.

⁸³ State v. Green, 124 Mo. App. 80.

⁸⁴ Miner v. Coburn, 4 Allen 136.

is lost by his negligence he is liable for its value,⁸⁵ and is not entitled to have deducted therefrom the expense which might have been incurred in keeping it.⁸⁶ The value of lost property held under a writ of replevin is to be fixed as of the time it should have been delivered, and interest is to be added thereto. The allegation of value in the complaint in the replevin action is immaterial.⁸⁷ If property lawfully attached and held is sold illegally, and between the time of the attachment and sale it deteriorated in value, without fault on the officer's part, his liability in an action on the case is for its value at the time of the sale.⁸⁸ If mortgaged chattels are levied upon and sold and possession thereof given to the purchaser without requiring him to pay the debt or perform the contract which the mortgage was given to secure, the officer is liable on his bond and cannot avoid responsibility by showing that the purchaser is solvent; but if the property is so situated that the mortgagee may subject it to his mortgage he is bound to do so and can recover from the officer only such damages as he has actually sustained.⁸⁹ By neglecting to tender a deed to the purchaser of land at an execution sale and conveying the land to another the sheriff releases such purchaser and becomes liable for the difference between the amount of his offer and the sum paid by the other person;⁹⁰ and by making an unauthorized sale under an execution on credit he assumes responsibility for the amount for which the property was sold, but not for interest on it;⁹¹ but if interest is received on the purchase price of property so sold the officer must account for it to the execution debtor if the creditors have been paid.⁹²

The measure of damages for taking an insufficient bail bond is, *prima facie*, the amount of the judgment against the debtor, subject to reduction by proof that he was unable to pay.⁹³ That

⁸⁵ Tudor v. Lewis, 3 Met. (Ky.) 378.

⁸⁶ Lovejoy v. Hutchins, 23 Me. 272.

⁸⁷ Hearn v. Ayers, 77 Ark. 497.

⁸⁸ Walker v. Wilmarth, 37 Vt. 289.

⁸⁹ McDaniel v. State, 118 Ind. 239; Slifer v. State, 114 Ind. 291.

⁹⁰ State v. Lines, 4 Ind. 351.

⁹¹ Chase v. Monroe, 30 N. H. 427.

⁹² Farley v. Moore, 21 N. H. 146.

⁹³ West v. Rice, 9 Metc. (Mass.) 564; Danforth v. Pratt, 9 Cush. 318.

fact will not mitigate the damages for refusing to deliver such a bond,⁹⁴ but the insolvency of the bail may be shown for that purpose.⁹⁵ In one case it has been said that knowingly taking an insufficient bail bond bears no analogy to permitting an escape; hence the poverty of the debtor is immaterial. The liability is measurable by the difference between having the amount recovered not paid and paid; or, between having a bad security for it and a good one. In so far as the accepted security was of value the sheriff's liability was lessened.⁹⁶ If an insufficient replevin bond is negligently taken the sheriff is liable to the defendant who has obtained judgment for the return of the property, for its value at the time it was taken and the costs of the replevin suit,⁹⁷ and also of a futile suit on the bond.⁹⁸ The amount recoverable by the plaintiff in the replevin suit is not the value of the property, but the amount of his loss.⁹⁹ Where the defendant in such suit brings an action against the officer the latter may show, the suit in replevin having been dismissed, that the property was owned and possessed by the plaintiff in that suit.¹

Under a statute providing that unless the sureties in a re-delivery bond justify or their justification is waived by the plaintiff the sheriff shall be responsible for them, it is not necessary in an action against him for failure to take a good bond to plead and prove the value of the property released; the sheriff is liable for the value thereof as determined in the proceeding in which the bond was given.²

In the absence of proof of pecuniary loss resulting from a false return the officer's liability, independently of statute, is limited to nominal damages.³ But if the amount an execution calls for has been lost by reason of such a return the offi-

⁹⁴ *Simmonds v. Bradford*, 15 Mass. 82; *Seeley v. Brown*, 14 Pick. 177.

⁹⁵ *Bradt v. Holden*, 12 R. I. 335.

⁹⁶ *Gerrish v. Edson*, 1 N. H. 82.

⁹⁷ *O'Grady v. Keyes*, 1 Allen 284.

⁹⁸ *Norman v. Hope*, 13 Ont. 556, 14 id. 287.

⁹⁹ *Carter v. Duggan*, 144 Mass. 32; *Mortland v. Smith*, 32 Mo. 225, 82 Am. Dec. 128.

¹ *Case v. Babbitt*, 16 Gray 278.

² *Magnus v. Woolery*, 14 Wash. 43.

³ *Pelham v. Way*, 15 Wall. 196, 21 L. ed. 55; *State v. Miles*, 149 Mo. App. 638.

cer cannot lessen his liability for it by showing that it was not due under the judgment;⁴ but he may do so by proving that prior executions in his hands would have exhausted the property.⁵ If property is sold for taxes as the result of a false return of personal service the officer is liable for its reasonable value with interest.⁶ A tax collector who falsely returns that he has been unable to find personal property on which to collect the tax due on land is liable to the owner of the land for the money paid in consequence of such return, there being on the premises sufficient personalty to pay the tax and a tenant having agreed to pay it as a part of the rent.⁷ For a false return of *nulla bona* the officer must respond for the reasonable value of the property as shown by a sale of it under a subsequent execution in favor of another creditor.⁸ Neither the relator's counsel fees nor other disbursements of the trial may be recovered for making a false return to a writ of mandamus.⁹

§ 492. **Same subject.** A judgment creditor can only recover, without proving more, nominal damages against officers who refuse to place upon the tax-roll they make the amount necessary to pay a judgment held by him.¹⁰ But in a very aggravated case officers were held liable for counsel fees.¹¹ A more rigid rule prevails in New York. There an officer who refused to comply with a statute which made it his duty to present to the proper authorities the re-assessment of damages found by a jury as compensation for laying out a highway was held liable for the amount thereby awarded with interest on it; although the plaintiff might have presented his claim to the authorities at a subsequent time he was not obliged

⁴ Bacon v. Cropsey, 7 N. Y. 195.

⁵ Forsyth v. Dickson, 1 Grant's Cas. 26.

Under the Missouri statute the liability for a false return is absolute. State v. Case, 77 Mo. 247.

⁶ State v. Finn, 13 Mo. App. 285.

⁷ Kean v. Kinnear, 171 Pa. 639.

⁸ Thayer v. Roberts, 44 Me. 247.

⁹ People v. New York Cent., etc. R. Co., 116 App. Div. (N. Y.) 849;

People v. Deutscher Krieger Bund, 129 App. Div. (N. Y.) 80.

¹⁰ Dow v. Humbert, 91 U. S. 294, 23 L. ed. 368; Branch v. Davis, 29 Fed. 888. The first case is fully stated and the grounds upon which it is ruled are given in § 161.

¹¹ Newark Sav. Inst. v. Panhorst, 7 Biss. 99; School Dist. v. Burress, 2 Neb. (Unof.) 554.

to do so.¹² Under a statute which makes a town liable to a purchaser of property at a tax sale for all damages which have accrued to him by reason of the tax collector's neglect of duty the measure is the sum paid with interest, not the value of the property.¹³ A drainage commissioner who fails to properly construct a drain is liable for the expense of finishing it according to the plan he should have followed.¹⁴ A plumbing inspector who fails to inspect the plumbing in a house in course of construction is liable to the purchaser for the increased price paid on the faith of the performance of that duty and the expense of putting it in the condition it would have been had such duty been performed.¹⁵ A collector of customs refused to sign a bill of entry unless a sum which he erroneously claimed as duty was paid. After payment under protest the property was delivered to the importer. The officer was liable for the sum collected and the loss arising from the detention of the property, including a decline in its price which occurred between the time of his refusal and its delivery.¹⁶ The purchaser of land, a defect in the title to which was not discovered because of an error on the part of an officer, may recover from him the price paid, the expense of the sale and of a suit to maintain his possession, the defense being made in good faith; possibly, also, the sum expended in making repairs upon the property if that cannot be recovered from the actual owner.¹⁷ If the defendant in a replevin suit is obliged to resort to *mandamus* proceedings to secure the entry by a justice of the peace of a judgment of nonsuit to which he was entitled he may recover the expense of such proceedings in an action against the justice to recover damages for his misconduct.¹⁸ For failing to deliver property seized

¹² Clark v. Miller, 54 N. Y. 528.

¹³ Saulters v. Victory, 36 Vt. 351.

¹⁴ Smith v. State, 17 Ind. 167.

¹⁵ District of Columbia v. Ball, 22 App. D. C. 543.

¹⁶ Barrow v. Arnaud, 8 Q. B. 595.

¹⁷ Brown v. Penn, 1 McGloin 265.

A *bona fide* purchaser from a mortgagor may recover from an officer who has erroneously recorded a

mortgage on the premises in question their value at the time of the conveyance with interest, but not for the value of improvements made after the mistake was discovered. Howe v. Taylor, 9 Ore. 288.

¹⁸ Cagney v. Wattles, 121 Mich. 469.

Expense, including the costs of an appeal, incurred in setting aside

under a writ of detinue there may be a recovery for the loss of possession and the value of its use, as well as for the attorney's fees of the party who was entitled to its possession.¹⁹ The receipt of securities in lieu of cash is attended with liability for so much money as should have been received; the neglect to turn over money within a reasonable time must be compensated for by paying interest.²⁰ The failure to note on a *testatum fieri facias* matter appearing on the judgment, as a waiver of exemption, the debtor successfully claiming the privilege, involves for the resulting loss.²¹ The seizure and detention of a vessel for a pretended infraction of the law is accompanied with liability for the difference between her value at the time of seizure, as shown by a sale, and the price obtained at public auction after she was restored to the owner, and the expense incurred by him, with interest on the amount; expenses incurred after the restoration of the vessel were not recoverable.²²

In the last English edition of Mayne on Damages²³ the law concerning the liability of sheriffs for the breach of miscellaneous duties is thus stated: "The principle that where the sheriff has been in fault the plaintiff is entitled to be placed in the same position by means of damages as if the defendant had done his duty is maintained in actions for delay in executing a writ of arrest;²⁴ in selling under a *fi. fa.*;²⁵ in returning the writ;²⁶ for a false return;²⁷ for not levying.²⁸ In all these the damages are measured, not by the amount of the debt, but by the amount which could or would have been recovered if the breach of duty had not taken place.²⁹ And if the sheriff return

a judgment based on a false return may be recovered. *People v. Barrett*, 141 Ill. App. 168.

¹⁹ *Pruett v. Williams*, 156 Ala. 346.

²⁰ *Board of Justices v. Fennimore*, 1 N. J. L. 242.

²¹ *Wilson v. Arnold*, 172 Pa. 264.

²² *Woodham v. Gelston*, 1 Johns. 134.

²³ 8th ed. (1909) p. 549.

²⁴ *Clifton v. Hooper*, 6 Q. B. 468.

²⁵ *Aireton v. Davis*, 9 Bing. 740;

Bales v. Wingfield, 4 Q. B. 580, n.

²⁶ *Rex v. Sheriff of Essex*, 1 M. & W. 720.

²⁷ *Crowder v. Long*, 8 B. & C. 598; *Heenan v. Evans*, 3 M. & G. 398.

²⁸ *Augustien v. Challis*, 1 Ex. 279; *Mullett v. Challis*, 16 Q. B. 239.

²⁹ And all the probabilities of the case must be looked at; as, for example, whether or not, if the execution had been levied, the plaintiff

nulla bona to a writ of *fi. fa.*, and the creditor knows of goods belonging to his debtor, he need not sue forth a second writ of *fi. fa.*, but may, in an action for a false return, recover the value of the goods which the sheriff ought to have taken.³⁰

"There is a difference to be observed in these actions, viz., that in those the whole gist of which is pecuniary damage some such damage must be proved or the action will fail.³¹ But in others there is an injury to a right, even independent of actual loss, and the fact of loss being negatived merely makes the damages nominal. Thus in an action for a false return,³² for not arresting on *mesne* process,³³ or for permitting a debtor arrested on *mesne* process to escape,³⁴ it has been held that proof of absence of loss entitled the defendant to a verdict.³⁵ In all these cases the truth of the return or the detention of the debtor was only of importance to the plaintiff as contributing to some ulterior result. If no such result could have been produced, or has been effected by it, there was no ground of action. But the case of escape on final process was different. The creditor, it was said, when he was ascertained to be such by a judgment and had charged the debtor had a right to the body of his debtor every hour till the debt was paid.³⁶ This itself was the end, not the means. Consequently,

would have got any benefit from it, the other creditors of the execution debtor having been in a position to make him bankrupt. *Hobson v. Thellusson*, 8 B. & S. 476, L. R. 2 Q. B. 642.

³⁰ Per cur., *Arden v. Goodacre*, 11 C. B., at p. 377, 20 L. J. (C. P.) 184. *Prima facie*, the measure of damage is the value of the goods which might have been and were not levied. *Hobson v. Thellusson*, *supra*.

³¹ *Beck & G. H. Co. v. Knight*, 121 Ga. 287, 3 L.R.A.(N.S.) 420. citing the text.

³² *Wylie v. Birch*, 4 Q. B. 566; *Levy v. Hall*, 29 L. J. (C. P.) 127; *Stimson v. Farnham*, L. R. 7 Q. B. 175, 41 L. J. (Q. B.) 52.

³³ *Curling v. Evans*, 2 M. & G. 349.

³⁴ *Williams v. Mostyn*, 4 M. & W. 145; *Lewis v. Morland*, 2 B. & A. 56-64; *Planck v. Anderson*, 5 T. R. 37, overruling *Barker v. Green*, 2 Bing. 317.

³⁵ So where the action was against the sheriff for selling the reversionary interest of the plaintiff in goods in the possession of an execution debtor. *Tancred v. Allgood*, 4 H. & N. 438, 28 L. J. (Ex.) 362. See, also, *Lancashire W. Co. v. Fitzhugh*, 6 H. & N. 502, 30 L. J. (Ex.) 231.

³⁶ Per Buller, J., *Planck v. Anderson*, 5 T. R. 40.

a right of action for nominal damages arose on any escape, for however short a time, even though no pecuniary damage arose,³⁷ or on any delay in making the arrest.³⁸ It would appear in all cases in which damage is necessary to maintain the action that proof of the breach of duty will lay upon the defendant the *onus* of showing that no damage ensued; but to entitle plaintiff to substantial damage specific evidence of loss must be given.³⁹ For instance, in an action against a sheriff under 8 Anne, c. 14, s. 1, for removing goods without paying the landlord a year's rent, the measure of damages is *prima facie* the amount of rent due, but the sheriff may prove in mitigation of damages that the value of the goods removed was less than the amount."⁴⁰ By giving a false certificate of infancy to a defendant to support his plea of infancy, the plaintiff has ground for the recovery of counsel fees paid by him at a term of court at which the case was continued to secure evidence of the falsity of the certificate, the travel and attendance of the plaintiff and his witnesses, and his expense incurred in obtaining them. In the absence of evidence of the insolvency of the defendant subsequent to the continuance the officer was not liable for the amount of the debt.⁴¹

SECTION 4.

PROBATE BONDS.

§ 493. Bonds for administration of decedents' estates. The responsibility of the obligors in these bonds arises from their contract, which is adapted to secure the performance of the principal's duties. These include making and returning a full and true inventory, care and fidelity in the preservation and administration of the estate, and, in the end, a faithful ac-

³⁷ Williams v. Mostyn, 4 M. & W. 153.

³⁸ Clifton v. Hooper, 6 Q. B. 468.

³⁹ Bales v. Wingfield, 4 Q. B. 580, n.; Wylie v. Birch, 4 Q. B. 566, 578; Scott v. Henley, 1 M. & Rob. 227.

⁴⁰ Thomas v. Mirehouse, 19 Q. B. Div. 563. See Wren v. Stokes, (1902) 1 Irish 167; Woodfall's Land. & Ten. 559, 17th ed.

⁴¹ Maxwell v. Pike, 2 Me. 8.

counting. In the case of decedents' estates assets constitute a trust fund, first for creditors and secondly for legatees and distributees.⁴² The ordinary administration bond has substantially the following conditions: (1) that the administrator will make and exhibit an inventory; (2) that he will well and truly administer the estate; (3) that he will make a true account of his administration; and (4) that he will deliver and pay over to the persons entitled the residue. Distributees have an interest in the performance of all these conditions; creditors only in the performance of the first two.⁴³

⁴² *Ordinary v. Connolly*, 75 N. J. Eq. 521, 138 Am. St. 577; *Dawson v. Dawson*, 25 Ohio St. 443.

⁴³ *Blakeman v. Sherwood*, 32 Conn. 324. See *American S. Co. v. Piatt*, 67 Kan. 294.

In *Ordinary v. Cooley*, 30 N. J. L. 271, *Vredenburg, J.*, gives an interesting sketch of the early practice and the successive statutes on the subject of administration of the personal estates of deceased persons. He says: "In very early times the king, as *parens patriæ*, was entitled to the personal property of intestates. He took possession of them, and, practically, after paying debts, gave two-thirds to the widow and children and kept the balance himself. This payment of debts and giving two-thirds to the widow and children was a matter of grace and not of legal right. He had the legal right to keep the whole if he saw fit. But in those early times the influence of the Roman clergy was very great and continually on the increase. They represented to the king that the souls of the intestates were inconveniently delayed in purgatory for the want of masses said for them, and that it was an unconscientious thing in him to deprive the intestate by distribution thus of his own property just when

he most wanted it, and that the king ought to pass his prerogative in this regard to them so that they could appropriate it to that use, and thus the true owner get the value of his property. Partly by such persuasions and partly from fear of the pope the king finally passed these prerogatives to Roman bishops, who, by virtue thereof, stood in the king's shoes, and so legally entitled to the whole personal estate of intestates; and this is the origin of the ecclesiastical courts of England, and the prerogative and orphans' courts in this state. The Roman clergy, being thus under no legal obligation to pay debts or to distribute any part of the estate to the next of kin, felt bound in conscience strictly to execute the trust. The widow and children easily acquiesced in this arrangement, but the creditors were always somewhat reluctant; and accordingly we find that the barons at Runnymede procured an insertion in *Magna Charta* that the bishops should pay the debts and distribute. But the Roman clergy had influence enough to avoid its execution. So that this provision of the great charter fell obsolete. Not only so, but afterwards, in the great charter of Henry the Third, they had

§ 494. How such bonds made; what recoveries may be had.
Such bonds are usually executed to the state or to some officer

influence to cause the whole subject-matter to be ignored. Things remained in this condition, the bishops having the legal right to all the personal property of intestates, and without either paying debts or accounting to the next of kin, until the thirteenth year of the reign of Edward the First, when it was enacted that the ordinary should be bound to pay the debts of the intestates as far as his goods extended. But the ordinary yet gave no security whatever, and all the residuum, after the payment of debts, still remained in his hands to be disposed of for pious uses. Thus it continued until the thirty-seventh year of the reign of Edward the Third, when parliament, in consequence of the flagrant abuses practiced, enacted that 'in case where the death of an intestate occurs, the ordinary shall depute of the next and most lawful friends of the dead person to administer his goods; which persons deputed shall have action to demand and recover as executors the debts of said intestate to administer and dispense for the soul of the dead, and shall answer also in the king's courts to others to whom the said deceased was holden and bound.' It will be observed that this statute merely took from the ordinaries the power to administer, and compelled them to grant the administration to the next and most lawful friends of the intestate; and all the administrator had to do was to pay the debts. He gave no bond of security; and he retained all the residuum after the payment of debts as his own property.

"There was yet no such thing as

distribution amongst the next of kin, or security given by the administrator either to pay debts or to distribute. As soon as the debts were paid the estate was administered and there was nothing further to be done by the administrator. All the rest of the estate belonged to himself to *dispense*, in the language of the statute, for the soul of the dead. The administration by this statute, it will be observed, was granted to the next and most lawful friends of the intestate. The language was afterwards altered by the statute of Henry VIII., and the ordinary compelled to grant the administration to the widow or the next of kin of the intestate; and which is the same as our own statute now in force. It will be perceived that as yet no change is made in the rights of the administrator. There is yet no statute of distribution; the administrator takes all after the payment of debts. But this statute of 21 Henry VIII. introduces one great change. It requires, for the first time in the history of administrations, that the ordinary shall take surety from the administrator, not to distribute, but only to pay debts. It could not have been, surely, that the administrator shall settle in the prerogative court, and pay the surplus after the payment of debts to the next of kin, for the surplus yet belonged to the administrator himself, to do with it as he pleased; and, moreover, there was as yet no statute of distribution. But the only surety that could be required was that the administrator would make and exhibit an inventory, and pay the debts, or, as it was then technically

having probate jurisdiction. When sued for the benefit of the estate, as the practice is in some states, especially for the breach

called, administer the estate. So that, by the statute of 21 Henry VIII., the bond given by the administrator contained two conditions; one was the exhibiting an inventory, the other was to pay the debts. These, it will be observed, are the two first conditions in the bond now required by our statute. * * * But these two first conditions were provided in the interest of creditors, and not in the interest of the next of kin; because there were yet no next of kin that could take or had an interest in the estate. Things remained in this condition until the 22d of Charles II., over a hundred years, when the first English statute of distributions was passed. This statute provided that the ordinary should call administrators to account, and order a just and equal distribution (after debts and funeral expenses were paid) among the wife and children and next of kin, substantially as our statute does now. And it provided in the second place, that the ordinary should require of the administrator a bond with security, and with the same conditions as our statutes now provide, viz.: 1st, to file an inventory; 2d, to well and truly administer the estate, or, in other words, to pay the debts; 3d, account in the prerogative court; and 4th, pay the surplus found upon such accounting to the next of kin. Hence it is manifest that these two last conditions in the bond were required to compel the administrator to perform the two additional duties imposed upon him by the last statute of 22 Charles II., viz.: 1st, to account to the prerogative court; 2d, to pay over the

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surplus found upon such accounting to the next of kin. This is further manifested from another historical fact. After the said statute of Edward III. took away from the Roman bishops the power to administer themselves, and forced them to grant administration to the next of kin, like other people, they were very prompt to force others to be honest, as soon as they had no temptation to be otherwise themselves, and they attempted to force the administrator to give security to distribute to the next of kin; but they were restrained by the courts of common law, by prohibitions, upon the ground that the statute of Edward III. meant to give to the administrator appointed by the ordinary the same rights of property that the ordinary himself had before that statute was passed, and that consequently the administrator was not obliged to account or distribute, and that his only duty was to pay the debts, and that he might do with the surplus what he pleased; and no bond ever was or ever could be required of the administrator to account or distribute until those additional duties were expressly imposed upon him by the said statute of 22 Charles II. This statute was passed in the year 1661, and was among the very first of our colonial statutes, and has to this day remained unaltered upon our statute book. So that by this short historical résumé, it appears that originally the administrator neither paid debts nor distributed. After some hundreds of years, he was first made to pay debts; after some more hundred of years he was next made to give se-

of the first condition, the recovery inures to the benefit of all parties interested in the same order as they would have been benefited by a due performance of the administrator's duty. There can be no recovery beyond nominal damages unless there is such misconduct of the administrator as results in actual injury to some person for whose protection the bond is required.⁴⁴

The heir at law may prosecute a suit on the bond in the name of the obligee for neglect to return an inventory, although his precise interest as heir has not been definitely ascertained, either by settlement of the administration account or by an order for distribution;⁴⁵ but one who claims as next of kin and is not entitled to a distributive share cannot prosecute such an action.⁴⁶ In the former case the full value of the property withheld from the inventory may be recovered. The estate is the loser to that precise extent; and the loss should be made good. If any equitable circumstances exist which would go to show that the loss is less it devolves on the defendant to prove them.⁴⁷ The plaintiff acts as trustee for the persons beneficially interested in the estate.⁴⁸ And the money recovered must be applied

curety to pay debts; after over a hundred years more, he was made to distribute the surplus after paying the debts, and to insert in his bond the additional condition that he would distribute. So that it would appear that these conditions of our administration bonds of the present day were the growth of many centuries of English legislation, each additional condition being added as each additional duty was imposed by statute upon the administrator. Thus we see how each stone was laid in the edifice, and came to have its peculiar form and color. The very antiqueness of the language of these conditions gives evidence of their origin, and their natural import is in accord with their history."

⁴⁴ *Edwards v. White*, 12 Conn. 28; *Spencer v. Wilkinson*, 11 id. 1;

Adams v. Spaulding, 12 id. 350; *Scarborough v. State*, 24 Ark. 20; *State v. Bloxom*, 1 Houst. 446.

The costs of proceedings taken to compel an administrator to account are chargeable to his sureties; but not the amount paid for counsel fees therein. *Mann v. Everts*, 64 Wis. 372.

⁴⁵ *Blakeman v. Sherwood*, *infra*.

⁴⁶ *Judge of Probate v. Southard*, 62 N. H. 228.

⁴⁷ *Blakeman v. Sherwood*, 32 Conn. 324, 329; *Minor v. Mead*, 3 Conn. 289; *State v. Bennett*, 24 Ind. 383; *Boston v. White*, 21 Pick. 58. See *Dawson v. Dawson*, 25 Ohio St. 443.

⁴⁸ *Thomas v. Leach*, 2 Mass. 152; *Paine v. Ball*, 3 Mass. 235; *Skinner v. Phillips*, 4 Mass. 874; *Rowland v. Isaacs*, 15 Conn. 115.

to the payment of all the debts of the intestate in their order, giving preference to those that have a preference by law and making a ratable distribution among all others.⁴⁹ If the estate be insolvent each creditor is entitled to receive an average with others.⁵⁰ There is no liability beyond the amount of assets which come to the hands of the administrator. But it is his duty to apply them to the payment of debts; and a suit on his bond by a creditor having a debt so liquidated that it is the administrator's duty presently to pay it is an action to recover for a breach of the bond. And it is no answer to such an action that the administrator has not wasted or misapplied the assets. His retention of the assets and failure to apply them to such debt is a breach of the bond.⁵¹ A creditor is in such cases entitled to recover the amount of his debt on the bond if the assets are sufficient; and if not, such ratable proportion thereof

⁴⁹ *Dickerson v. Robinson*, 6 N. J. L. 202, 10 Am. Dec. 396. In this case Kirkpatrick, C. J., said: "This is certainly the course of the ecclesiastical courts in England. * * * To show the more clearly that the application of the money recovered in these actions must necessarily be to the payment of all debts, let us pursue the thing a little. Let us suppose the administrator to have wasted the whole estate, and to be himself insolvent, and that there is nothing to respond to creditors but the administration bond; shall he that can first get the assignment of it, and a verdict and judgment for his debt, even though it be a simple contract debt, swallow up the whole penalty, take the whole money recovered to himself, and leave all other debts, even of a superior order, altogether unpaid? This, I think, would be hardly maintained by anybody; and it is to prevent this that the money recovered must be distributed by the judge of the prerogative court. What then is to be done upon such

a recovery? Is the judge of the prerogative court to divide the sum so recovered among all the creditors, and so pay the assignee of the bond but a part of his debt [as would be the case if the assignee recovered only the damage to himself], and then put every other creditor to go through with the same course, and make a like division of what he might recover? And if it be an estate in which there is a surplus, shall he, after all, compel the next of kin to run the same race? This would, indeed, as Lord Ch. J. Holt says, *be endless and infinite*. But it is not so. No such breach can be assigned. The law runs itself into no such absurdity."

"Debts" include all enforceable claims against the decedent. *Lothrop v. Parke*, 202 Mass. 104.

⁵⁰ *Warren v. Powers*, 5 Conn. 373.

⁵¹ *Pierce v. Maetzold*, 126 Minn. 445; *American S. Co. v. Piatt*, 67 Kan. 294; *Elizalde v. Murphy*, 11 Cal. App. 32; *Cannon v. Cooper*, 39

as it was the administrator's duty to pay,⁵² *Prima facie* the sureties are liable to the extent of the assets which have come to the hands of the administrator within the limit stated in the bond.⁵³ If no inventory has been filed or account rendered and the estate has not been represented to be insolvent its solvency is presumed in favor of a judgment creditor, and a failure to pay his judgment carries liability for the amount of it.⁵⁴

Suits by legatees and distributees may also be instituted for the amount of the legacy or distributive share when the administration has gone to such point that the immediate duty to pay it is imposed and neglected.⁵⁵ Service performed or money expended in aid of the defendant's administration cannot be shown in support of a suit on his bond, nor as a set-off against payments by the administrator, but are a claim on the defendant

Miss. 784, 80 Am. Dec. 101; State v. Nichols, 10 Gill & J. 27; Lining v. Giles, 3 Brev. 530; People v. Dunlap, 13 Johns. 437; Hazen v. Durling, 2 N. J. Eq. 133; Brown v. Glascock, 1 Rob. (Va.) 461.

When the bond expressly admits that the surety is presently indebted in a specific sum unless the administrator shall perform his duties the surety becomes indebted as soon as default is made though no judgment has been rendered on the bond. Ransom v. Brinkerhoff, 56 N. J. Eq. 149.

⁵² McKim v. Haley, 173 Mass. 112; Peirce v. Whittemore, 8 Mass. 282; Thomson v. Searcy, 6 Port. 393; Fairfax v. Fairfax, 5 Cranch 19, 3 L. ed. 24; Sturdivant v. Raines, 1 Leigh 481; Burnett v. Harwell, 3 id. 89; Gardner v. Vidal, 6 Rand. 106; Miller v. Gill, 4 Ala. 359; Seat v. Cannon, 1 Humph. 471; Gordon v. State, 11 Ark. 12; Calla v. Patterson, 18 B. Mon. 201; Daws v. Shea, 15 Mass. 6, 8 Am. Dec. 80; Inglehart v. State, 2 Gill & J. 235; People v. Summers, 16 Ill. 173; Warren v. Powers, 5 Conn.

373; Willey v. Paulk, 6 id. 74; People v. Randolph, 24 Ill. 324; State v. Campbell, 10 Mo. 724; Strong v. White, 19 Conn. 238; Hobbs v. Middleton, 1 J. J. Marsh. 176; Smith v. Fagan, 2 Dev. 292; Chairman v. Moore, 2 Murph. 22; Ordinary v. Bracey, 2 Bay 542; People v. Dunlap, 13 Johns. 437; Gookin v. Hoyt, 3 N. H. 392; O'Connor v. Such, 9 Bosw. 318.

⁵³ McAlpine v. Kratka, 98 Minn. 151.

⁵⁴ McIntire v. Parker, 195 Mass. 155.

⁵⁵ Ralston v. Wood, 15 Ill. 159, 58 Am. Dec. 604; State v. Bennett, 24 Ind. 383; Jackson v. Justices, 2 Bibb 292; State v. Ruggles, 20 Mo. 99; Judge v. Looney, 2 Stew. & P. 70; Judge v. Emery, 6 N. H. 141; Judge v. Coulter, 3 Stew. & P. 348.

Where the personal estate of an intestate consisted of slaves it was held in action upon the administration bond by a distributee that the plaintiff could not recover both the appraised value of the slaves and their increase and hire from the time of granting the letters or the

individually.⁵⁶ The sureties are liable for any default on the part of their principal in not accounting for moneys received before as well as after the execution of their bond;⁵⁷ they are also chargeable with the value of the use of property of the estate used by their principal for his own benefit,⁵⁸ and for interest on money he withheld and the resulting increased expense in administering the estate.⁵⁹ Where the breach is the non-payment of a dividend struck in the probate court on a plea of payment receipts showing payment to the plaintiff by a former administrator are admissible in evidence, and their effect cannot be defeated by showing waste by such administrator.⁶⁰

The liability of the sureties does not extend beyond the acts and omissions of their principal in his representative capacity.⁶¹ Where real estate of the decedent was not administered on, but administration was dispensed with by agreement among the heirs, they all being *sui juris* and having joined in a deed conveying it to a purchaser at private sale, the payment of the purchase price to the person who was administrator was not a

appraisement. He may claim their appraised value and interest thereon, or their increase and hire up to, and real value at, the time of bringing the action, and the pleadings must disclose which course he elects to take. *Burch v. State*, 4 Gill & J. 444.

⁵⁶ *Gordon v. Clapp*, 5 Vt. 129.

⁵⁷ *McIntire v. Linehan*, 178 Mass. 263; *Ellyson v. Lord*, 124 Iowa 125.

⁵⁸ *Musick v. Beebe*, 17 Kan. 47. See next note.

⁵⁹ *American S. Co. v. Piatt*, 67 Kan. 294.

Under sec. 114 of the Illinois Administration Act sureties are liable for statutory interest if their principal has not paid it. *McDonald v. People*, 123 Ill. App. 346.

Interest may be recovered where securities were converted in bad faith. *Elizalde v. Murphy*, 11 Cal. App. 32.

If an executor has forfeited his

right to compensation for services performed prior to his misconduct his sureties will not be credited with the value thereof; nor will they be charged with interest on the funds of the estate if he received none prior to his breach of trust. They will be liable for reasonable expenses incurred in obtaining his removal and the appointment of his successor, and for the value of the use of property of the estate occupied by their principal, but not for the services of the new administrator or the expense of prosecuting the action on the bond. *McIntire v. Mower*, 24 Mass. 233.

⁶⁰ *Gordon v. Clapp*, 5 Vt. 129.

⁶¹ *Costigan v. Kraus*, 158 Ky. 818, holding sureties on an executor's bond not liable for the proceeds of the sale of land of the testator in the absence of a power to sell under the will.

payment to him in his representative capacity, and the sureties on his bond were not liable for his failure to pay the money to his co-heirs.⁶² The same rule applies if the money was held by the person who was executor in the capacity of a trustee for the widow and heirs of the decedent.⁶³ Where the administrator collected rents which accrued after the death of his intestate and which belonged to the widow and heir, and which he, as administrator, had no right to collect the sureties on his bond were not liable therefor, notwithstanding he expended the greater part of the money in payment of claims against the estate. The sureties were entitled to credit for such expenditures, regardless of the source from which the funds to make them came.⁶⁴ Interest may be recovered in an action by an administrator *de bonis non* for a *devastavit*.⁶⁵

§ 495. Actions on bond as to sureties; liability for executor's debt to estate. In an action against the sureties on an administrator's or a guardian's bond for a breach by the principal the proceedings taken in the probate court, in passing on the account rendered by the administrator or guardian, and a decree rendered therein directing him to pay over a sum found remaining in his hands are admissible in evidence against the sureties although they were not parties to the same. Such a decree is equally conclusive upon the principal and his sureties; and upon the refusal of the former to obey it the liability of the sureties attaches; they cannot go behind the decree to inquire into the merits of the matter therein passed on unless they can show that it was obtained by fraud or collusion.⁶⁶ A

⁶² Johnson v. Hall, 101 Ga. 687; Cronan v. Cotting, 99 Mass. 334; Shields v. Smith, 8 Bush 601; Pace v. Pace, 19 Fla. 454. See Ashby v. Ashby, 7 B. & C. 444.

⁶³ People v. Petrie, 191 Ill. 497, 94 Ill. App. 652; Clay v. Hart, 7 Dana 1; Hinds v. Hinds, 85 Ind. 312. See Bellinger v. Thompson, 26 Ore. 320; In re Quimby's Estate, — N. J. L. —, 92 Atl. 56.

⁶⁴ Denton v. Crouch, 101 Ky. 386. Rents received may be recovered

though the lands from which they were derived were leased without an order of court. Lyons v. Lyons, 101 Mo. App. 494.

⁶⁵ State v. Morrison, 244 Mo. 193.

⁶⁶ Pierce v. Maetzold, 126 Minn. 445; Judge of Probate v. Sulloway, 68 N. H. 511, 73 Am. St. 619, 49 L.R.A. 347; Deobold v. Oppermann, 111 N. Y. 531, 7 Am. St. 760, 2 L.R.A. 644; Choate v. Arrington, 116 Mass. 552, 556; Douglass v. Ferris, 138 N. Y. 192, 34 Am. St.

clause in a decree finding the amount due from the guardian to his ward to the effect that the same was without prejudice to any defense the sureties might have in any action against them on the bond is inoperative as to the legal effect of the decree.⁶⁷ As a general rule sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court or an opportunity to be heard in their defense, but administration bonds form an exception to this rule.⁶⁸

The principle that sureties are generally liable only for such assets as may have come to their principal's possession or which might have been reduced to possession by the exercise of due diligence does not obtain where he owes a debt in his individual capacity to the estate he represents. In such a case the right to demand and the obligation to pay co-exist in him, and the law presumes instantaneous payment and extinguishment of the debt on the qualification of the representative. The sureties in such a case are conclusively liable for the debt.⁶⁹ The same principle has been applied where a debt was due from an

435; *Bellinger v. Thompson*, 26 Ore. 320; *Treweek v. Howard*, 105 Cal. 434; *Crook v. Newborg*, 124 Ala. 479; *Jacobson v. Anderson*, 72 Minn. 426; *Cross v. White*, 80 Minn. 413, 81 Am. St. 267; *Botkin v. Kleinschmidt*, 21 Mont. 1, 69 Am. St. 641; *Thompson v. Dekum*, 32 Ore. 506; *Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125; *Slagle v. Entrenkin*, 44 Ohio St. 637; *Braiden v. Mercer*, 44 Ohio St. 339; *Shepard v. Pebbles*, 38 Wis. 373; *Scofield v. Churchill*, 72 N. Y. 565; *Knox v. Kearns*, 73 Iowa 286; *Knepper v. Glenn*, 73 Iowa 730; *Stovall v. Banks*, 10 Wall. 583, 19 L. ed. 1036; *Harrison v. Clark*, 87 N. Y. 572; *Briggs v. Manning*, 80 Ark. 304; *McDonald v. People*, 222 Ill. 325.

Similarly in case of a decree rendered by a court of competent jurisdiction, other than a probate court,

allowing a claim against an estate. *Connecticut Mut. Life Ins. Co. v. Schurmeier*, 125 Minn. 368.

The sureties are concluded as to the capacity in which the administrator received funds by the court's approval of his sales and conveyances. *Ellyson v. Lord*, 124 Iowa 125.

⁶⁷ *Allen v. Kelly*, 55 App. Div. (N. Y.) 454.

⁶⁸ Cases cited in first note to this section.

⁶⁹ *McGaughey v. Jacoby*, 54 Ohio St. 487; *Charles v. Jacobs*, 9 S. C. 295; *Succession of Bailey*, 30 La. Ann. 75; *Davenport v. Richards*, 16 Conn. 310; *Wright v. Lang*, 66 Ala. 389; *Seawell v. Buckley*, 54 id. 592; *Choate v. Thorndike*, 138 Mass. 371; *Probate Court v. Merriam*, 8 Vt. 234; *State v. Morrison*, 244 Mo. 193.

insolvent firm of which the executor was a member though insolvency occurred before the testator's death.⁷⁰ In some states this rule is regarded as vesting wholly on technical grounds, and will not be extended so as to work injustice to sureties. Hence they will not be so liable beyond the ability of their principal to pay his debt to the estate. By signing the bond the sureties have aided him to get possession of assets from his indebtedness only to the extent of his ability to pay it. If in such a case the executor accounts to the probate court for his debt and distribution is therein decreed accordingly a court of equity will grant the relief.⁷¹ The sureties on a special statutory bond of a public administrator, who is also sheriff, are primarily liable for a breach of their bond; resort cannot be had to the bond given as sheriff until the remedies on the special bond are exhausted.⁷² The sureties are liable for the costs in an action against their principal by a creditor of the estate who recovered judgment therein.⁷³

In New Hampshire if the executor is charged, pursuant to a decree of the probate court, with the amount of his indebtedness to the testator the liability of the sureties therefor is not affected by the fact that the executor was insolvent at the date of his appointment and continued unable to discharge his indebtedness to the estate. It is there provided by statute that all debts due from the executor or administrator to the

⁷⁰ *Bassett v. Fidelity & D. Co.*, 184 Mass. 210, 100 Am. St. 552.

⁷¹ *Costigan v. Kraus*, 158 Ky. 818; *State v. Gregory*, 119 Ind. 503; *McCarty v. Frazer*, 62 Mo. 263; *Terhune v. Aldis*, 44 N. J. Eq. 146; *Baucus v. Barr*, 107 N. Y. 624, affirming without opinion, 45 Hun 582; *Rader v. Yeargin*, 85 Tenn. 486; *Lyon v. Osgood*, 58 Vt. 707; *Garber v. Commonwealth*, 7 Pa. 265; *Piper's Est.*, 15 id. 533; *Gottsberger v. Smith*, 5 Duer 566; *Harker v. Irick*, 10 N. J. 269. *Contra*, *Bassett v. Fidelity & D. Co.*, *supra*.

⁷² *Briggs v. Manning*, 80 Ark. 304. See § 481.

⁷³ *McKim v. Haley*, 173 Mass. 112. See *McIntire v. Mower*, stated in note to the preceding section.

There may be a recovery, in addition to the extent to which the estate has been a loser, of all costs incurred, reasonable counsel fees resulting from the proceedings to remove the administrator and the prosecution of the suit on the bond, though the latter service was performed by one who might not have recovered attorney's fees from the estate. *Ordinary v. Connolly*, 75 N. J. Eq. 521, 138 Am. St. 577.

testator or intestate shall be assets in his hands for which he shall account in the same way and manner as for a debt against any other person, and the judge of probate is authorized to ascertain and liquidate such debt and charge the executor or administrator therewith. There is no power in such judge, said the court, to relieve the executor from that liability, though a surety might, upon taking appropriate steps, be relieved; as if, *e. g.*, he executed the bond in ignorance of the executor's insolvency, the executor might be removed and another appointed, or he might be discharged under a statute and a new bond required.⁷⁴ If a responsible party was bound with the executor for the debt, either as joint principal or as surety, equity would compel him to pay on the application of the surety. Referring to the rule in Vermont and New Jersey, which holds the surety for the executor's debt only when he is solvent, it is said that when the executor is solvent and able to pay and no surety is needed, the surety is responsible for his debt, but when the executor is unable to pay and a surety's liability would be valuable the surety is not liable.⁷⁵

In California the statute, in connection with the principles of equitable estoppel presented by the facts, has led to the declaration of the rule that the sureties upon the bond of an executor are guarantors of a debt owed by him to the testator.⁷⁶ But it is otherwise as to administrators, the code declaring that no executor or administrator is accountable for any debts due to the decedent if it appears that they remain uncollected without his fault. As to administrators the sureties are liable for the debt or any part thereof which remained unpaid through the fault of the administrator, where he was able to pay and failed to do so.⁷⁷

§ 496. Guardian's bond; sureties' liabilities. A surety upon a bond given by a guardian for managing the whole estate of the ward is liable for all money in the hands of the guardian

⁷⁴ See *Benchley v. Chapin*, 10 Cush. 173, 176.

⁷⁵ *Judge of Probate v. Sulloway*, 68 N. H. 511, 73 Am. St. 619, 49 L.R.A. 347.

⁷⁶ *Treweek v. Howard*, 105 Cal. 434.

⁷⁷ *Walker's Est.*, 125 Cal. 242, 73 Am. St. 40; *Sanchez v. Forster*, 133 Cal. 914.

belonging to the ward, whether received before or after the undertaking.⁷⁸ It includes property of the ward received by him in another state,⁷⁹ and is not limited to such as was owned by the ward at the time the bond was executed, but extends to that subsequently acquired which came into the guardian's hands,⁸⁰ and to money which could and should have been collected by a faithful discharge of his duties. That liability exists notwithstanding a subsequent guardian resorted to a security for the payment of such indebtedness and realized a part of it.⁸¹ An action at law, however, cannot be maintained before the accounts have been adjusted and a specific sum decreed to be paid over,⁸² but a court of equity, if special circumstances exist as where

⁷⁸ *State v. Buck*, 63 Ark. 218; *McDowell v. Caldwell*, 2 McCord Ch. 43, 16 Am. Dec. 635; *Merrells v. Phelps*, 34 Conn. 109; *Ammons v. People*, 11 Ill. 6. See § 494.

In *Eockenstedt v. Perkins*, 73 Iowa 23, 5 Am. St. 652, the only evidence as to the possession of the money by the guardian when the bond was executed was that it had been received by him six days prior to that time. The court refused to set aside a judgment against the sureties on the ground that it was not sustained by the proof.

⁷⁹ *McDonald v. Meadows*, 1 Met. (Ky.) 507.

There is a tendency in some decision to limit the liability of the sureties of personal representatives to assets within the state of their appointment. *Keaton v. Campbell*, 2 Humph. 224; *Snodgrass v. Snodgrass*, 1 Baxter 157. The same rule was assumed to be applicable to a guardian's sureties. *Andrews' Heirs*, 3 Humph. 592. It is said that there are grave difficulties in holding, as a general proposition, that the sureties of a guardian whose bond has been made with reference to the estate of the ward in one

state may also be held liable for an equal amount of assets brought from another state thus covering the entire penalty which the statute only requires to be in double the value of the estate. *Pearson v. Dailey*, 7 Lea 674. In the case last referred to the ward's estate consisted wholly of a fund in the hands of a guardian in another state, which the domestic guardian obtained possession of through the court which appointed him, and the receipt of which he acknowledged in his report. His sureties were liable for it. See *Brooks v. Tobin*, 135 Mass. 69.

⁸⁰ *Gray v. Brown*, 1 Rich. 351.

⁸¹ *Ames v. Williams*, 74 Miss. 404.

⁸² *Cook v. Ceas*, 143 Cal. 221; *Anderson v. Maddox*, 3 McCord 237; *State v. Strange*, 1 Ind. 538; *Hunt v. White*, 1 Ind. 105; *Barrett v. Monroe*, 4 Dev. & Bat. 194; *Stilwell v. Mills*, 19 Johns. 304; *Salisbury v. Van Hoesen*, 3 Hill 77; *Probate Court v. Slason*, 23 Vt. 306. *Contra*, *Justices v. Willis*, 3 Yerg. 461; *Foster v. Maxey*, 6 id. 224. See *Call v. Ruffin*, 1 Call (Va.) 333.

an insolvent guardian has defaulted and absconded, will, all the parties being before the court, determine the liability of the sureties.⁸³ Nor can a guardian's sureties be made liable for work done for him by the ward.⁸⁴ In actions upon the bond the recovery is measured by the actual injury;⁸⁵ and where there is merely a technical breach of the condition, but no loss, only nominal damages can be recovered.⁸⁶ If the breach consists in the conversion of a chose in action the sum apparently due upon it is *prima facie* the damages;⁸⁷ and if it consists in the failure to account on the ward's attaining his majority and it is not shown that the guardian received interest, the recovery, as against the sureties, is the sum due with simple interest; and, in the discretion of the court, the penalty prescribed by statute; exemplary damages cannot be awarded.⁸⁸ If a guardian whose accounts have been restated for fraud in obtaining credits in his final settlement has paid out more for the support of his ward than he has been given credit for he should not be charged with more than the legal rate of interest on the account due from him.⁸⁹ If one bond is given to secure three wards the recovery thereon must be limited to the amounts proportionately due those who are plaintiffs.⁹⁰ In Indiana the recovery in an action by one of the parties interested must be for the entire existing liability; the amount collected is brought into court for distribution.⁹¹ In no case can the damages exceed the penalty of the bond,⁹² except in jurisdictions where interest is allowed.⁹³

By taking title to his ward's land in his own name and encumbering it to secure a loan for his benefit a guardian renders

⁸³ Duck v. McGrath, 160 App. Div. (N. Y.) 482.

⁸⁴ Phillips v. Davis, 2 Sneed 520.

⁸⁵ State v. Murray, 24 Md. 310, 87 Am. Dec. 608.

⁸⁶ Fuller v. Wing, 17 Me. 222; Buchanan v. State, 106 Ind. 251; Probate Court v. Slason, 23 Vt. 306 (as where no account has been rendered or required in the probate court, though the guardianship has been terminated).

⁸⁷ State v. Berning, 74 Mo. 87.

⁸⁸ Peelle v. State, 118 Ind. 512.

⁸⁹ Campbell v. Clark, 63 Ark. 450.

⁹⁰ Knox v. Kearns, 73 Iowa 286; Hooks v. Evans, 68 Iowa 52; Edmonds v. Edmonds, 73 Iowa 427.

⁹¹ Moody v. State, 84 Ind. 433.

⁹² Woods v. Commonwealth, 8 B. Mon. 112.

⁹³ See §§ 477, 478.

Interest on balances in his hands may be recovered if the guardian has failed to realize it; Gay v. Whidden, 64 Fla. 295.

his sureties liable for the reasonable expenses of a suit by the ward to set aside the incumbrance, including counsel fees, especially if the surety has consented to the suit and participated in it.⁹⁴ A guardian who has received the estate of his ward safely invested according to law and who changes such investment, without authority and without cause, for one comparatively worthless, and which was, *prima facie*, a questionable investment for trust funds, is liable on his bond for the sum so invested and a sum equal to the intervening dividends, less any money realized from the new investment and used for the benefit of the ward. If he acted in good faith interest should not be compounded.⁹⁵ A guardian cannot enlarge the obligation of his sureties by receiving and charging himself with moneys which he had no legal right to receive⁹⁶ and for which a special bond should have been given, as upon the sale of real estate.⁹⁷ So long as the real estate of a ward is in care of the administrator of the ward's ancestor the guardian is not chargeable with its rental value, but only with the money actually received by him.⁹⁸ An order removing a guardian cannot be rescinded at a term of court subsequent to that at which it was made; the effect of such order, so far as the surety is concerned, is to limit his liability for the money for which the guardian was liable when the order was made. If no new guardian is appointed and no order made concerning the disposition of funds in the hands of the one removed, the surety is not liable for interest thereon,⁹⁹ but where on removal of the guardian the court adjusts and settles his accounts and makes an order fixing his liability and directing him to pay over funds in his hands to his successor the sureties are liable for interest from the time of such settlement.¹ There may be recovered from the sureties of a guardian who unauthorizedly leases the

⁹⁴ State v. Smith, 139 Mo. App. 101; State v. Tittmann, 134 Mo. 162.

⁹⁵ State v. Washburn, 67 Conn. 187; Pearson v. Haydel, 87 Mo. App. 495.

⁹⁶ Johnson v. Chamberlain, 18 App. Div. (N. Y.) 495.

⁹⁷ Allen v. Kelly, 55 App. Div. (N. Y.) 454.

⁹⁸ Haden v. Sweptston, 64 Ark. 477.

⁹⁹ Id.

¹ Beakley v. Cunningham, 112 Ark. 71.

land of his wards for a share of the products and buys these himself, keeping his accounts in such shape that it cannot be ascertained what is due the wards, the cash rental value of the land; and where such and other culpable neglect is accompanied by fraud interest on the yearly balance found due may be added annually.² The periodical settlements made by a guardian and approved by the court are but *prima facie* correct; it is otherwise as to an approved report made by a guardian on resignation; that is conclusive upon the sureties unless impeached in the court in which it was made by proof of fraud or such other facts as would invalidate a judgment.³ As between different sets of sureties, the first are liable for any *devastavit* prior to their release on approval of the new bond; and the second are liable for prior misappropriations upon the ground of their principal's failure to make a true account.⁴

§ 497. **Mitigation of damages.** Where the father or mother of a ward is called to account as guardian the general rule is that the sureties upon the bond cannot claim an allowance out of the ward's estate for his support if the parent was able to maintain him. The law imposes that duty upon parents.⁵ If the ward's estate is small and the father never made any charge for his support the sureties on the bond cannot be granted an allowance on account of it.⁶ Neither will such an allowance be made in the absence of proof that the father was unable to support the ward, where he had the benefit of his labor.⁷ Courts, "however, will look with liberality to the circumstances of each particular case, and to the respective estates of father and children, and will authorize the income arising from the estates of infants to be applied to their support whenever, under all circumstances, it appears to be proper."⁸ When the ward lives with the guardian as a member of his family, though not legally

² Charles v. Witt, 88 Kan. 484.

³ American B. Co. v. People, 46 Colo. 394.

⁴ Matthews v. Mauldin, 142 Ala. 434, citing local cases.

⁵ Guion v. Guion, 16 Mo. 48; Cummings v. Cummings, 8 Watts 366; Presley v. Davis, 7 Rich. Eq.

195; Edwards v. Durgan, 19 Grant's Ch. (Up. Can.) 101; Martin v. Foster, 38 Ala. 68.

⁶ Walling's Case, 35 N. J. Eq. 105; Pratt v. McJunkin, 4 Rich. 5; Myers v. Appleton, 45 Ind. 160.

⁷ Wilson's Case, 38 N. J. Eq. 205.

⁸ Evans v. Pearce, 15 Gratt. 513,

such, receiving support on the one hand, and on the other rendering the ordinary household services required by parents of their children, such services will be presumed, in the absence of a clear showing to the contrary, to be a sufficient compensation for the board of the ward.⁹ On his final accounting a guardian will not be credited for items of board, clothing, medicine and tuition bills for which he did not intend to charge at the time the expenses were incurred.¹⁰ When application is made on behalf of a parent who was guardian *de facto* for credit on account of support furnished his ward it must be made before the guardianship terminated, otherwise it will not be granted without the clearest proof that justice requires it.¹¹ If the person who is guardian is not charged by law with the duty of supporting his ward he cannot waive his right to charge therefor to the damage of the sureties on his bond.¹² If an executor or administrator has been guilty of a flagrant breach of his trust the commissions which would otherwise have been due him will not be allowed his sureties in mitigation of their liability.¹³ Where a joint bond has been given by administrators for the faithful administration of the estate that may come to their hands and all the personal property of the decedent has been possessed by them and one of them has committed waste after the other's death the surety on their bond may have the estates of both exhausted before he can be made to answer for the wrong-doing of the survivor.¹⁴ The sureties upon the general bond of a guardian are co-sureties with the sureties upon a

78 Am. Dec. 635; *Dawes v. Howard*, 4 Mass. 97; *McGeary v. McGeary*, 181 Mass. 539.

⁹ *Campbell v. Clark*, 63 Ark. 450; *Otis v. Hall*, 117 N. Y. 131; *Doan v. Dow*, 8 Ind. App. 324; *Marquess v. La Baw*, 82 Ind. 550; *Folger v. Heidel*, 60 Mo. 285; *Horton's App.*, 94 Pa. 62.

¹⁰ *Abrams v. United States F. & G. Co.*, 127 Wis. 579, 5 L.R.A. (N.S.) 575, 115 Am. St. 1055; *Reynolds v. Jones*, 63 Ark. 259. See *McGeary v. McGeary*, 181 Mass. 539.

Though a mother who was guardian of her minor son was poor and converted his estate after filing a report containing no charge for his support, her sureties were denied any benefit because of such support. *In re Mackall*, 60 Wash. 655.

¹¹ *Evans v. Pearce*, 15 Gratt. 513, 78 Am. Dec. 635.

¹² *Hauser v. King*, 76 Va. 731.

¹³ *State v. Berning*, 74 Mo. 87, 100.

¹⁴ *Eckert v. Myers*, 45 Ohio St. 525.

special bond given to authorize the sale of real estate only to the extent of the proceeds of the latter; and the sureties on the special bond are entitled to have a sum realized from a security given by the guardian for the indemnity of all the sureties credited upon their liability in proportion to their liability for the funds realized from the real estate to the liability of the sureties on the general bond for other funds.¹⁵ The liability of sureties is not affected by an attempt of the guardian to loan the funds of the ward to himself.¹⁶ The court is without power, in the absence of consent of all parties in interest, to reduce the amount of a guardian's bond.¹⁷

§ 498. **Liability as between sets of sureties.** As has been shown, the liabilities of sureties on official bonds are limited to the term for which their principal was elected or appointed.¹⁸ There is a marked distinction in this respect between such bonds and those given by executors, administrators and guardians. The distinction rests on the fact, aside from the difference in the language of the instruments, that public officers hold for designated terms, while the principals in probate bonds exercise their functions from the commencement until the close of the administration; and in guardian's bonds until the ward reaches his majority; there are no terms. When a new bond is given there is no new commitment of the estate to their hands, nor is there any settlement or rest made in their accounts.¹⁹ When a guardian gives an additional bond as further security, pursuant to an order of the probate court, the sureties thereon are liable for the failure of their principal to account for money on hand at the time it was executed. Nothing appearing to the contrary, except the insolvency of the guardian, the presumption is that there had been no misappropriation of moneys previously received and that they were in his possession when such bond was given.²⁰ If such a bond is conditioned for the

¹⁵ *Swisher v. McWhinney*, 64 Ohio St. 343.

¹⁶ *Brehm v. United States F. & G. Co.*, 124 Wis. 339.

¹⁷ *Commonwealth v. American Bonding Co.*, 245 Pa. 535.

¹⁸ § 480.

¹⁹ *Scofield v. Churchill*, 72 N. Y. 565; *Beard v. Roth*, 35 Fed. 397; *Beakley v. Cunningham*, 112 Ark. 71.

²⁰ *Clark v. Wilkinson*, 59 Wis. 543; *Whitworth's Distributees v. Oliver*, 39 Ala. 286; *Choate v. Ar-*

faithful execution of the trust "and also to obey all orders of the surrogate touching the estate committed," the sureties are liable for the failure of their principal to obey an order as to the payment of money which came to his possession before their obligation was assumed, although the money was previously lost or disposed of.²¹ Such a bond is cumulative without regard to the time it was executed.²² The same liability attaches to the sureties of an executor under a new bond conditioned that he "shall administer, according to law and the will of the testatrix, all her goods, chattels, etc., which shall at any time come to the possession of the executor."²³ The breach in such a case occurs during the life of the second bond, the *gravamen* of the action

rington, 116 Mass. 552; Brehm v. United States F. & G. Co., 124 Wis. 339.

²¹ Scofield v. Churchill, 72 N. Y. 565.

²² Lacoste v. Splivalo, 64 Cal. 35; Bellinger v. Thompson, 26 Ore. 320; Thompson v. Dekum, 32 Ore. 506; Kaspar v. People, 230 Ill. 342.

²³ Foster v. Wise, 46 Ohio St. 20, 15 Am. St. 542; Brown v. State, 23 Kan. 235; Pinkstaff v. People, 59 Ill. 148.

Seven years after the appointment of a substituted trustee his accounts were passed by a judgment which adjudged that a certain sum was held by him to be divided among the several *cestui que trust*, which division he was ordered to make. Three years later the trustee gave, pursuant to an order of court, another bond conditioned that he "shall faithfully execute the trust reposed in him as such trustee, and shall faithfully pay over, distribute and divide and account for all the property and money which shall come into his hands as trustee, in accordance with the provisions of the will." The surety upon the last mentioned bond was not responsible for any previous neglect of duty by

the trustee. It was said: Under this bond the defendant was liable for any failure of the principal to account for all property and money which should come into his hands as such trustee; and the proof offered upon the trial was a judgment in an action brought against the trustee's executrix for an accounting, from which it appeared that the trustee had failed to account for certain sums of money which had come into his hands prior to the time that the bond in suit was executed; and although I think this judgment would have been conclusive, if it had adjudicated that the trustee had failed to account for moneys which had come into his hands after the execution of the bond, as there was no such adjudication, and as the whole record shows that the action was brought to compel an accounting by the trustee for money which he had received long before the execution of the bond, the judgment was not, I think, evidence against this defendant of the breach of the condition of the bond which would entitle the plaintiff to recover. Thomson v. American S. Co., 56 App. Div. (N. Y.) 113.

on which is the failure to pay over according to duty.²⁴ It is not necessary that the original bond be exhausted before resort is had to the second. The former is in force and is as obligatory upon its makers as if no other had been given. A creditor or other person interested in the estate may sue upon either if the wrong complained of was a breach of both.²⁵

The sureties upon one or more of several bonds of an executor will not be compelled to contribute with the surety on another bond to the payment of the amount charged against the executor for interest on money of the estate loaned to the latter surety.²⁶ In South Carolina and Tennessee the second bond is the primary security, and the first is at least suspended until the other is exhausted.²⁷ This is the rule in South Carolina although only one of the sureties on the first bond petitioned for relief from liability and for a new bond, unless some act of such surety led the sureties on the second bond to believe that the sum in the administrator's hands was less than it in fact was, in which case the primary liability for the difference between the amount actually on hand and that which was represented will be on the original bond.²⁸ If the second bondsmen prove insufficient the first are responsible up to the date of their

²⁴ *Bellinger v. Thompson, supra*; *Dugger v. Wright*, 51 Ark. 232, 14 Am. St. 48; *Brown v. State*, 23 Kan. 235; *Beard v. Roth*, 35 Fed. 397; *Pinkstaff v. People*, 59 Ill. 148.

²⁵ *Pinkstaff v. People, supra*.

²⁶ *Thompson v. Dekum, supra*.

²⁷ *Glenn v. Wallace*, 4 Strobb. Eq. 150, 53 Am. Dec. 657; *Bobo v. Vaiden*, 20 S. C. 271; *Morris v. Morris*, 9 Heisk. 814, 822. See *Bankers' S. Co. v. Wyman*, 141 Iowa 574, for facts showing the primary liability of the surety on a new bond.

The Tennessee statute provides: "Every guardian, at the time of exhibiting his biennial list or statement of his ward's estate, shall renew his bond in a penalty of double the value of the estate, with the same conditions as the original

bond." § 2499. The sureties on a renewed guardian's bond are liable before those on a former bond, although the guardian misappropriated the ward's money prior to the execution of the last bond. *Crook v. Hudson*, 4 Lea 448.

The same rule applies to new sureties given by way of substitution for former sureties released according to law. *Crawford v. Penn*, 1 Swan 388.

And to new sureties given by way of counter-security. *Steele v. Reese*, 1 Yerg. 263.

If the new security is given pursuant to an order of court requiring other or better security the two sets of sureties are equally liable. *McGlothlin v. Wyatt*, 1 Lea 717.

²⁸ *Bobo v. Vaiden*, 20 S. C. 271.

release; the former must account, first, for any default after their bond was given, and then for such as accrued prior thereto.²⁹ It is provided by statute in Missouri that when an additional bond is given and approved "it shall discharge the former securities from any liability arising from any misconduct of the principal after the filing of the same, and such former securities shall only be liable for such misconduct as happened prior to the giving of such new bond." Where the assets of the estate were pledged by the administrator for his own purposes, while the original bond was the only security for his conduct, the fact that after another bond was given he failed to recover the pledged securities did not operate to shift the resulting loss wholly upon the sureties on the latter; both sets were liable.³⁰

A person holding funds in one fiduciary capacity cannot by his own election shift the responsibility therefor from one set of sureties to another, as by signing a receipt to himself in the capacity of trustee and, without having funds in hand, transfer his liability and that of his sureties as guardian to himself and his sureties as trustee. That can only be done by the transfer of substantial assets.³¹ Sureties upon a guardian's bond are only liable for money or property actually in his hands during the term covered by their bond. Thus, where a guardian deposited his ward's funds in bank in his own name, mingling them with his own, the sureties on his then bond were liable, it being shown in an action against the sureties on a bond subsequently given that such funds had all been checked out before they became sureties.³² Settlements made and approved by the proper court are *prima facie* evidence that the estate was not misappropriated when they were made.³³ Under a statute providing that when a new bond shall be required the sureties in the prior bond shall, nevertheless, be liable for all breaches of the conditions committed before the new bond

²⁹ *Morris v. Morris*, 9 Heisk. 814, 822.

³⁰ *State v. Berning*, 74 Mo. 87; *Wolff v. Schaeffer*, id. 154.

³¹ *State v. Branch*, 151 Mo. 637.

³² *State v. Greer*, 101 Mo. App.

669; *State v. Elliott*, 157 Mo. 609, 80 Am. St. 643. Compare *State v. Dennis*, 58 Mo. App. 568, an earlier case.

³³ *State v. Holman*, 93 Mo. App. 611.

shall be approved by the court, where successive bonds with different sets of sureties have been given by an executor, and a *devastavit* has occurred before the execution and approval of some of the bonds the liability of the sureties in the subsequent bonds is secondary to that of the sureties on those subsisting and in force when the estate was wasted, and if the former have made good the loss they may recover from the latter the full sum paid.³⁴

Under a statute which provides that the discharged surety "shall only be liable for such misconduct as happened prior to giving the new bond," one who had been discharged is not responsible for moneys found due the estate on a settlement made subsequent thereto unless it is shown that the wrong was done before the discharge.³⁵ The demand upon the discharged surety need not be made before a new bond is given.³⁶ Independently of statute, new sureties on a guardian's bond are liable for so much money as he might have collected on a loan made before they became such.³⁷ And so if a new bond is filed by order of the court, the guardian not being discharged or re-appointed nor the sureties on the first bond being released, and the evidence fails to show whether the money previously received had been misappropriated or not, the new security will be cumulative for the whole term.³⁸ If the bond is conditioned that the guardian will pay all moneys which may come into his hands or possession and faithfully discharge his office and trust according to law, the sureties on an additional bond will be liable to pay the whole amount ordered to be paid though it had been wrongfully expended before their obligation was given.³⁹ If an administrator resigns and afterwards succeeds himself and a balance is found due from him on the settlement of the first administration the distributees may charge the sureties on

³⁴ Corrigan v. Foster, 51 Ohio St. 225.

³⁵ Beard v. Roth, 35 Fed. 397.

³⁶ Conover's Case, 35 N. J. Eq. 108.

³⁷ McWilliams v. Norfleet, 63 Miss. 183; Rader v. Yeargin, 85 Tenn. 486.

³⁸ Beakley v. Cunningham, 112 Ark. 71; Miller v. Kelsey, 100 Me. 103; Douglas v. Kessler, 57 Iowa 63; Loring v. Baker, 3 Cush. 465; Bell v. Jasper, 2 Ired. Eq. 597; Jones v. Blanton, 6 id. 115, 51 Am. Dec. 415.

³⁹ Knox v. Kearns, 73 Iowa 286.

either bond.⁴⁰ If sureties have been discharged and a new bond accepted and there was a breach of the first bond before their discharge by the administrator's neglect to render his account the original sureties are not subject to the statutory rule of damages which makes them liable for the full value of the property in his hands if the appropriation was not made before they were discharged; their liability is for nominal damages, or such as resulted from his neglect. If the property of the estate was lying idle and unproductive interest during the period of such delay is the measure of damages.⁴¹ In Indiana the liability of the sureties on a new bond is prospective only.⁴² But if it appears that money received while the first bond was in force was on hand when the second was given they are liable for it.⁴³ A guardian who has resigned and been re-appointed in another county, where he gives a new bond and charges himself with the amount received under his first appointment, does not thereby release his original sureties from liability for a defalcation committed while their bond was in force.⁴⁴ An involuntary payment made on behalf of a guardian who committed a breach of trust under two bonds will be applied *pro rata* upon the liability under both, although the sureties upon one of them have become insolvent.⁴⁵

There is ample authority and reason for saying that when the law provides for a special bond as security for the performance of a special duty imposed upon any officer and such bond is given the sureties upon his general bond are relieved from liability for the discharge of that duty unless it is clear from the law that such was not the intention.⁴⁶ It is provided in the statutes of many states that when the real estate of a ward is to be sold the guardian shall give an additional bond to secure the proper application of the proceeds. If such a statute is

⁴⁰ *Modawell v. Hudson*, 80 Ala. 265.

⁴¹ *McKim v. Bartlett*, 129 Mass. 226.

⁴² *Lowry v. State*, 64 Ind. 421; *State v. Page*, 63 id. 209; *Parker v. Medsker*, 80 id. 155; *State v. Barrett*, 121 id. 92.

⁴³ *Parker v. Medsker*, 80 Ind. 155.

⁴⁴ *Yost v. State*, 80 Ind. 350; *Naugle v. State*, 11 id. 284.

⁴⁵ *Bond v. Armstrong*, 88 Ind. 65.

⁴⁶ § 481.

mandatory it may be said with the best of reasons that the sureties in the general bond did not contemplate that they were assuming responsibility for money coming to their principal's hands from that source, and that whether such a bond was given or not they are not responsible for funds so received.⁴⁷ In Florida the statutory provision is that the county judge shall require such security from guardians as is necessary; he may authorize a sale of the real estate of minors and shall require "such additional bond as in his discretion may seem to be necessary to protect the interests of the infant." A bond so given is subsidiary and auxiliary to the general bond and cannot be sued until the latter is exhausted.⁴⁸ The same rule has been declared as to administrators in Indiana,⁴⁹ Alabama,⁵⁰ Ohio⁵¹ (under a discretionary statute), and in Pennsylvania under a mandatory one.⁵² If part of the funds with which a guardian is charged are the proceeds of real estate and one who had been his surety upon both his general and special bonds has been discharged from liability and a new bond has been executed by order of the court the last covers liability for all money in the guardian's hands when it was executed.⁵³ If the proceeds of land sold under a decree are personalty a guardian who has given a general bond and, later, an additional bond to secure such proceeds, is primarily liable on the latter for them.⁵⁴ Where the court, in the exercise of its discretion, does not require the guardian to give additional security before selling real estate the sureties on his general

⁴⁷ *Bailey v. McAlpin*, 121 Ga. 111; *People v. Huffman*, 182 Ill. 390, 398; *Madison County v. Johnston*, 51 Iowa 152; *Bunce v. Bunce*, 65 Iowa 106; *Morris v. Cooper*, 35 Kan. 156; *Lyman v. Conkey*, 1 Metc. (Mass.) 317; *Williams v. Morton*, 38 Me. 47, 61 Am. Dec. 229; *Warwick v. State*, 5 Ind. 350; *Lowry v. State*, 64 id. 421; *Hannum v. Day*, 105 Mass. 33, 38; *State v. Peterman*, 66 Mo. App. 257.

The distinction between statutes of this character which are man-

datory and those which are not is pointed out in *Hughes v. Goodale*, 26 Mont. 93, 101.

⁴⁸ *Hart v. Stribling*, 21 Fla. 136.

⁴⁹ *Salzer v. State*, 5 Ind. 202; *Salzers v. Ross*, 15 id. 130.

⁵⁰ *Clarke v. West*, 5 Ala. 117.

⁵¹ *Wade v. Graham*, 4 Ohio 126.

⁵² *Commonwealth v. Loyd*, 12 Phila. 221. See *Kress's Est.*, 52 Pa. Super. 29.

⁵³ *Moody v. State*, 84 Ind. 433.

⁵⁴ *Findley v. Findley*, 42 W. Va. 372.

bond who bound themselves to render a just and true account of all moneys and other property received by him are liable for the proceeds of real estate paid to the guardian.⁵⁵

SECTION 5.

REPLEVIN BONDS.

§ 499. **Their original conditions.** The English statute, enacted nearly six hundred years ago, provided that sheriffs or bailiffs from henceforth shall not only receive of the plaintiff pledges for the pursuing of the suit before they make deliverance of the distress, but also for the return of the goods if return be awarded.⁵⁶ The statute of George II. was intended rather as an improvement and modification of the old security than as the creation of a new one.⁵⁷ This required a bond, with two sureties, in double the value of the goods distrained and conditioned for prosecuting the suit with effect and without delay, and for duly returning goods and chattels distrained in case a return should be awarded.⁵⁸ Though framed for exclusive application to replevin on distress for rent, as were some early American statutes, it was the foundation of the practice in other cases. These conditions have always been treated as independent, and if either was not complied with the bond was forfeited.⁵⁹ The condition to prosecute the suit to effect

⁵⁵ *Allen v. Kelly*, 171 N. Y. 1; *Hughes v. Goodale*, 26 Mont. '93.

⁵⁶ West. 2, ch. 2; Edw. 1.

⁵⁷ *Morris on Repl.* 267.

⁵⁸ 11 Geo. 2, ch. 19, § 23.

⁵⁹ *Siebolt v. Konatz S. Co.*, 15 N. D. 87; *Pure O. Co. v. Terry*, 209 Pa. 403; *Ihrig v. Bussell*, 68 Wash. 70; *Moore v. Bowmaker*, 7 Taunt. 97; *Perreau v. Bevan*, 5 B. & C. 284; *Balsley v. Hoffman*, 13 Pa. 603; *Smith v. Newton*, 38 Ill. 228; *Lomme v. Sweeney*, 1 Mont. 584; *Dunbar v. Dunn*, 10 Price 542; *Whitman v. Jones*, 5 N. H. 362; *Gibbs v. Bartlett*, 2 W. & S. 29; *Ne-*

ville v. Williams, 7 Watts 421; *Short v. Hubbard*, 2 Bing. 348; *Vinyard v. Barnes*, 124 Ill. 346; *Parrott v. Scott*, 6 Mont. 340; *Boom v. St. Paul F. & Mfg. Co.*, 33 Minn. 253; *Imel v. Van Deren*, 8 Colo. 90, citing the text; *Pittsburgh Nat. Bank v. Hall*, 107 Pa. 583; *Elliott v. Black*, 45 Mo. 372; *Gardiner v. McDermott*, 12 R. I. 206; *Thomas v. Irwin*, 90 Ind. 557, quoting the text; *Pace v. Neal*, 92 Ill. App. 416.

In New Hampshire and Ohio a judgment for return seems never to have been a feature of the practice

and without delay has been generally interpreted to mean a continuous prosecution to a final judgment in favor of the plaintiff; he must diligently pursue the case and succeed.⁶⁰ But according to some authorities there is no liability on the part of the sureties if the replevin suit is dismissed, whether by consent or for lack of jurisdiction; ⁶¹ in Ohio and North Dakota it is otherwise.⁶² Under a statute providing that where the merits of the case have not been determined in the trial of the

in replevin, and the bond contains no such condition. *Bell v. Bartlett*, 7 N. H. 178; *Smith v. McGregor*, 10 Ohio St. 461.

⁶⁰ *Flannagan v. Erwin*, 173 Ill. App. 452; *Rogers v. United States F. & G. Co.* (N. Y. Misc.), 84 Supp. 203; *Fidelity & D. Co. v. Texas L. & M. Co.*, 40 Tex. Civ. App. 489; *Peffley v. Kenrick*, 4 Ind. App. 510, citing the text; *Smith v. Whiting*, 100 Mass. 122; *McAlester v. Suchy*, 1 Ind. Ty. 666 (the condition was to duly prosecute); *Little v. Bliss*, 55 Kan. 94 (same condition). But in *Citizens' State Bank v. Morse*, 60 Kan. 526, the condition to duly prosecute was construed not to mean to prosecute with effect, but to prosecute to verdict and judgment without delay. *Biddinger v. Pratt*, 50 Ohio St. 719, contains a *dictum* to the contrary. To the same effect as the text, *Alderman v. Roesel*, 52 S. C. 162; *Turnor v. Turner*, 2 Brod. & B. 107; *Crabbs v. Koontz*, 69 Md. 59; *Boom v. St. Paul F. & Mfg. Co.*, 33 Minn. 253; *Meigs v. Keach*, 1 Wash. Ty. 305; *Perreau v. Bevan*, 5 B. & C. 284; *Axford v. Perrett*, 4 Bing. 586; *Harrison v. Woodle*, 5 B. & Ad. 146; *Harrison v. Montstephen*, 2 Dow. & Ry. 343; *Balsley v. Hoffman*, 13 Pa. 603; *Morgan v. Griffith*, 7 Mod. 380; *Dias v. Freeman*, 5 T. R. 195; *Brown v. Parker*, 5 Blackf. 291; *Gould v.*

Wenner, 3 Wend. 54; *Jackson v. Hanson*, 8 M. & W. 477; *Phillips v. Price*, 3 M. & S. 183; *Persse v. Watrous*, 30 Conn. 139; *Lindsay v. Blood*, 2 Mass. 518; *Sevey v. Blacklin*, id. 543.

A judgment awarding the defendant costs, following a trial on the merits, does not impose liability upon the sureties for the value of the property. *Ihrig v. Bussell*, *supra*.

⁶¹ *Seaboard A. L. R. Co. v. Hewlett*, 94 S. C. 478. It is held by a divided court, the better reasons being given by the dissenting judge, that the defendant's remedy for a breach of the bond in failing to prosecute the suit is not waived by his consenting to a dismissal of the action merely. *Hall v. Smith*, 10 Iowa 45.

A settlement of the matter in dispute and a dismissal of the action pursuant to it bars a suit on the bond. *Gerard v. Dill*, 96 Ind. 101; *Clow v. Gilbert*, 54 Ill. App. 134.

There is no liability on an unsuccessful plaintiff's bond unless the judgment orders the property returned or the payment of money for its seizure or detention. *Valdlandingham v. Ray*, 128 Ky. 506.

⁶² *Biddinger v. Pratt*, 50 Ohio St. 719; *Siebolt v. Konatz S. Co.*, *supra*.

action in which the bond was given the defendant in the action upon the bond may plead that the fact and his title to the property in dispute in said action of replevin, the dismissal of an action for want of jurisdiction does not bar plaintiff from the right given.⁶³ The condition to prosecute the suit is not one the performance of which is in itself beneficial to the party for whose benefit the bond is made. But the recovery of a final judgment in favor of the plaintiff makes it clear that, when the property was delivered to him at the commencement of the action, he received his own and no wrong was done the defendant. His bond is a penal undertaking to establish at as early a day as practicable that he had a right to possession when he obtained the writ. If he fails to do so it appears clearly that the possession which the plaintiff acquired by process based on the bond was wrongful and injurious to the defendant to the extent of his interest in the property, and the costs to which he has been subjected in asserting that interest. On failure to fulfill the conditions the penalty of the bond is forfeited and relief is granted against a demand of the whole only on the terms of making equitable compensation according to the injury caused to the defendant by the process by which he was deprived of possession. This compensation is only limited by the penalty of the bond; within that limit the plaintiff is entitled to the value of the property and costs of the replevin suit.⁶⁴ And the liability of the sheriff for taking insufficient bail or for other official neglect resulting in a loss of the security of the replevin bond is governed by the same standard and subject to the same limitations.⁶⁵ But if the

⁶³ O'Donnell v. Colby, 153 Ill. 324.

⁶⁴ Peffley v. Kenrick, *supra*, citing the text; McAlester v. Suchy, *supra*; McKey v. Laufin, 48 Kan. 581; Branscombe v. Scarborough, 6 Q. B. 13; Gainsford v. Griffith, 1 Williams' Saund. 58, n. 1; Hunt v. Round, 2 Dow. P. C. 558; Ward v. Henley, 1 Y. & J. 285; Hefford v. Alger, 1 Taunt. 218; Gould v. Wen-

ner, 3 Wend. 54; Gibbs v. Bartlett, 2 W. & S. 33; McCabe v. Morehead, 1 id. 513; Arnold v. Bailey, 8 Mass. 145; Fraser v. Little, 13 Mich. 195; Balsley v. Hoffman, 13 Pa. 603.

⁶⁵ Evans v. Brandon, 2 H. Bl. 548; Baker v. Garratt, 3 Bing. 56; Jeffrey v. Barnard, 4 A. & E. 823; Paul v. Goodluck, 2 Bing. N. C. 220; Murdoch v. Will, 1 Dall. 341, 1 L. ed. 166.

party for whose benefit the bond is made be entitled to only the possession of the property, the title being in the opposite party, such obligee is not entitled to recover only the value of his possessory right.⁶⁶

§ 500. **The condition for return of property.** As replevin is a form of action to enable a plaintiff to recover specific personal property, if he fails to maintain his right to the possession after it has been delivered to him there is fairness and equality in allowing a defendant at least an election to have it restored. Accordingly, instead of leaving to him a mere claim of damages, assessable on the broken condition to prosecute to effect, the law has wisely provided for a judgment of return as well as a specific condition to the same effect in the bond. Such judgment imposes the duty on the plaintiff to restore the property; and if not complied with the condition for such return, when adjudged, is also violated. If the plaintiff does not voluntarily execute the judgment for return the defendant may, but is not obliged to, avail himself of the writ of return to compel its execution. He may at once sue on the bond unless a preliminary resort to the writ is required by statute.⁶⁷

This provision for return of the same goods and chattels is intended for the benefit of the defendant.⁶⁸ Thus construed, according to the import of the transaction of which the bond is a part, it is an indirect undertaking by the plaintiff, in consideration of being able of his own motion to get possession of the property in dispute at once, to return it if return be adjudged and to pay the defendant from whom he has wrested it such sum as ought to be assessed for damages by reason of the premises if he neglects to prosecute the suit, or it appears by an adverse judgment that he was not entitled to the property. Any such default is an event on the happening of which

⁶⁶ *Hawley v. Warner*, 12 Iowa 42. See *Buck v. Rhodes*, 11 id. 348; *Hayden v. Anderson*, 17 id. 158; *Smith v. Whiting*, 100 Mass. 122; *Schweer v. Schwabacher*, 17 Ill. App. 78; *Crabbs v. Koontz*, 69 Md. 59.

⁶⁷ *Wright v. Quirk*, 105 Mass. 44; *Turner v. Turner*, 2 Brod. & B. 107; *Sevey v. Blacklin*, 2 Mass. 541. See as to the practice in Missouri, *Morrison v. Yancey*, 23 Mo. App. 670.

⁶⁸ *Gibbs v. Bartlett*, 2 W. & S. 33.

he in form acknowledges himself bound to pay the penalty, but as the court will not allow the obligee to take more than in conscience he ought, damages assessed for the breaches are made to embrace the full redress to which such defendant, secured by such bond, is entitled.⁶⁹ The act of 11 George II. contained a clause that the court where such action shall be brought may by rule give such relief to the parties upon such bond as may be agreeable to justice and reason and such rule shall have the nature and effect of a defeasance of the bond.⁷⁰

§ 501. **The condition required by modern statutes.** Modern legislation on this subject has the merit of prescribing substantially equivalent conditions which are more precise and direct. In some, if not in most, of the states there are three conditions: first, to prosecute the suit to effect or to final judgment; second, to return the property if return be adjudged; and third, to pay such a sum as the defendant may recover judgment for in the replevin suit. The action for breach of the condition to prosecute to final judgment proceeds in the absence of any determination of the merits of the replevin suit, and for failure to prosecute to judgment; but the breach of the condition to prosecute to effect, as we have seen, may consist not only of such neglect, but also of an adverse judgment on the merits.⁷¹

⁶⁹ *White Blakeslee Mfg. Co. v. Rhodes*, 152 N. C. 636.

⁷⁰ *Wright v. Quirk*, 105 Mass. 44; *Turnor v. Turner*, 2 Brod. & B. 107.

⁷¹ See § 499.

The legal effect of the dismissal of the suit is a judgment of restitution. If that cannot be had the defendant is entitled to a *feri facias* for the value of the property. He is not forced to bring an action on the bond. *Marshall v. Livingston*, 77 Ga. 21.

In *Mills v. Gleason*, 21 Cal. 274, Cope, J., said: "A dismissal stands on the same footing as a nonsuit, leaving the parties to settle in an

account upon the undertaking those matters which, if the suit were prosecuted, it would be necessary to determine in the first instance. Such matters include, of course, the right of the defendant to a return of the property; and as the opportunity to obtain a return is taken away by the failure to prosecute he is entitled to compensation in damages. A failure to prosecute is a breach of the undertaking, and the legal and necessary result is that the sureties to the undertaking are liable for whatever injury the defendant has sustained." *Presse v. Watrous*, 30 Conn. 139; *Ladd v. Prentice*, 14 Conn. 109.

In Tennessee the defendant in an attachment suit may replevy the property upon giving bond either in double the amount of the plaintiff's demand, conditioned to pay the same, or in double the value of the property attached, conditioned to pay such value if he is cast in the suit. A bond which did not conform to the statute, being conditioned to account for the property, was regarded as coming under the latter clause—a bond in double the value of the property attached, conditioned to pay its value and interest if the defendant failed in the suit. The proper judgment was for the penalty of the bond, which could be satisfied by the delivery of the property or payment of its value.⁷² A bond given under that statute did not clearly show whether it was given for double the amount of the demand or double the value of the property, the condition being to secure the delivery of the property or its value. This language was given controlling effect, and a personal decree for the amount of the recovery could not be rendered against the sureties.⁷³

The bond is intended to give the defendant in replevin complete indemnity for the property being taken out of his possession, and for the necessity imposed of active measures for the defense of his right to it. He is not entitled to indemnity if he had no title or right of possession, and the possession is taken by one who has the right; and he can recover nothing beyond costs and nominal damages even if the plaintiff fails to prosecute.⁷⁴ And where the suit is prosecuted to judgment, if the defendant recovers and the plaintiff performs the judgment, the bond is satisfied.⁷⁵ The purpose of indemnity is

Where there is a breach of the condition to prosecute to effect and no judgment is entered for the return of the property an officer who is defendant and has a special interest in or title to the property is entitled to retain the custody of it; but in the absence of an order awarding him such custody he must affirmatively show in an action on the bond that the demand upon which he acquired possession of the

property has not been satisfied, otherwise it cannot be determined how or to what extent he has been damnified. *Imel v. Van Deren*, 8 Colo. 90.

⁷² *Kuhn v. Spellacy*, 3 Lea 278.

⁷³ *Chattanooga, etc. R. Co. v. Evans*, 14 C. C. A. 116, 66 Fed. 809.

⁷⁴ *Little v. Bliss*, 55 Kan. 94; *Cobbey on Repl.* § 1355.

⁷⁵ *Gerlaugh v. Ryan*, 127 Iowa

accomplished if, when the defendant succeeds in the replevin suit, whether it is tried on its merits or not, the property is returned to him, the damages paid, whether they arise from deprivation of the use, deterioration, or decrease of market value, and the costs incident to making a defense. Where these damages have not been, and could not be, determined in the replevin suit they may be determined in the action on the bond if there is a breach of either of the conditions. There is no breach of the condition to prosecute to final judgment if the case is tried on the merits, though judgment be rendered for the defendant; then, if the other conditions are fulfilled by performance or execution of the judgment the bond is satisfied. But the recovery of judgment by the defendant, whether on the merits or not, as well as the neglect of the plaintiff to prosecute the replevin suit with diligence, is a breach of the condition to prosecute to effect, and then the defendant may sue on the bond and rely on the breach, although in the former case the condition to return when adjudged may also be broken.⁷⁶ The plaintiff may accept a delayed tender of the property, but is not bound to do so. After the defendant has refused to return the property the breach of his obligation is complete, and if the plaintiff has elected to sue for damages he cannot be compelled to accept the property.⁷⁷ The party by virtue of whose process property is attached remains the real party in interest in subsequent replevin proceedings brought against the officer who levied the attachment as sole defendant, and may sue upon the replevin bond although not a formal party to it.⁷⁸

§ 502. **Assessment of damages in suit on bond.** The obligee is entitled to recover damages for the taking and detention

226; *Lake v. Hargis*, 82 Kan. 711, 30 L.R.A.(N.S.) 366; *Chambers v. Waters*, 7 Cal. 390; *Pettygrove v. Hoyt*, 11 Me. 66; *Hovey v. Coy*, 17 Me. 266; *Smallwood v. Norton*, 21 Me. 83; *Millett v. Hayford*, 1 Wis. 401; *Claggett v. Richards*, 45 N. H. 360; *Clark v. Norton*, 6 Minn. 412; *Balsley v. Hoffman*, 13 Pa. 603; *Ginaca v. Atwood*, 8 Cal. 446.

⁷⁶ *Kentucky L. & I. Co. v. Crabtree*, 118 Ky. 395; *Brown v. Parker*, 5 Blackf. 291; *Gibbs v. Bartlett*, 2 W. & S. 33; *Roman v. Stratton*, 2 Bibb 199. But compare *Wall v. Humphries*, 4 Dana 209.

⁷⁷ *Bradley v. Reynolds*, 61 Conn. 271, 283; *Wallace v. Cox*, 92 Neb. 354.

⁷⁸ *Quinnipiac B. Co. v. Hackbarth*, 74 Conn. 392.

in the action on the bond. The omission of the defendant in the replevin suit to have the damages assessed in that action, he being at liberty to have them there assessed, has been held to be no renunciation of them if the judgment there rendered remains unsatisfied.⁷⁹ This rule has been applied when the only breach assigned was of the condition to return the property if adjudged; for it is said the statute contemplates that the property will be returned when such is the judgment, and the damages are then assessed upon that expectation. But where it is not returned and there is a breach of the bond the statute does not prescribe how the damages shall be assessed. The general rule of law would give in such a case as an indemnity the value of the property at the time it was taken, and interest from that time to the time of trial.⁸⁰ If the defendant's damages are assessed in the replevin suit he may, in a subsequent action on the bond, recover such as resulted from the failure to return the property;⁸¹ but he cannot maintain a subsequent action to recover vindictive damages because

⁷⁹ *Quinnipiac B. Co. v. Hackbarth*, *supra*. *Contra*, *Mounts v. Murphy*, 126 Ky. 803.

⁸⁰ *McKey v. Laufin*, 48 Kan. 581; *Ward v. Hood*, 124 Ala. 570; *Bradley v. Reynolds*, 61 Conn. 271, 286, citing the text; *Manning v. Manning*, 26 Kan. 98; *Treman v. Morris*, 9 Ill. App. 237; *Yelton v. Slinkard*, 85 Ind. 190; *Smith v. Dillingham*, 33 Me. 384; *Thomas v. Spofford*, 46 Me. 408; *Tuck v. Moses*, 58 Me. 461; *Washington I. Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Hall v. Smith*, 10 Iowa 45. Compare *Swift v. Barnes*, 16 Pick. 194; *Wallace v. Cox*, 92 Neb. 354.

If the statutory damages are recovered the defendant cannot recover interest upon the value of the property. *Treman v. Morris*, *supra*.

⁸¹ *Miltimore v. Bottom*, 66 Vt. 168.

The statute of Maine provides

that "if it appears that the defendant is entitled to a return of the goods he shall have judgment and a writ of return accordingly, with damages for the taking and costs." It was contended that the words "damages for the taking" mean all damages resulting from the taking and detention of the goods; that if the defendant in replevin recovers judgment for a return, he may, at his election, have the damages which he has sustained by reason of the taking and detention of them to the time of such judgment assessed in the replevin suit, or he may recover them in a suit on the bond, but cannot pursue both remedies; that if he elects, as he did in this case, to have the assessment made in the replevin suit, he cannot in a subsequent suit on the bond, founded on a failure to return the goods, recover any damages which accrued prior to the judgment in the re-

of the bringing of the replevin suit.⁸² If a successful intervenor, entitled to the value or the return of the property from the plaintiff, elects to take the property without claiming damages he cannot maintain a separate action on the bond to recover for injuries to the property caused by the plaintiff while it was in his possession.⁸³

Where the plaintiff neglects to prosecute his action there is a difference of opinion concerning the defendant's remedy. In Rhode Island and Texas he is not required to make complaint and obtain judgment for the return of the property before bringing a suit on the bond. The purpose of the bond is not merely to secure to the defendant the execution of the judgment which he may recover, but rather as an indemnity to him for taking the property out of his possession.⁸⁴ It is held by the federal supreme court that the defendants in a suit on the bond cannot avail themselves of the omission of the trial court to render the alternative judgment provided for by statute for the return of the property or its value.⁸⁵

plevin action, and therefore cannot recover for any depreciation in the value of the goods which occurred between the time of the taking and the date of the judgment of return. In answer the court said: "This point seems to us, at best, to be altogether technical, and not to be founded on any sound principle. By the terms of the bond it was made enforceable against the principal and sureties if the principal should not pay such damages and costs as W. should recover against it, and should not also return and restore the goods replevied in like order and condition as when taken. Under the condition of the bond the sureties were liable to pay the damage recovered against the principal in case the principal had not paid them as he did. By the judgment in the present suit they are only made liable according to their obli-

gation, that their principal shall return and restore the goods in like order and condition as when taken." *Washington I. Co. v. Webster*, 125 U. S. 426, 437, 31 L. ed. 799, 803.

If attached property is replevied and, before the execution of the replevin bond and without the knowledge of the sureties therein or the officer, is adjudged to be sold, such bond is not thereby made void, but only its condition, and a present debt arises unaffected by the condition. *Ward v. Hood*, 124 Ala. 570.

⁸² *Kapischke v. Koch*, 79 Ill. App. 238, 180 Ill. 44.

⁸³ *Newton v. Round*, 109 Iowa 286.

⁸⁴ *Gardiner v. McDermott*, 12 R. L. 206; *Morris v. Anderson* (Tex. Civ. App.), 152 S. W. 677.

⁸⁵ *Sweeney v. Lomme*, 22 Wall. 208, 22 L. ed. 727.

This is the rule in several states.⁸⁶ In Maine, California and Vermont the rule is contrary to that which prevails in Rhode Island.⁸⁷ In Kansas, in the absence of any judgment for damages, if the bond describes and itemizes the property and places a value on each article the return of any part of the property reduces the obligation of the sureties *pro tanto* at the valuation designated in the bond.⁸⁸ In Arkansas the sureties on a bond executed to the sheriff for the release of a defendant arrested on a *capias* in replevin are not liable for the judgment against the defendant unless an execution against his body has been returned not found.⁸⁹

§ 503. When sureties not liable for judgment in replevin suit.

If there be no condition to pay any judgment that may be recovered in the replevin suit a judgment there obtained for such damages, it has been held in Illinois, is not evidence against the sureties in an action on the bond. The non-payment of such a judgment would be no breach of the bond; nor would it measure the damages on any breach. The surety is not a party to an assessment in such a case, and as to him it is wholly inoperative. While, under the general breach assigned upon the bond, evidence of damages suffered by the detention prior to the order of return is admissible, it must be evidence of what the damages in fact were, without reference to any former assessment.⁹⁰ In Maine the damages recovered by an attaching officer in replevin, being recovered in trust, are not conclusive upon the sureties in a suit on the bond.⁹¹ But in Pennsylvania it is held that the damages and costs for which the defendant in the replevin suit obtained

⁸⁶ *Cox v. Sargent*, 10 Colo. App. 1; *Pittsburgh Nat. Bank v. Hall*, 107 Pa. 583; *Berghoff v. Heckwolf*, 26 Mo. 511; *Little v. Bliss*, 55 Kan. 94; *Hall v. Smith*, 10 Iowa 45; *Presse v. Watrous*, 30 Conn. 139; *Cobbey on Repl.* § 1253 *et seq.*; *Capital L. Co. v. Learned*, 36 Ore. 544, 78 Am. St. 792; *Lindsey v. Hewitt*, 42 Ind. App. 573.

⁸⁷ *Pettygrove v. Hoyt*, 11 Me. 66;

Smallwood v. Norton, 20 id. 83, 37 Am. Dec. 39; *Collamer v. Page*, 35 Vt. 387; *Mitchum v. Stanton*, 49 Cal. 302.

⁸⁸ *Larabee v. Cook*, 8 Kan. App. 776.

⁸⁹ *Duncan v. Owens*, 47 Ark. 388; *Eddings v. Boner*, 1 Ind. Ty. 173.

⁹⁰ *Shepard v. Butterfield*, 41 Ill. 76.

⁹¹ *Howe v. Handley*, 28 Me. 241.

judgment may be recovered in an action on the bond.⁹² These damages and interest, however, are not invariably the value. As was said by Mr. Justice Rogers, "it would be anything but an act of justice to permit a person who has wrongfully deprived another of his goods, and retained them in his possession until they were nearly destroyed by time and use, afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of his bond by an offer to return the article in its depreciated condition. Nor can the sureties be placed in any better condition."⁹³ Interest will compensate for delay to return mere merchandise; but if, while the owner is deprived of possession, it deteriorates by use or lapse of time, or by fall of the market he is entitled to compensation for that loss.⁹⁴ If the deterioration is assessed in the action of replevin and collected or paid it cannot again be collected on the bond.⁹⁵ And where the use of the property is valuable the value of such use, rather than interest, is allowed as damages.⁹⁶ The plaintiff cannot claim damages for

⁹² *Miller v. Foutz*, 2 Yeates 418; *Balsley v. Hoffman*, 13 Pa. 603.

⁹³ *Gibbs v. Bartlett*, 2 W. & S. 29, 34.

⁹⁴ *Stevens v. Tuite*, 104 Mass. 328; *Howe v. Handley*, 28 Me. 241; *Parker v. Simonds*, 8 Metc. (Mass.) 211; *Leighton v. Brown*, 98 Mass. 515; *Swift v. Barnes*, 16 Pick. 194; *Bank v. Smith*, 12 Allen 243, 90 Am. Dec. 144; *Whitwell v. Wells*, 24 Pick. 34; *Crabb v. Mickle*, 5 Ind. 145; *Washington I. Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Schrader v. Wolfen*, 21 Ind. 238; *Walls v. Johnson*, 16 Ind. 374; *Hopkins v. Ladd*, 35 Ill. 178; *Story v. O'Dea*, 23 Ind. 326; *Lutes v. Alpaugh*, 23 N. J. L. 165; *Caldwell v. West*, 21 id. 411; *Cohen v. State*, 34 Miss. 179; *Ormsbee v. Davis*, 18 Conn. 555; *Emerson v. Booth*, 51 Barb. 40; *Mattoon v. Pearce*, 12 Mass. 406; *Rowley v. Gibbs*, 14 Johns. 385; *Yelton*

v. Slinkard, 85 Ind. 190; *Treman v. Morris*, 9 Ill. App. 237; *Dalby v. Campbell*, 26 id. 502; *Quinnipiac B. Co. v. Hackbarth*, 74 Conn. 392 (license expired intermediate judgment for its return and demand made for it upon execution; substantial damages were recovered); *Lindsey v. Hewitt*, 42 Ind. App. 573.

The right to recover for the depreciation in the value of the property is not affected because the defendant received it in that condition under an alternative judgment. *Mounts v. Murphy*, 126 Ky. 803.

⁹⁵ *Rowley v. Gibbs*, 14 Johns. 385.

⁹⁶ *Allen v. Fox*, 51 N. Y. 562; *Dorsey v. Gassaway*, 2 Ill. & J. 402, 3 Am. Dec. 557; *Butler v. Mehrling*, 15 Ill. 488. See § 1144.

In *Tibbles v. O'Connor*, 28 Barb. 538, the sureties were held responsible not only for the costs of the

depreciation while he has possession, for he may always convert the property into money.⁹⁷ And undoubtedly the same principle would be applied to a defendant having possession.⁹⁸ Damages resulting to the good will of a business cannot be recovered.⁹⁹

It is the rule in Massachusetts that the party who is adjudged to return the property in controversy should, on general principles, be charged, in case of default, with its value at the date when the duty to return it attaches. If it is of less value then than when taken the difference should be compensated in damages, and they are recoverable on the bond as a breach of its conditions.¹ In some courts the value of the property at the time it was taken and where it was situated, for any lawful use to which it could be put, is the measure of liability.² In Iowa the value is to be determined as of the time of the trial;³ and so in Texas if the question arises in the original proceeding.⁴ In fixing the value of property consideration may be given all the facts and circumstances which might have led any desiring purchaser to make an offer for it.⁵

§ 504. Evidence of the value. The value of the property is sometimes established, as against the plaintiff and his sureties, by permitting the obligee to put in evidence the estimate of it stated in the bond, the obligors being bound by it. The plaintiff is bound because it is his own valuation, and the sureties, by executing the bond, admit the same.⁶ The other party, however,

suit in the trial court, but also for costs of an appeal to the general term. And in *Letson v. Dodge*, 61 Barb. 121, parties in an undertaking in a justice's court were held responsible for the final result in the court of last resort.

In New Hampshire the replevin bond prescribed by the statute does not extend to a judgment on a review of the action. *Bell v. Bartlett*, 7 N. H. 178.

⁹⁷ *Gordon v. Jenny*, 16 Mass. 465; *Bradley v. Reynolds*, 61 Conn. 271, 286.

⁹⁸ *Katz v. Hlavac*, 88 Minn. 56. *Suth. Dam. Vol. II.—27.*

⁹⁹ *Dalby v. Campbell*, *supra*.

¹ *Maguire v. Pan-American A. Co.*, 205 Mass. 64, 137 Am. St. 422; *Swift v. Barnes*, 16 Pick. 194; *Parker v. Simonds*, 8 Metc. (Mass.) 211.

² *Washington I. Co. v. Webster*, 125 U. S. 426, 443, 31 L. ed. 799, 806, 68 Me. 449, 462.

³ *Clement v. Duffy*, 54 Iowa 632.

⁴ *Lueddle v. Hooper*, 95 Tex. 172; *Wood v. Fuller*, 34 Tex. Civ. App. 178.

⁵ *Maguire v. Pan-American A. Co.*, *supra*.

⁶ *Washington I. Co. v. Webster*,

is not so bound; and if the value is greater at the time when judgment for return is pronounced he may show its actual value at that time.⁷ In some courts either party may show the actual value of the property, the amount stated in the affidavit being

125 U. S. 426, 31 L. ed. 799, 62 Me. 341, 16 Am. Rep. 462; *Marshall v. Livingston*, 77 Ga. 21; *Middleton v. Bryan*, 3 M. & S. 155; *Howe v. Handley*, 28 Me. 241; *Tuck v. Moses*, 58 Me. 461; *Gibbs v. Bartlett*, 2 W. & S. 33; *Butts v. Woods*, 4 N. M. 343 (by statute); *Capital L. Co. v. Learned*, 36 Ore. 544, 78 Am. St. 592; *Treman v. Morris*, 9 Ill. App. 237.

⁷ *Id.*; *Lindsey v. Hewitt*, 42 Ind. App. 573.

In *Parker v. Simonds*, 8 Metc. (Mass.) 211, *Hubbard, J.*, referring to *Swift v. Barnes*, 16 Pick, 194, said: "In that case a quantity of sperm oil was replevied, and there was judgment for a return, and a writ of restitution issued, and a demand was made of the property, but it was not redelivered. The question made by the parties was whether the valuation in the bond should be the measure of damages, or whether judgment should be rendered for the actual value of the oil at the time of the service of the writ of replevin, or when the verdict was given, or on the rendition of judgment, or at the date of the demand upon the writ of restitution. The oil having risen in value after it was replevied, it was argued by the plaintiff that the value of the oil at the time of the rendition of the judgment, or at the time of the demand made on the writ, was the rule to be adopted; while it was contended by the defendant that the value of the oil at the time of the original taking should determine the amount of

damages, and that the circumstance that a bond had been given should make no difference. The court, after a review of the authorities cited, was of opinion that the value of the property replevied, at the time it was demanded on the writ of restitution, was the true measure of damages; and Mr. Justice Wilde, who gave the opinion, referred to the general rule of damages on all contracts to deliver goods on demand, and expressed the opinion that there was no essential difference between this contract and the common one to deliver goods. And the court further held that the party who made the bond and fixed the value might well be bound by it, as was decided in *Gordon v. Jenny*, 16 Mass. 465; and that it did not follow that the other party, who had no agency in fixing the amount, should be concluded by it because the property had risen in value. But a leading feature in that decision is this, namely, that the party injured was entitled to an indemnity, and could not receive it unless the actual value of the goods at the time of the demand made was adopted as the rule to fix the measure of damages. But though the court state the rule by which the damages are to be ascertained in strong and general terms, yet it does not embrace every case arising under the process of replevin; and the case at bar is one of those which are to be excepted from its operation. The goods replevied consisted of household furniture, horses, cattle, wagons, etc.,

only *prima facie* evidence thereof. It is said that the other rule would sometimes operate harshly, it being common knowledge that the statement of value in the affidavit is usually made without a very nice attention to the real value of the property, but is made largely as an estimate, based somewhat upon the amount of the plaintiff's claim, lest under some circumstances the jury might not be at liberty to give him more than the value he had himself estimated.⁸ It is said in a late case: We are not disposed to think that a plaintiff may not show, especially when, as here, the defendant, upon a return bond, was suffered to retain the possession, that he had mistakenly undervalued the property; at least there is no estoppel to preclude an amendment of the *ad damnum*.⁹ If the value has increased in the possession of the obligor by an advance in the market price since the time of default in complying with the judgment of return the obligee is entitled to the benefit of the enhanced value.¹⁰ But if the value has been increased by the labor bestowed upon it in good faith by the party who retained the possession it is otherwise.¹¹ If the bond is insufficient as a

which had been more or less used. At the time of the demand some of them had been sold, and others were deteriorated and much depreciated in value by further use. They were not all of them goods, like oil or other articles of merchandise, of a current market price; and some having been sold, and others thus deteriorated, the value at the time of the demand could not be ascertained; nor would that value be the measure of damages without a proper allowance for the depreciation, which, under the circumstances of this case, could not be computed upon any accurate data. The only mode, therefore, to give the plaintiff the indemnity to which he is entitled is to take the estimate of the value as set out in the replevin bond. To this is to be added six per cent. on such value from the

time of the judgment in the action of replevin. It not sufficiently appearing but that the plaintiff might have had his writ of return immediately, or have put his bond in suit, he is not entitled to the penal damages since that time." But see *West v. Caldwell*, 23 N. J. L. 736.

⁸ *Martin v. Hertz*, 224 Ill. 84; *Farson v. Gilbert*, 85 Ill. App. 364; *Gibbs v. Bartlett*, 2 W. & S. 29. Compare *O'Donnell v. Colby*, 55 Ill. App. 112.

This rule has been adopted in Massachusetts, early cases to the contrary being disapproved. *Wright v. Quirk*, 105 Mass. 44; *Maguire v. Pan-American A. Co.*, 205 id. 64, 137 Am. St. 422.

⁹ *Bierce v. Waterhouse*, 219 U. S. 320, 55 L. ed. 237.

¹⁰ *Tuck v. Moses*, 58 Me. 461.

¹¹ *Single v. Schneider*, 30 Wis.

statutory obligation, but good as a common-law bond, the sheriff's appraisal of the value of the property, as evidenced by his indorsement upon the writ, is incompetent as against the sureties. Their liability must be established by evidence known to the common law.¹² In an action to recover for the non-performance of the condition to return the property it may be shown what it would cost to buy similar property or, if that is impossible, what has been lost by not being able to do so.¹³ The value of reapers and mowers is determinable by their fair cash market value at the time and place when and where they were replevied, without considering the guaranties of the manufacturer or other person as to their efficiency, the supply of parts if there should be breakage or any guaranty which might add to their value.¹⁴

§ 505. **Damages recoverable.** Exclusive of the value of the goods, in default of or in place of a return, the damages secured by the bond ordinarily consist of interest upon the money value of the goods, if fixed at the time of the taking, computed up to the time of the verdict, and in addition any special damage shown to result directly from the taking.¹⁵ The expenses

570; *Hungerford v. Redford*, 29 Wis. 345; *Herdie v. Young*, 55 Pa. 176, 93 Am. Dec. 739.

¹² *Jacobs v. Daugherty*, 78 Tex. 682.

An affidavit by a stranger to the action is not admissible. *Edwards v. Bricker*, 66 Kan. 241.

¹³ *Miltimore v. Bottom*, 66 Vt. 168.

¹⁴ *Plano Mfg. Co. v. Downey*, 100 Ill. App. 36.

¹⁵ *Franks v. Matson*, 211 Ill. 338; *Lindsey v. Hewitt*, 42 Ind. App. 573; *Kentucky L. & I. Co. v. Crabtree*, 118 Ky. 395; *Dickson v. Bichkershoff*, 48 N. Y. Misc. 353; *Pace v. Neal*, 92 Ill. App. 416; *Stevens v. Tuite*, 104 Mass. 328; *Davis v. Crow*, 7 Blackf. 129; *Brewster v. Silliman*, 38 N. Y. 423; *Pettit v. Allen*, 64 App. Div. (N.

Y.) 579; *Ward v. Hood*, 124 Ala. 570, 82 Am. St. 205; *Hanson v. Weber I. Co.*, 173 Ill. App. 293.

In North Carolina if delivery of the property cannot be had the statute limits the recovery to such sum as may be recovered for the value of the property at the time of the unlawful taking or detention, with interest thereon. *Hall v. Tillman*, 110 N. C. 220.

If the part of the property returned is damaged compensation must be made accordingly, and interest is due on the sum found to be equal to the depreciation. *Franks v. Matson*, *supra*.

Liability is limited to the value of the property if return cannot be had and the loss resulting from its detention. *Woodburn v. Driver*, 81 Ark. 333.

actually incurred in procuring teams and appurtenances for the purpose of removing the property, which were rendered useless by the wrongful suing out of the replevin, may be included in such damages.¹⁶ The costs of the defendant, in the replevin suit for which he is liable may be recovered,¹⁷ but not those made by the other party.¹⁸ The costs of a continuance granted the defendant, he being awarded the property, have been denied.¹⁹ In some jurisdictions the liability for costs turns upon the language of the bond,²⁰ the non-assumption of it therein being regarded as sufficient reason for not extending the liability of the sureties. In Texas the question does not appear to have been authoritatively settled, though it has been ruled by one of the courts of civil appeals, that the sureties do not make themselves parties to the suit by becoming such so far as to be liable for the costs.²¹ In Illinois there may be a recovery for attorneys' fees,²² but not unless property is taken under the writ; if the plaintiff avails himself of the statutory right to proceed in trover he cannot recover such fees.²³ Their

¹⁶ *Washington I. Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462.

¹⁷ *Hunter v. Commercial Security Co.*, 181 Ill. App. 260; *Lindsey v. Hewitt*, 42 Ind. App. 573; *Kellar v. Carr*, 119 Ind. 127; *Morrill v. Daniel*, 47 Ark. 316; *Mills v. Hackett*, 65 Tex. 580; *Carlton v. Dixon*, 14 Ore. 293; *Hall v. Tillman*, 110 N. C. 220 (liability extends to the entire costs of prosecuting the action involving the title to the property); *Ingram v. Cox*, 5 Pa. Dist. 617; *Tibbal v. Cahoon*, 10 Watts 232; *Balsley v. Hoffman*, 13 Pa. 609; *Wallace v. Cox*, 92 Neb. 354.

¹⁸ *Kellar v. Carr*, *supra*.

¹⁹ *American S. F. Co. v. Dean D. Co.*, 136 Iowa 312.

²⁰ If the obligation of the sureties is merely to pay any "damages" that may be awarded they are not liable for costs. *Brock v. Bolton*, 37 S. C. 40. But it is

otherwise if their obligation is to return the property when adjudged and also to pay whatever sum should be recovered. *Rhodes v. Burkart*, 28 S. C. 155; *Katz v. American B. & T. Co.*, 86 Minn. 168.

If the terms of a bond given to replevy land in a sequestration proceeding do not include liability for costs the sureties are not liable therefor. *Collier v. Myers*, 14 Tex. Civ. App. 312.

²¹ *Henderson v. Brown*, 16 Tex. Civ. App. 464.

²² *Dalby v. Campbell*, 26 Ill. App. 502; *Pace v. Neal*, 92 id. 416; *Edwin v. Cox*, 61 id. 567 (if they are specially declared for); *Hunter v. Commercial Security Co.*, 181 Ill. App. 260.

²³ *Reno v. Woodyatt*, 81 Ill. App. 553.

recovery has been sanctioned in Alabama,²⁴ but not under a bond conditioned merely for the return of the property.²⁵ In Indiana, Kansas, Massachusetts and Kentucky there cannot be a recovery of attorneys' fees paid in the suit on the bond and in the replevin action.²⁶ There can be no recovery for time and money expended in procuring sureties or in attending the trial of the original action.²⁷ The recovery cannot exceed the penalty of the bond,²⁸ except in jurisdictions where interest may be recovered.²⁹ If property which has been seized on an attachment against a third person is replevied the sureties' liability is not to be measured by the value of the interest of the attachment debtor for whose debt it was seized by the sheriff. The value of the property at the time it was replevied,³⁰ limited by the debt still due on the attaching creditor's judgment and the penalty of the bond, are the elements to determine the damages in the suit on the bond.³¹ But if the defendant holds the property under a contract of sale and is in default in payments, the title being in the vendor, the value of the property should be fixed as of the time he acquired possession, because it was said, "his refusal to meet the payments and perform the conditions attaching to the purchase place him, in contemplation of law, in the same position as if the original taking had been

²⁴ *Miller v. Garrett*, 35 Ala. 96; *Ferguson v. Baber*, 24 id. 402; *Hudson v. Young*, 25 id. 376; *Garrett v. Logan*, 19 id. 344; *Foster v. Napier*, 74 id. 393.

²⁵ *Heard v. Hicks*, 101 Ala. 102.

²⁶ *Lake v. Hargis*, 82 Kan. 711, 30 L.R.A.(N.S.) 366; *Edwards v. Bricker*, 66 Kan. 241; *Kentucky L. & I. Co. v. Crabtree*, 118 Ky. 395; *Maguire v. Pan-American A. Co.*, 205 Mass. 64, 137 Am. St. 422 (the bond was silent as to such expenses, but it was given as an additional reason for denying a recovery that the taxable costs are a full indemnity for the expenses incurred); *Davis v. Crow*, 7 Blackf. 129; *Kenley v. Commonwealth*, 6 B. Mon.

583; *Consolidated T. L. Co. v. Bronson*, 2 Ind. App. 1.

²⁷ *Id.*; *Foster v. Napier*, 74 Ala. 393; *Williams v. Finch*, 155 Ala. 399.

²⁸ *Lake v. Hargis*, 82 Kan. 711, 30 L.R.A.(N.S.) 366; *Kellar v. Carr*, 119 Ind. 127; *Dalby v. Campbell*, 26 Ill. App. 502. See ch. 9.

²⁹ *Carlson v. Dixon*, 14 Ore. 293; §§ 477, 478.

As against sureties interest on the penalty cannot be included. *Miltimore v. Bottom*, 66 Vt. 168.

³⁰ *Edwards v. Bricker*, *supra*.

³¹ *Siebolt v. Konatz S. Co.*, 15 N. D. 87; *Bradley v. Reynolds*, 61 Conn. 271; *Sweeney v. Lomme*, 22 Wall. 208, 22 L. ed. 727.

wrongful.”³² Under a bond conditioned for the performance of the judgment in the action the surety is responsible for only the amount of property the defendant retained by virtue of the bond and the proportionate amount of damages resulting from the detention thereof, and not for the value of property of which the defendant never had possession.³³ If the plaintiff is nonsuited and a return of the property is not awarded the surety’s liability is limited to the damages resulting from the failure to prosecute the suit with effect.³⁴ The value of the use of the property pending an appeal is not an element of damages where the plaintiff elects to take its assessed value.³⁵ There cannot be a recovery for injury to business.³⁶ The return of any or all of the property cannot be shown in mitigation unless the fact is pleaded.³⁷ The right to recover nominal damages is not affected by the return of all the property and payment of the assessed damages subsequent to a demand therefor.³⁸ Where the defendant’s possession is not interrupted and he buys most of the property at a sale made by the plaintiff, upon its being adjudged that the latter had no title the sureties in the replevin bond must answer for the money paid for the property bought and the value of that not bought at the time of its sale to others.³⁹ Regardless of the extent of the damages, if the judgment is not complied with at least a nominal sum and costs may be recovered.⁴⁰

§ 506. **Effect of the judgment in replevin suit.** As has been stated, in many states the bond or undertaking is conditioned for the payment of any judgment which the defendant may recover against the plaintiff in the action of replevin. The

³² *Hall v. Tillman*, 110 N. C. 220, 115 N. C. 500.

³³ *Board v. Moore*, 12 Ky. L. Rep. 682 (Ky. Super. Ct.).

³⁴ *Fellheimer v. Hamline*, 65 Ill. App. 384.

Exemplary damages are not recoverable. *Morris v. Anderson* (Tex. Civ. App.), 152 S. W. 677.

³⁵ *Fidelity & D. Co. v. Art Metal C. Co.*, 162 Ala. 323.

³⁶ *Edwards v. Bricker*, 66 Kan. 241.

³⁷ *Smith v. Bowers*, 2 Neb. (Unof.) 613, 91 N. W. 521.

³⁸ *Douglass v. Galwey*, 76 Conn. 683.

³⁹ *Pure O. Co. v. Terry*, 209 Pa. 403.

⁴⁰ *Schweer v. Schwabacher*, 17 Ill. App. 78.

liability assumed has regard to the power of the court to do any and all things within the scope of its authority which may be done in the ordinary and regular prosecution of the suit,⁴¹ and has special reference to the judgment which may be rendered in that action, and nothing short of full satisfaction of the judgment against the principal will satisfy the obligation.⁴² If there is an assessment of damages in the replevin suit, it constitutes, with the costs adjudged therein, a substantive item to be recovered in the action on the bond, and interest thereon will be computed from the date of that judgment.⁴³ Under a bond conditioned to abide by the judgment the sureties are bound by a judgment confessed by their principal without their knowledge, no fraud or collusion being shown, and nothing being confessed outside the indebtedness involved in the replevin suit.⁴⁴ Where the plaintiff was in possession and judgment was originally entered for the defendant for costs, and the latter, without notice to the sureties, obtained a judgment, *nunc pro tunc*, for the return of the property or its value at a sum named the sureties were bound by such judgment.⁴⁵ The principal in the bond is the agent of the sureties to such an extent that he may bind them by compromising the plaintiff's claim for damages and, such compromise being made, though without the knowledge or consent of the sureties, the court may render judgment in accordance with it.⁴⁶ The amendment of the *ad damnum* to any sum within the penalty of the bond to make the former correspond with the evidence as to the value of the property is binding upon the sureties.⁴⁷ When the right of the property and its value is put in issue and

⁴¹ Clark v. Dreyer, 9 Colo. App. 453.

⁴² Hicks v. McBride, 3 Phila. 377.

⁴³ Lindsey v. Hewitt, 42 Ind. App. 573; Maguire v. Pan-American A. Co., 205 Mass. 64, 137 Am. St. 422; Wallace v. Cox, 92 Neb. 354; Swift v. Barnes, 16 Pick. 194; Hopkins v. Ladd, 35 Ill. 178; Caldwell v. West, 21 N. J. L. 411; Washington I. Co. v. Webster, 62 Me. 341, 16

Am. Rep. 462; 125 U. S. 426, 31 L. ed. 799; Leighton v. Brown, 98 Mass. 515; Mattoon v. Pearce, 12 Mass. 406; Ormsbee v. Davis, 8 Conn. 555.

⁴⁴ Bradford v. Frederick, 101 Pa. 445.

⁴⁵ Clark v. Dreyer, *supra*.

⁴⁶ Minocks v. Pope, 117 N. C. 315.

⁴⁷ Bierce v. Waterhouse, 219 U. S. 320, 55 L. ed. 237.

determined by final judgment it is *res judicata*, and cannot, on general principles, be again inquired into between the same parties; and the sureties in the bond are also concluded by it when their obligation is to return the property, if it is so adjudged, and to pay any judgment recovered. If, however, the right has not been tried nor the value adjudged to the defendant, the extent of his interest and the amount he is entitled to recover on account of it are, of course, open questions in an action on the bond.⁴⁸ The sureties are represented in the

⁴⁸ *Martin v. Hertz*, 224 Ill. 84, 118 Ill. App. 297; *Jackson v. Morgan*, 167 Ind. 528; *Smith v. Bowers*, 2 Neb. (Unof.) 611, 89 N. W. 596; *Ihrig v. Bussell*, 68 Wash. 70; *Kennedy v. Brown*, 21 Kan. 177; *O'Loughlin v. Carr*, 9 Kan. App. 818; *Richardson v. People's Nat. Bank*, 57 Ohio St. 299; *Cox v. Hartranft*, 154 Pa. 457; *McCoslin v. David*, 22 Tex. Civ. App. 53; *Smith v. Mosby*, 98 Ind. 445; *McFadden v. Ross*, 108 id. 512; *Boom v. St. Paul F. & Mfg. Co.*, 33 Minn. 253; *Woods v. Kessler*, 93 Ind. 356; *Wallace v. Clark*, 7 Blackf. 298; *Clark v. Norton*, 6 Minn. 412; *Chambers v. Waters*, 7 Cal. 390; *Wall v. Humphreys*, 4 Dana 209; *Kimmell v. Kint*, 2 Watts 431. This view is favored in Delaware, though the court did not apply it because of deference to a former decision to the contrary. *Harmon v. Collins*, 2 Penne. 36, following *Mellvaine v. Holland*, 5 Harr. 10.

It is presumed that all matters which could have been, were litigated. *Lindsey v. Hewitt*, *supra*.

The sureties are liable to the party or parties to whom the final determination of the issue has awarded a recovery, though they were not all the parties plaintiff. *Pilger v. Marder*, 55 Neb. 113.

In *Warner v. Matthews*, 18 Ill.

83, *Skinner, J.*, thus discussed the effect of judgment for the defendant in replevin, rendered on the trial of an issue denying the plaintiff's title: "The judgment in the action of replevin necessarily determined that the plaintiff in that (the defendant in this) action was not entitled to the possession of the property, and that the defendant in that action (the plaintiff in this action) was entitled to a return thereof; and to that extent, and no further, are the rights of the parties concerning the property, and the ownership thereof, conclusively adjudged and determined. Whatever was in issue in that action, and essential to be found to authorize the judgment, and was in fact determined as between the parties, is *res judicata* and conclusive upon them. The defendant in that action was entitled to judgment upon either of the issues asserting property in himself and denying the plaintiff's right; and to prove these issues on the part of the defendant it was only necessary to show that the plaintiff had not the right of possession, or that the defendant had a special interest in the property entitling him to the present possession. The general ownership of the property was not therefore necessarily determined. Anderson

replevin suit by the plaintiff therein. If the question of the value of the property was essential to the verdict they are bound by the finding although no formal issue was made concerning it.⁴⁹ A judgment for return, even upon a nonsuit not complied with, will sustain an action on the bond for at least nominal damages; for to that extent it is imperative and conclusive.⁵⁰ The judgment for the return of the property authorized by statute to be rendered upon the withdrawal of a replevin suit cannot estop the surety from showing, in mitigation of damages, that his principal owned the property replevied but not returned.⁵¹ The plaintiff when sued on his bond, after the dismissal of his suit for lack of jurisdiction, may show that the property is his.⁵²

§ 507. What may be shown in defense or in mitigation. Where a judgment for the value in lieu of a return, by the election of the defendant, is regularly taken; or in the alternative in case return cannot be had, it is absolute, whether rendered on the merits or not.⁵³ But a mere judgment for return, without the trial of an issue of such scope as to embrace a determination of the extent or value of the defendant's interest, will not preclude inquiry upon that subject in an action on the bond. In the suit thereon the obligors may avail themselves of any fact which the plaintiff in replevin is not estopped by the judgment therein from setting up in order to limit the sum for which recovery shall be had.⁵⁴ The fact that the replevin suit

v. Talcott, 6 Ill. 365; King v. Ramsay, 13 Ill. 619; 1 Greenl. Ev., § 333." Hawley v. Warner, 12 Iowa 42.

⁴⁹ Washington Ice Co. v. Webster, 125 U. S. 426, 31 L. ed. 799; American B. Co. v. Hurd, 143 Ky. 799.

The judgment in the replevin suit is conclusive as to the value of the property in an action on the redelivery bond, no fraud or collusion appearing. Bierce v. Waterhouse, 219 U. S. 320, 55 L. ed. 237.

⁵⁰ Buck v. Rhodes, 11 Iowa 348; Hayden v. Anderson, 17 id. 158.

⁵¹ Fielding v. Silverstein, 70 Conn.

605; Hanchett v. Gardner, 138 Ill. 571.

⁵² O'Donnell v. Colby, 153 Ill. 324.

⁵³ Buck v. Rhodes, *supra*; Hayden v. Anderson, *supra*; Davis v. Harding, 3 Allen 302; Williams v. Vail, 9 Mich. 162, 80 Am. Dec. 76; Ryan v. Akeley, 42 Mich. 216; Pearl v. Garlock, 61 Mich. 419, 1 Am. St. 603.

⁵⁴ Leonard v. Whitney, 109 Mass. 265; Denny v. Reynolds, 24 Ind. 248; Wallace v. Clark, 7 Blackf. 298; McKelvey v. McLean, 34 Up. Can. C. P. 635; Walter v. Warfield, 2 Gill 216; Mason v. Sumner, 22 Md.

was defeated because prematurely brought;⁵⁵ that the plaintiff is a mere trustee, representing claims not sufficient to absorb the entire value;⁵⁶ that he has been fully compensated for the value of the property;⁵⁷ that since the taking under the writ the plaintiff's interest in the property has been extinguished in whole or in part;⁵⁸ that it has been delivered and accepted pending the suit;⁵⁹ that the property has been restored to the defendant by means of legal proceedings;⁶⁰ that a substantial portion of the property has been tendered in the same condition in which it was when the writ issued;⁶¹ that other goods

312; *Ormsbee v. Davis*, 18 Conn. 555; *Pacaud v. McEwan*, 31 Up. Can. Q. B. 328; *Stockwell v. Byrne*, 22 Ind. 6; *Belt v. Worthington*, 3 Gill & J. 252; *Dugan v. Tyson*, 6 id. 458; *Cumberland C. Co. v. Tilghman*, 13 Md. 74.

While a judgment in a replevin suit against a member of a partnership determines that the defendant was such member and that his interest in the tangible property of the firm had been lawfully attached, the amount or extent of that interest may be shown in an action on the replevin bond. *Hannon v. O'Dell*, 71 Conn. 698.

⁵⁵ *Davis v. Harding*, 3 Allen 302; *Martin v. Bailey*, 1 id. 381.

⁵⁶ *Howe v. Handley*, 28 Me. 241.

⁵⁷ *Vinton v. Mansfield*, 48 Conn. 474; *Stuart v. Trotter*, 75 Iowa 96.

The sale on a *fi. fa.* of goods replevied in an action for rent is a defense to the sureties only to the extent of the proceeds of the sale. *Krumbhaar v. Stetler*, 20 Phila. 341; *Shell v. Hummel*, 1 Pearson 19.

The recovery of judgment against the assigned estate of the principal in a replevin bond, to be paid on the settlement of such estate, does not merge the bond in the judgment, and, so far as the surety is

concerned, the bond is satisfied only to the extent of the actual payments. *Schott v. Youree*, 142 Ill. 233. It is not a defense to the surety that his principal failed to file a claim on the bond against the assigned estate of the real plaintiff in the replevin suit, there being only mere passive delay. *Id.*

⁵⁸ *Tuck v. Moses*, 58 Me. 462.

Under the Illinois statute the principal in the bond can prove property in himself only in mitigation of the damages. *Holler v. Coleson*, 23 Ill. App. 324.

⁵⁹ *Conroy v. Flint*, 5 Cal. 327; *Story v. O'Dea*, 23 Ind. 326 (property forcibly taken from the defendant).

⁶⁰ *Rinker v. Lee*, 29 Neb. 783; *Otto v. Burch*, 50 Neb. 894; *Harrow v. Ryan*, 31 Iowa 156; *Barton v. Shull*, 62 Neb. 570.

⁶¹ *Carroll v. Burgin*, 159 Ala. 406 (the delivery must be in accordance with the terms of the bond); *Leeper v. First Nat. Bank*, 26 Okla. 707, 29 L.R.A. (N.S.) 747; *Johnson v. Mason*, 64 N. J. L. 258; *Harts v. Wendell*, 26 Ill. App. 274. But compare *Bradley v. Reynolds*, 61 Conn. 271 (return tendered after election made to sue for damages); *Holmes v. Langston*, 110 Ga. 861 (to the same effect).

of like character and value had been substituted for those sold, and that the stock so replenished had been accepted by the plaintiff as the equivalent of the goods described in the bond, and as full satisfaction of the judgment in the replevin action;⁶² that the sureties hold a mortgage upon the property in suit;⁶³ that the defendant has the title to the property, in whole or in part, when the decision of that question was not involved in the replevin suit,⁶⁴ or any other fact which would show that the replevin was defeated on some technical ground, or that the defendant had but a temporary or partial right, may be shown, and the amount recoverable for the value will be limited accordingly.⁶⁵ But a return of the property to the

The plaintiff may return a part of the goods if they are separable from and not dependent upon the others for use or value, and are in the same condition as when taken. *Edwin v. Cox*, 61 Ill. App. 567.

⁶² *Union S. & M. Works v. Breidenstein*, 50 Kan. 53.

⁶³ *Ringgenberg v. Hartman*, 124 Ind. 186; *McFadden v. Ross*, 108 Ind. 512; *Henry v. Ferguson*, 55 Mich. 399; *Consolidated T. L. Co. v. Bronson*, 2 Ind. App. 1; *Schweer v. Schwabacher*, 17 Ill. App. 78.

⁶⁴ *Jones v. Smith*, 79 Me. 452; *Crabbs v. Koontz*, 69 Md. 59; *Pearl v. Garlock*, 61 Mich. 419, 1 Am. St. 603; *Ernst v. Hogue*, 86 Ala. 502; *Magerstadt v. Harder*, 95 Ill. App. 303; *Wallace v. Clark*, 7 Blackf. 298; *Belt v. Worthington*, 2 Gill & J. 247; *Lyon v. Pease*, 86 Ill. App. 251; *Weber v. Hertz*, 87 id. 601; *Fielding v. Silverstein*, 70 Conn. 605; *Little v. Bliss*, 55 Kan. 94; *King v. Ramsey*, 13 Ill. 619; *Easter v. Foster*, 173 Mass. 39, 73 Am. St. 257.

⁶⁵ *Simpson v. McFarland*, 18 Pick. 427, 29 Am. Dec. 602; *Wheeler v. Train*, 4 Pick. 168; *Flagg v. Tyler*, 6 Mass. 33; *Mattoon v. Pearce*,

12 id. 406; *Bartlett v. Kidder*, 14 Gray 449; *Ware River R. v. Vibbard*, 114 Mass. 458; *Leonard v. Whitney*, 109 id. 265; *Witham v. Witham*, 57 Me. 447, 99 Am. Dec. 787; *Walter v. Warfield*, 2 Gill 216; *Hacker v. Johnson*, 66 Me. 21; *Hayden v. Anderson*, 17 Iowa 158; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Russell v. Butterfield*, 21 Wend. 30; *De Witt v. Morris*, 13 id. 496; *Wallace v. Clark*, 7 Blackf. 298; *Jackson v. Bry*, 3 Ill. App. 586; *Dehler v. Held*, 50 Ill. 491.

In *Mason v. Sumner*, 22 Md. 312, *Bowie, C. J.*, said: "The first and second exceptions raise the question of how far the judgment in the action of replevin concludes the obligors in the bond. The appellant contends that wherever the title to property is in issue, or might have been in issue, in the original proceedings, that question becomes *res adjudicata* and cannot afterwards, in any subsequent proceedings, be inquired into; he assimilates this to a case of *sci. fa.*, where any defense which might have been pleaded to the original action cannot be set up against the *sci. fa.* In the case of *Belt v. Worthington*, 3 Gill &

marshal employed in the replevin action, the defendant never having come into possession of it, will not relieve the sureties

J. 252, Archer, J., declared that 'the object of the law in prescribing that a replevin bond shall be entered into by a plaintiff before he should have the benefit of the writ was only to give indemnity to the defendant. If, in truth, he had no right to the property at the time of the institution of the suit, the rejection of the evidence, by putting it in his power to recover the value of the goods, would enable him to overreach a just measure of indemnity, and inflict a penalty which the law never contemplated.' Repudiating the analogies sought to be established in that case to judgments by default in actions on appeal bonds and money contracts, he said the action of replevin was '*sui generis*,—the recovery on the replevin bond ought to be moulded in such manner as will best subserve the principles of justice. * * * The question (of the admissibility of evidence) must always be regulated by reference to the rights decided in the action and the nature and character of the bond.' In this case the obligors in the replevin were permitted, after nonsuit in replevin and judgment by default on the bond, to show, in mitigation of damages, that they had title to the articles replevied. The same general principle is announced by Stephen, J., in the case of *Dugan v. Tyson*, 6 G. & J. 458. This principle is exemplified most strongly in the case of *Walter*, for use of *Walter v. Warfield et al.*, 2 Gill 216, where, after judgment upon verdict rendered on pleas of *non cepit*, and property in the defendant, and judgment for return of the property in the action of replevin,

upon an action on the replevin bond against the obligors, the plaintiffs in the action of replevin, as defendants in the action on the bond, were permitted to show in mitigation of damages that the property was not in the defendant in the first action and plaintiff in the second. This case was argued before Archer, Dorsey, Chambers and Spence, JJ., and affirmed without dissent. In the more recent case of the *Cumberland Coal Co. v. Tilghman*, 13 Md. 74, the same doctrine is forcibly expressed. The theory of the action of replevin is thus defined by the learned judge, who, delivering the opinion of the court in this case, says: 'In this state the action is most generally resorted to for the purpose of trying the right of possession at the time of issuing the writ, and not to determine necessarily the *absolute* title to the property for all time. And this being so, it follows that if the plaintiff at the time of bringing the suit has the right to the possession, he must succeed; or, if he have it not, that his action must be defeated. Whoever is entitled to the possession, whatever may be his title in other respects, may maintain or defeat the action of replevin. His right to success in the action of replevin depending entirely on his right of possession, in reason it follows that his title to damages must be confined to the extent of interference with that possession. If the right to possession covers all time, or is limited to a determinate period, the damages will be accordingly graduated, as the case may be. In the case now before this court, the effort on the part of the defendants was

on the bond.⁶⁶ If the defendant was possessed of the property under a conditional title and it has been placed beyond the

to show, as alleged by them, in mitigation of damages, title in the Cumberland C. & I. Co. Now, this they could not do because that question was decided in the replevin suit. It was, however, competent to them to show that, although the defendant in the replevin suit had title to the possession of the boat at the time of the judgment rendered in his favor, yet that title was of but short duration, and terminated by contract in a short time after that judgment. No such evidence was offered to the court below.' It is obvious from the theory and illustration given in the above extract that the judgment in replevin does not conclude the obligors in the bond from proving by the proceedings in the cause, or *aliunde*, the character of the possessory right upon which the plaintiffs in the action on the bond recovered in the replevin suit. If from these it appears that the relation between the parties to the action in replevin was that of landlord and tenant, cultivating or renting on shares, and that the subject of replevin was the crop then growing upon the farm of the landlord, such evidence shows a qualified property, or joint right of possession, which would defeat the action of replevin by the tenant, and at the same time diminish the claim of damages on the part of the landlord founded on his *prima facie* right to the value of the appraisement, showing that he was entitled to but a moiety of the same. Such evidence was proper to rebut the '*prima facie*' case of the plaintiff on the bond. His right to damages must be confined

to the extent of his ownership over the property replevied. If as joint owner of the property he was entitled to such possession as precluded his tenant from replevying, and secured him a judgment of *retorno habendo*, yet his title was not so absolute and entire as to entitle him to recover of the principal and surety the full value of the property, or more than the value of his share of the crops. If we are correct in these premises, it necessarily follows that the prayer offered on the part of the appellant was not proper, since it required the court to instruct the jury that the appraisement was the measure of damages; this, we have seen, was but *prima facie* evidence, subject to be rebutted by such testimony as was offered on the part of the appellee."

In *Smith v. Lisher*, 23 Ind. 500, the proceedings in the action of replevin were put in evidence, and in that action the court found "the property mentioned in said complaint and writ of replevin in said defendant, and that he have possession thereof;" and it was held that the finding and judgment was conclusive between the parties to the suit on the bond as to the right of property, and precluded any proof of title thereto in a stranger in mitigation; but in *Stockwell v. Byrne*, 22 Ind. 6, it was held that, if the title was not tried in the replevin suit, title in a stranger may be shown to reduce the recovery to nominal damages.

⁶⁶*Sauerman v. Fidelity & Deposit Co. of Maryland* (Misc.), 145 N. Y. Supp. 114.

court, pursuant to irregular judicial proceedings, and the proceeds of it have been paid to the plaintiff and credited upon the irregular judgment, the purchase-money will be credited as of the date of the sale.⁶⁷ The accidental destruction of property wrongfully replevied will not release the sureties from their liability, it not appearing the loss was caused by the act of God.⁶⁸ In some jurisdictions the sureties may take advantage of the neglect of the court to render the alternative judgment required by the statutes for a return of the property or its value if a return cannot be had.⁶⁹ There can be no recovery for a failure to return without proof of a judgment awarding it;⁷⁰ notwithstanding the attorneys of the parties stipulate that the property cannot be returned, the sureties may show the contrary.⁷¹ The rule established by the supreme court of the United States precludes the sureties from taking advantage of the omission of the trial court to render an alternative judgment.⁷² They are not bound for any liability of their principal not involved in the replevin suit;⁷³ nor for the damages sustained by one who has been substituted as defendant in his stead.⁷⁴ If such suit is dismissed as to one of the defendants and proceeds to judgment against the other the sureties are released.⁷⁵

In an action for the equitable reduction of damages on a replevin bond given by one partner who has taken from his copartner some of the firm property, the rule is full indemnity for the obligee, and the obligor must establish not merely the apparent interest of the other in the property replevied upon

⁶⁷ Hall v. Tillman, 115 N. C. 500.

⁶⁸ Suppiger v. Gruaz, 137 Ill. 216; Heard v. Hicks, 101 Ala. 102; Carr v. Houston G. & W. Co., 105 Ga. 268; George v. Hewlett, 70 Miss. 1, 35 Am. St. 626, overruling Whitfield v. Whitfield, 44 Miss. 254; McPherson v. Acme L. Co., 70 Miss. 649. See §§ 1151, 1152.

⁶⁹ Lee v. Hastings, 13 Neb. 508.

⁷⁰ Citizens' State Bank v. Morse, 60 Kan. 526; Swartz v. English, 4 Kan. App. 509; Vinyard v. Barnes,

124 Ill. 346; Thomas v. Irwin, 90 Ind. 557.

⁷¹ Lee v. Hastings, *supra*.

⁷² Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727; Katz v. American B. & T. Co., 86 Minn. 168.

⁷³ Lee v. Hastings, *supra*.

⁷⁴ Vinton v. Mansfield, 48 Conn. 474. But see Hanna v. International P. Co., 23 Ohio St. 622, stated in first note to the next section.

⁷⁵ Tyler v. Davis, 63 Miss. 345.

a numerical division of it among the members of the firm, but go further and show that as between the obligee and himself the former will have had more of the property and funds of the firm than himself if full damages are given, or that the obligee is indebted to the firm, and his equitable interest in the property does not equal the value of that replevied and not returned.⁷⁶ In Pennsylvania, though set-off is not allowed in replevin, the sureties for the defendant in the replevin suit may "defalk" the amount of a counter-claim against the plaintiff which they bought of their principal.⁷⁷

§ 508. **Damages when plaintiff recovers as special owner; effect of change in statute.** The cases in which a defendant in replevin will be limited to the value of his special interest are those in which the other party is the general owner, represents him, or has made reparation to him.⁷⁸ In replevin brought by a mere stranger to the title, who never had possession until he obtained it by the writ, on a judgment for return, or in an action on his bond for breach of the condition to return the property, recovery may be had for its full value although the party so recovering, as between him and the general owner, has but a possessory right.⁷⁹ Where the property re-

⁷⁶ Clapham v. Crabtree, 72 Me. 473.

⁷⁷ Snyder v. Frankenfield, 4 Pa. Dist. 767.

⁷⁸ Atkins v. Moore, 82 Ill. 240; Broadwell v. Paradise, 81 id. 474; Dilworth v. McKelvey, 30 Mo. 149; Rhoades v. Woods, 41 Barb. 471; Seaman v. Luce, 23 Barb. 240; Noble v. Epperly, 6 Ind. 468; Fitzhugh v. Wiman, 9 N. Y. 559; Weaver v. Darby, 42 Barb. 441; Buck v. Remsen, 34 N. Y. 383.

⁷⁹ Bradley v. Reynolds, 61 Conn. 271, 287, citing the text; Broadwell v. Paradise; Atkins v. Moore, *supra*; Bennet v. Gilbert, 94 Ill. App. 505; Russell v. Butterfield, 21 Wend. 30; First Nat. Bank v. Crowley, 24 Mich. 492; Woodman v. Nottingham, 49 N. H. 387; Littlefield

v. Biddeford, 29 Me. 310; Fallon v. Manning, 35 Mo. 271; Frei v. Vogel, 40 Mo. 149; White v. Webb, 15 Conn. 302; Ingersoll v. Van Bokkelen, 7 Cow. 670; Green v. Clark, 12 N. Y. 343; Brizee v. Maybee, 21 Wend. 144; Kennedy v. Whitwell, 4 Pick. 466; Van Baalen v. Dean, 27 Mich. 104; Stanley v. Gaylord, 1 Cush. 536, 48 Am. Dec. 643; Farnham v. Moor, 21 Me. 508; Mattoon v. Pearce, 12 Mass. 406; Flag v. Tyler, 6 id. 33.

In *Hanna v. International P. Co.*, 23 Ohio St. 622, it was held in replevin brought against a party having possession of the property as agent that the principal might be substituted in his place without releasing the sureties in the replevin bond—that they stand bound for

plevied from a sheriff was held by him under several executions the sureties were liable for such sum as would put the sheriff in the position he occupied before the replevin and give him the power to perform his duty in the way he would have done if the property had remained in his custody.⁸⁰ A defendant who holds the property to satisfy a lien may recover only the amount due.⁸¹

Where a bond in accordance with the practice prescribed by statute is conditioned to return the property if adjudged and to pay any judgment that the defendant may recover against the plaintiff in the replevin suit, it obviously extends and will be limited to such judgment as the statute then in force provides for. Then, if the statute gives a defendant who recovers judgment by nonsuit or discontinuance an absolute right to a return or, in lieu thereof, at his election, a judgment for the value, in addition to damages for detention, the bond will cover any judgment recovered for the value; and especially if the statute provides that in a suit on the bond the amount for which judgment is recovered in replevin shall be the measure of damages these cannot be reduced or increased by proof of any facts antecedent to the judgment.⁸² But if, under the code practice, a judgment for return is rendered and there is no adjudication of the value to be paid or collected in case delivery of the property cannot be had the obligee is, nevertheless, entitled to recover the value on the undertaking or bond.⁸³ The

the indemnity of the new party equally as though he had been the original and only defendant—it is no prejudice to the plaintiff in the replevin suit. Compare *Walter v. Warfield*, 2 Gill 216; *Vinton v. Mansfield*, 48 Conn. 474; *Tyler v. Davis*, 63 Miss. 345; stated in last section.

⁸⁰ *Tanton v. Slyder*, 93 Ill. App. 455.

An officer with a special interest in, or title to, the property must show that the demand by which he holds it is unsatisfied. *Imel v. Van Deren*, 8 Colo. 90.

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⁸¹ *Seaboard A. L. R. Co. v. Hewlett*, 94 S. C. 478.

⁸² *Williams v. Vail*, 9 Mich. 162, 80 Am. Dec. 76.

The bond is given in view of the right of the state to govern the review of any judgment which may be entered in the action, so long as the contract it expresses is not affected. *Bierce v. Waterhouse*, 219 U. S. 320, 55 L. ed. 237.

⁸³ *Whitney v. Lehmer*, 26 Ind. 503. In this case *Frazer, J.*, said: "It is clearly not a void judgment; and the question is, what are the liabilities of the obligors in the re-

condition is absolute to return the property, if adjudged, and damages may be assessed on it unless it is satisfied by performance of other conditions. Where, however, a judgment regulated by the code is rendered absolutely for the value, and

plevin bond, who undertook that the plaintiff in that suit would return the property if such a return should be adjudged, as it has been. Is the defendant in that suit precluded from recovering the actual damages which resulted to him merely because the jury in that case failed to find the value of the property?

* * * In the absence of any direct authority, the case must find its solution in such general rules of the law as seem to be applicable to it. It will be noticed that the statute under examination contains no negative words, nor does it purport to prescribe a mode by which a remedy may be obtained upon the bond, or the tribunal where that remedy shall be sought. It does not even regulate the practice in a suit upon the bond; it is the practice in the replevin suit only which it prescribes. We have, then, a valid bond; its conditions broken; what is the measure of damages for breach of the condition to return the property? The answer furnished in all the cases ever decided, when no statute interfered, is the value of the property at least; this value to be shown as in ordinary cases involving an inquiry as to value. The case is not one where the statute creates a new right, giving a particular remedy therefor. In such a case the statutory remedy is the only one. But this is a right of action arising by the common law out of a breach of the contract; and if the statute gives a remedy without negative words, the common-law remedy still remains and may be

pursued at the plaintiff's option. An assessment of the value of the property in the replevin suit, and a judgment in the alternative for its return or its value, would, as evidence, undoubtedly have bound the parties upon the question of value, for the reason that it would have been a judicial determination of that question by a tribunal having that authority, putting it at rest forever. But it does not follow that the absence of such assessment and judgment shall have the practical effect of a finding and judgment that the property was of no value, or that no other tribunal shall examine the question. Common justice, as well as reason, would be shocked by the announcement of such a doctrine. The statute does not so declare, either in terms or by any implication which the recognized rules of construction will warrant. Grant that the plaintiffs had the right to have the verdict of the jury which tried the replevin suit upon the question of the value of the property. They should have asserted the right, and failing to do so then, when they should have acted, shall they do so now when it is impossible for their adversary to obtain that verdict? Nor can the surety * * * be deemed to be in any better position than his principals. His liability is co-extensive with theirs. Nothing has been done to work his discharge, if it be conceded that his principals are yet bound." *Yelton v. Slinkard*, 85 Ind. 190; *Sweeney v. Lomme*, 22 Wall. 208, 22 L. ed. 727.

not as an alternative, if delivery of the property cannot be had the liability of the sureties for that judgment is not so clear.⁸⁴ In Minnesota a party has no election to take a money judgment only for the value of the property. The bond must be read and construed in connection with the provisions of the statute, which enter into and become a part of it. Thus read and construed the obligation of the sureties to pay the value of the property was not absolute, but only conditional in case a return could not be had. The expression "such sum as for any cause may be recovered against the defendant," in a bond given for the return of the property, means such sum as may, in connection with a judgment for a delivery of the property, be recovered as damages for its detention, or, perhaps, for an injury to it, and also, conditionally, the value of the property in case a return cannot be had.⁸⁵

§ 509. Bond by defendant to retain the property. The defendant is permitted in many jurisdictions to prevent the delivery of replevied property to the plaintiff by giving a bond substantially like that required of the latter, except the condition to prosecute the suit. The measure of damages, of course, will be the same for breach of like conditions.⁸⁶ The costs of the action of replevin cannot be recovered on this

⁸⁴ *Gallarati v. Orser*, 27 N. Y. 324; *Ashley v. Peterson*, 25 Wis. 621; *Nickerson v. Chatterton*, 7 Cal. 568; *Clary v. Rolland*, 24 Cal. 147; *Mason v. Richards*, 12 Iowa 74; *Lomme v. Sweeney*, 1 Mont. 584; *Sweeney v. Lomme*, 22 Wall. 208, 22 L. ed. 727.

⁸⁵ *New England F. & C. Co. v. Bryant*, 64 Minn. 256, referring to *Gallarati v. Orser*, 27 N. Y. 324; *Dwight v. Enos*, 9 N. Y. 470, and *Fitzhugh v. Wiman*, id. 559, and disapproving *Mason v. Richards*, 12 Iowa 73, and *Robertson v. Davidson*, 14 Minn. 422. See *Katz v. American B. & T. Co.*, 86 Minn. 168.

⁸⁶ In *Tibbal v. Cahoon*, 10 Watts

232, the plaintiff gave a bond with surety to prosecute the suit to effect and without delay, and to return the property if adjudged; the defendant gave a counter bond and retained the property. Afterwards arbitrators awarded no cause of action. The plaintiff's sureties were liable for the costs in the replevin suit.

"A party who desires to avoid the penalties of a delivery bond in replevin must show a delivery or offer of delivery of the property within a reasonable time in substantially as good condition as when taken and without material depreciation in value." *Vallancy v. Hunt* 26 N. D. 611.

bond⁸⁷ nor the damages to the property while in the defendant's possession, if accepted by the officer on the writ of return, unless the bond is conditioned to pay any judgment recovered against the defendant, and a judgment is recovered for such damages.⁸⁸ If the defendant's undertaking admits that the plaintiff has taken the property described in his affidavit and requisition from his possession he cannot afterward deny that he had possession of such property or any part of it at the commencement of the action, or show that it was different or other property from that described.⁸⁹ The defendant cannot set up in defense of an action on his bond any issue which he could with reasonable diligence have set up or interposed in the replevin suit. It is a defense *pro tanto* if the property has been sold by a receiver and after the trial of such suit the plaintiff therein applied to the court for and received a portion of the proceeds of the sale, the remainder being held to abide the result of the action in which the receiver was appointed.⁹⁰ Where the plaintiff in replevin has received part of the property the sureties on a redelivery bond are liable for the difference between the value of the property so returned and the total value of the property involved as fixed by the alternative money judgment in the replevin action.⁹¹ The liability of the sureties ceases when the proceeding in sequestration is quashed,⁹² or on tender of the property.⁹³

SECTION 6.

ATTACHMENT AND FORTHCOMING BONDS.

§ 510. Attachment bonds; when cause of action accrues. Attachment bonds and undertakings are statutory obligations,

⁸⁷ *Lutes v. Alpaugh*, 23 N. J. L. 165.

⁸⁸ *Douglass v. Douglass*, 21 Wall. 98.

⁸⁹ *Martin v. Gilbert*, 119 N. Y. 298, 16 Am. St. 823; *Diossy v. Morgan*, 74 N. Y. 11.

⁹⁰ *Boyd v. Huffaker*, 39 Kan. 525.

⁹¹ *Trindle v. Register Printing & Publishing Co.*, 58 Colo. 81.

⁹² *London v. Miller*, 19 Tex. Civ. App. 446, and local cases cited.

⁹³ *Ely v. Liscomb*, 24 Cal. App. 224.

differing somewhat in form in the several states, but not substantially in legal effect. They are generally conditioned that the obligors will pay all damages which the defendant in the suit may sustain by reason of the attachment if the plaintiff shall fail to recover judgment, or because of the wrongful suing out of the writ. By "wrongful," as used in the statutes and in obligations made under them, is meant unjustly, injuriously, tortiously, in violation of right.⁹⁴ The condition of the bond is violated if the causes alleged for attachment do not exist, although the party suing it out may have believed in their existence;⁹⁵ but not if the alleged ground is true in fact though the party who made the allegation had no knowledge of its truth.⁹⁶

In Iowa the plaintiff in an action on the attachment bond must allege and prove that the attachment plaintiff had no reasonable grounds for believing that the allegations in his affidavit for the writ were true; it is not enough to show that they were not true.⁹⁷ The original case was ruled under a

⁹⁴ *Anvil G. M. Co. v. Hoxsie*, 125 Fed. 724, 60 C. C. A. 492; *Vandiver v. Waller*, 143 Ala. 411; *Raver v. Webster*, 3 Iowa 502, 66 Am. Dec. 96; *Smith v. Eakin*, 2 Sneed 456, 462; *Carothers v. McIlhenny*, 63 Tex. 138; *Woods v. Huffman*, 64 id. 98.

There must be a debt due or to become due and the existence of one of the statutory grounds for suing out the writ. *McLane v. McTighe*, 89 Ala. 411; *Bliss v. Heasty*, 61 Ill. 338; *Steen v. Ross*, 22 Fla. 480.

"When only actual damages are sought and the fact of indebtedness is not denied the complaint in an action on the bond should negative the existence of any statutory ground for suing out the attachment, since the bond is not broken unless the attachment was wrongfully sued out, and the non-existence of the particular ground averred in the affidavit, or of any partic-

ular ground does not render the attachment wrongful." *Painter v. Munn*, 117 Ala. 322, 67 Am. St. 170.

⁹⁵ *Anvil G. M. Co. v. Hoxsie*, *supra*; *Mobile F. Com. Co. v. Little*, 108 Ala. 399; *Hundley v. Chadick*, 109 Ala. 575; *Troy v. Rogers*, 113 Ala. 131; *Birmingham D. G. Co. v. Finley*, 122 Ala. 534; *Jerman v. Stewart*, 12 Fed. 266; *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Jackson v. Smith*, 75 id. 97; *Pettit v. Mercer*, 8 B. Mon. 51. But see *Mahnke v. Damon*, 3 Iowa 107.

⁹⁶ *McCormick H. Mach. Co. v. Col-liver*, 75 Iowa 559; *Calhoun v. Hannan*, 87 Ala. 277.

⁹⁷ *Ames v. Chirburg*, 152 Iowa 278, 38 L.R.A.(N.S.) 120; *Burton v. Knapp*, 14 Iowa 196, following earlier cases.

statute which did not vary materially from the statutes of other states; the later cases were decided under a statute like that of Washington, the court of which has taken issue with the view held in Iowa, which latter court, it is said, stands alone in holding that the actual damages are not recoverable if the attachment was issued without cause. "To say that a debtor may be deprived of the use of his property, not for any fault of his own, but because he believes that his creditor has been in fault, is to make his rights depend upon a matter which the law cannot, and does not pretend to, regulate, viz., the nature and condition of the creditor's mind; and is to put him, upon the trial of his suit for damages, to proof of facts which he can get positively from no other source but the creditor himself, which would be entirely unreasonable. Moreover, different creditors whose rights to have an attachment are equal when a cause exists, would be placed upon an entirely different footing if the writ should be discharged for want of actual cause. When one creditor attaches, others are likely to, deeming that the affidavit of the first one on file is sufficient information to lead a prudent person to act, but in a suit for damages the first one would escape, under the Iowa rule, because he had credible information, while the second would pay the full penalty. The language of the statute is, 'and that there was no reasonable cause to believe the ground * * * to be true.' The 'ground' in this case was that respondent had disposed of its property with intent to defraud its creditors, and that it was about to do so; but the cause for believing that ground to be true was not the statement of any one that there was a cause, but a fact, or facts, as, for example, a sham sale to a third person, without consideration, with the understanding that he was to hold it or sell it for the benefit of the respondent, or a plan or scheme devised for that purpose but not yet executed. This cause the law requires the plaintiff to prove to be non-existent."⁹⁸ If the other conditions giving the

⁹⁸ *Seattle C. Co. v. Haley*, 6 Wash. 302, 36 Am. St. 156; *Rodgers v. Cades*, 103 Ark. 187.

right to sue on the bond exist it is immaterial that the attachment defendant had no property except such as was exempt.⁹⁹

The principal and his sureties are liable for the wrongfully suing out of an attachment by an agent though it was done without directions.¹ If an attachment is dissolved after notice and hearing because the allegations in the affidavit were false and the case is not one in which the writ might issue, this is conclusive in an action upon the bond that it was wrongfully obtained, the ruling not being reversed.² If a suit is abandoned under circumstances which show that it was not instituted in good faith the plaintiff is liable. "Suitors who try experiments without hope of success must take the consequences. They cannot be considered in good faith."³ If the issue in the attachment is disposed of without determining whether it was wrongfully obtained that question may be adjudicated in the suit on the bond.⁴ A judgment in the original suit, fixing the damages, is not a condition precedent to an action against the sureties.⁵ An order directing delivery of the property is essential to liability.⁶ A writ may be allowed and damages awarded without bringing a new and independent suit on the bond.⁷ In Kentucky mere failure to succeed in the attachment suit will not forfeit the attachment bond, but it must be shown that it was wrongfully obtained, that is, without just cause; and in case of a nonsuit or an abandonment of the suit this would not necessarily appear.⁸ If the defendant files a bond for the restitution of the property and it is restored there is a

⁹⁹ *Union M. Co. v. Chandler*, 90 Iowa 650; *Troy v. Rogers*, 113 Ala. 131. See *Crofford v. Vassar*, 95 Ala. 548, holding that the levy of an attachment for rent on property not subject to it is an abuse of the process for which the sureties are not liable.

¹ *Seattle C. Co. v. Haley*, *supra*; *Jackson v. Smith*, 75 Ala. 97.

² *Hoge v. Norton*, 22 Kan. 374; *Trentman v. Wiley*, 85 Ind. 33; *Sannes v. Ross*, 105 id. 558; *State v. McKeon*, 25 Mo. App. 667.

³ *Schuessler v. Still*, 169 Ala. 239; *Littlejohn v. Wilcox*, 2 La. Ann. 620; *Blum v. Gaines*, 57 Tex. 135.

⁴ *Renkert v. Elliott*, 11 Lea 235; *Sloan v. Langert*, 6 Wash. 26.

⁵ *Boatwright v. Stewart*, 37 Ark. 614.

⁶ *McDonald v. Loewen*, 145 Mo. App. 49.

⁷ *Carrier v. Poulas*, 87 Miss. 595.

⁸ *Pettit v. Mercer*, 8 B. Mon. 51; *Cooper v. Hill*, 3 Bush 219. See *Young v. Broadbent*, 23 Iowa 539.

waiver of the right to resort to an action on the attachment bond.⁹

§ 511. Who may sue. Under the federal statutes¹⁰ the right of action in a bankrupt for the wrongful attachment of his chattels passes to his assignee so far as compensation is claimed for injuring, detaining or converting the property. The right to compensation for injury to the bankrupt's business, reputation and credit and to vindictive damages for maliciously suing out the attachment or abusively using the process remains in him. Hence separate actions may be maintained, the liability of the sureties being limited to the penalty of the bond.¹¹ A bond payable to a named defendant "*et al.*" inures to the benefit of each and all of several defendants. If one alone is aggrieved he may sue in his own name or in the names of all for his use. The obligors are liable to each defendant severally if each has a several interest, and the sureties for each of their principals severally as well as jointly.¹² Only a party to the bond may sue upon it. It does not inure to the benefit of the assignee of one of the attachment defendants, although he was a party to the attachment proceedings and had possession of the property levied on.¹³ The right to recover damages for an attachment does not, as in replevin turn on the question of mere possession or right of possession but on the fact of ownership, so that an obligee on an attachment bond cannot recover thereon where he has sold or assigned the property though he is still in possession of it.¹⁴ All the obligees in the bond must be joined as plaintiffs, in the capacity in which they are named, for the use of such as claim to have been injured.¹⁵ Recovery may be had

If the plaintiff has a good cause of action on which an attachment might issue a dissolution of the attachment for some irregularity is not ground for recovering on the bond under a statute which imposes liability for "improperly" suing out the writ. *Steen v. Ross*, 22 Fla. 480.

⁹ *Bick v. Lang*, 15 Ind. App. 503.

¹⁰ § 5046, R. S.

¹¹ *Doll v. Cooper*, 9 Lea 576.

¹² *Renkert v. Elliott*, 11 Lea 235. See *Watts v. Rice*, 75 Ala. 289, stated in § 513.

¹³ *Hopewell v. McGrew*, 50 Neb. 789.

¹⁴ *State v. Lichtman*, — Mo. App. —, 168 S. W. 367.

¹⁵ *Painter v. Munn*, 117 Ala. 322, 67 Am. St. 170; *King v. Kehoe*, 91 Iowa 91.

in one suit for damages to both the joint and individual property of the obligees.¹⁶ Under a statute providing that the bond shall be conditioned for the payment of all damages which may be awarded against the plaintiff or sustained by any person by reason of the attachment if the effects of the defendant generally are attached he only can sue on the bond, and if the attachment is of specific property only the owner of it or the defendant can sue.¹⁷ Under such statute the defendant may sue on the bond to recover, in addition to the damages awarded against the plaintiff, other damages sustained by reason of the wrongful attachment.¹⁸ In Illinois under such a statute any person interested in the proceeding who has sustained damage by wrongful suing out of the writ may recover, and it is not necessary that all persons interested in the attachment proceeding shall have sustained damage.¹⁹ Where it is provided that the bond shall be conditioned to pay any claimant of any property seized a claimant of such property may sue on the bond without having recovered damages in an independent suit against the plaintiff in the attachment.²⁰ Under a statute giving a right of action to an interpleader his vendee may sue.²¹

§ 512. **Damages recoverable.** In the absence of statutes authorizing the recovery of exemplary damages the obligor and his sureties are not liable for anything beyond such actual damages as are the direct result of the attachment.²² The question

¹⁶ *Sloan v. Langert*, 6 Wash. 26; *Boyd v. Martin*, 10 Ala. 700.

¹⁷ *Davis v. Commonwealth*, 13 Gratt. 139.

¹⁸ *Offerdinger v. Ford*, 92 Va. 636.

¹⁹ *McKinstry v. Bras*, 180 Ill. App. 648.

²⁰ *Totten v. Henry*, 46 W. Va. 232.

²¹ *State v. Pitman*, 131 Mo. App. 299.

²² *Johnston v. Sexton*, 159 Fed. 70, 86 C. C. A. 260; *Springer v. Riley* (Tex. Civ. App.), 136 S. W. 577; *Floyd v. Anderson*, 36 Okla. 308, 43 L.R.A.(N.S.) 788; *Croford v. Vassar*, 95 Ala. 548; *Offer-*

dinger v. Ford, 92 Va. 636; *Elder v. Kutner*, 97 Cal. 490; *Commonwealth v. Magnolia Villa L. & I. Co.*, 163 Pa. 99; *Fidelity & D. Co. v. Bucki L. Co.*, 189 U. S. 135, 47 L. ed. 744; *Bucki L. Co. v. Fidelity & D. Co.*, 109 Fed. 393, 48 C. C. A. 436; *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529. *Contra*, *Doll v. Cooper*, 9 Lea 576; *Mayer v. Duke*, 72 Tex. 445.

If property wrongfully attached is taken from the possession of the plaintiff's mortgagees who are selling it under a mortgage, and independent proceedings are brought by the attachment creditor under

of malice is not an issue.²³ If an attachment has been obtained without just cause the terms of the bond secure to the defendant all costs and damages that he has sustained in consequence thereof. The condition is satisfied and its terms substantially complied with by awarding him damages adequate to the injury to the property attached and the loss arising from the deprivation of its use, together with the costs and actual expenses incurred. It is considered that the legislature did not intend to impose on the sureties in the bond a more extensive liability. The plaintiff is not bound to show malice, nor can the defendant rely for defense on probable cause.²⁴ The actual damages have generally been stated to be the injury to the plaintiff by being deprived of the use of his property, or its loss, destruction or deterioration, together with the costs and expenses incurred by him in the defense of the suit.²⁵ The reasonable expense of procuring an undertaking to secure the

which, instead of the attachment, the property is sold by consent, nominal damages only can be recovered on the attachment bond. *Schwartz v. Davis*, 90 Iowa 324.

The scope of the bond may include any damages directly occasioned by any process issued or proceeding taken in the suit in which the attachment issued. *State v. Stark*, 75 Mo. 566.

²³ *Elder v. Kutner*, *supra*.

²⁴ *Goodbar v. Lindsley*, 51 Ark. 380, 14 Am. St. 54; *Marqueze v. Sontheimer*, 59 Miss. 430; *McClen-don v. Wells*, 20 S. C. 514; *Pettit v. Mercer*, 8 B. Mon. 51; *Commonwealth v. Magnolia Villa L. & I. Co.*, *supra*; *Moore v. United States F. & G. Co.*, 52 Tex. Civ. App. 286.

²⁵ *State v. Pitman*, 131 Mo. App. 299; *Blakely's Trustee v. Bogard*, 143 Ky. 377; *Witherspoon v. Cross*, 135 Cal. 96 (depreciation in value arising otherwise than through officer's wilful and negligent acts);

Blaul v. Tharp, 83 Iowa 665, citing the text; *Ruthven v. Beckwith*, 84 Iowa 715; *State v. Gage*, 52 Mo. App. 464; *Stanley v. Carey*, 89 Wis. 410, citing the text; *Hundley v. Chadick*, 109 Ala. 575, 583; *Reid-har v. Berger*, 8 B. Mon. 160; *Pettit v. Mercer*, *id.* 51; *Campbell v. Chamberlain*, 10 Iowa 337; *Frankel v. Stern*, 44 Cal. 168; *Bruce v. Coleman*, 1 Handy 515; *Alexander v. Jacoby*, 23 Ohio St. 358; *Boatwright v. Stewart*, 37 Ark. 614; *Lowenstein v. Monroe*, 55 Iowa 82; *Sanford v. Willetts*, 29 Kan. 647; *Marqueze v. Sontheimer*, 59 Miss. 430; *Porter v. Knight*, 63 Iowa 365; *Floyd v. Anderson*, 36 Okla. 308, 43 L.R.A.(N.S.) 788 (attorney's fees allowed by statute). See *Parish v. Van Arsdale-Osborne Brokerage Co.*, 92 Kan. 286, allowing recovery for depreciation, attorney's fees and expenses incurred in procuring the dissolution of the order of attachment.

release of the attached property may be recovered.²⁶ On its being established that no cause existed for the attachment the plaintiff is a wrong-doer *ab initio*; and if the attached property is destroyed by fire while in the possession of the officer the plaintiff is liable for its value although the loss occurred without fault of the officer.²⁷ If property has been taken the owner is entitled to its fair cash value at the time it was taken²⁸ or at the time of the sale²⁹ with interest at the statutory rate;³⁰ he is not bound by the price for which it was sold under an order of the court.³¹ The value of a stock of goods is measurable by the cost of replacing it after making allowance for its depreciation.³²

If the attachment causes the appointment of a receiver and a sale of the property by him for less than its fair market value when it was taken the sureties are liable for such sum, in addition to what it brought at the sale, as will make such value.³³ If a second attachment does not deprive the defendant therein of the possession of the attached property nor force the sale of it because of proceedings under the prior attachment and the plaintiff only secures, to the extent of his claim, the surplus remaining after satisfying that attachment the recovery on his bond cannot exceed the interest on such surplus during the time it was wrongfully withheld.³⁴ Interest is not recoverable upon the value of the property or upon the

²⁶ *Smith v. American B. Co.*, 160 N. C. 574.

²⁷ *Stanley v. Carey*, 89 Wis. 410.

²⁸ *State v. Ryley*, 76 Mo. App. 412; *Keeler v. Ricker*, 3 Northampton Co. Rep. 48.

²⁹ *Jaksich v. Guisti*, 36 Nev. 104.

³⁰ *Adamson v. Izor*, 76 Ohio 64; *Keeler v. Ricker*, 3 Northampton Co. Rep. 48; *Norman v. Fife*, 61 Ark. 33, citing the text; *Marchand v. York*, 10 Ky. L. Rep. 777 (Ky. Super. Ct.); *Pearce v. Maguire*, 17 R. I. 61; *Porter v. Knight*, 63 Iowa 365.

The damages for wrongfully sequestering a homestead are not con-

fined to the value of the rent during the time its owner was unable to occupy it; his removal to another home and the inconvenience resulting are the natural and proximate results of its seizure and elements of actual damage. *Blum v. Gaines*, 57 Tex. 135.

³¹ *State v. Parsons*, 109 Mo. App. 432; *Trentman v. Wiley*, 85 Ind. 33.

³² *State v. Parsons*, *supra*.

³³ *Union M. Co. v. Chandler*, 90 Iowa 650.

³⁴ *Emerson v. Converse*, 106 Iowa 330.

expenses incurred in the suit until the property has been seized and liability for the expenses has attached.³⁵ But an undertaking providing that the maker will, on demand, pay the amount of any judgment that may be recovered, with interest, bears interest from the date of the recovery and not from the date of its execution, and, upon demand, becomes payable with interest from that date.³⁶ If a fund deposited in bank is levied upon its owner is entitled to recover such sum as represents the excess of interest which he could have obtained for it over the amount allowed by the bank holding the fund.³⁷ If shares of stock are attached interest is recoverable on them and also on dividends thereon subsequently declared, these being bound by the attachment.³⁸

The expense which the owner of horses incurs by hiring others to do the work of those taken from him in order that he may perform a contract previously entered into may be recovered; and the recovery may be for such sum as the use of the property was worth to him though that is in excess of the market value.³⁹ Where the plaintiff was engaged, with his teams and utensils, in performing a contract, the profits of which, if performance had not been stopped by the attachment, could have been readily and certainly ascertained. Such profits are recoverable.⁴⁰ If by reason of the attachment the owner of property is unable to dispose of it a depreciation of its value by reason of a change in the market is as much a ground of damage as though it resulted from any other cause.⁴¹ But it has been ruled in New York, on an appeal from an order denying defendant's application for an increase in the amount

³⁵ *Trentman v. Wiley*, 85 Ind. 33; *Woolner v. Spalding*, 65 Miss. 204.

³⁶ *SooySmith v. American S. Co.*, 28 App. Div. (N. Y.) 346 (one judge dissented). See *McDonald v. Loewen*, 145 Mo. App. 49.

³⁷ *Strong v. Hasterlik*, 146 Ill. App. 346; *State v. Seavey*, 137 Mo. App. 1; *Fourth Nat. Bank v. Mayer*, 96 Ga. 728; *Vannatta v. Vannatta*,

21 Ky. L. Rep. 1464; *Northampton Nat. Bank v. Wylie*, 52 Hun 146.

³⁸ *Jacobus v. Monongahela Nat. Bank*, 35 Fed. 395.

³⁹ *State v. McKeon*, 25 Mo. App. 667.

⁴⁰ *State v. Andrews*, 39 W. Va. 35, quoting much of the text.

⁴¹ *Fleming v. Bailey*, 44 Miss. 132; *Horn v. Bayard*, 11 Rob. (La.) 259.

of the undertaking, that where an attachment has been made upon stocks the fact that during the continuance of the suit the shares have depreciated in price does not render the sureties upon the undertaking liable for the loss.⁴² Where a stock of goods is attached damages for interruption of the owner's business may be recovered, as well as reasonable costs and expenses incurred in procuring the discharge of the attachment and restoration of the property; but injury to the reputation of goods, caused by the levy of an attachment thereon, are too vague and uncertain to be capable of legitimate proof.⁴³ But the Mississippi court has no doubt that it is proper to allow the damages proved to have arisen from a loss of business with respect to the goods seized in so far as their seizure suspended business and caused a loss as to those goods.⁴⁴

Where property held for use and not for sale—buildings, machinery, etc.,—is wrongfully attached damages may be recovered for the loss of its use and for any injury to it by wear or tear, or negligent care while in the hands of the officer; but, no malice being shown, there cannot be a recovery for supposed loss of profits from the interruption of business, nor, under the guise of depreciation in value, for injuries to business, credit and reputation resulting from bankruptcy.⁴⁵ Where the attachment interrupted the business of a lumber company and the attachment plaintiff thereafter refused to deliver materials to such company evidence was properly received to show the net

⁴² *Miller v. Ferry*, 50 Hun 256. This case is based upon *McBride v. Farmers' Branch Bank*, 7 Abb. Pr. 347, in which an attachment was levied on money on deposit. The defendant made an unsuccessful defense, but did not procure a dissolution of the attachment by giving security, neither did he apply for an order directing the sheriff to collect the money. While the litigation was pending the holder of the fund failed. The attachment plaintiff was not liable for the loss.

⁴³ *Oberne v. Gaylord*, 13 Ill. App. 30, approving the text; *Alexander*

v. Jacoby, 23 Ohio St. 358; *Moore v. Schultz*, 31 Md. 418.

⁴⁴ *Marqueze v. Sontheimer*, 59 Miss. 430, 442; *Birmingham D. G. Co. v. Finley*, 122 Ala. 534; *Meyer v. Fagan*, *Doll v. Cooper*, *infra*; *Alexander v. Jacoby*, 23 Ohio St. 358. *Contra*, *Mocerf v. Stirman*, 16 Ky. L. Rep. 587; *Kirbs v. Provine*, 78 Tex. 353 (except under a claim for exemplary damages; see *Kaufman v. Armstrong*, 74 Tex. 65); *Weeks v. Prescott*, 53 Vt. 57.

⁴⁵ *Union Nat. Bank v. Cross*, 100 Wis. 174.

profits of the business for a few months prior to the levy of the attachment, not for the purpose of establishing the measure of damages, but as tending to show the damage done by the brief interruption of the business. The sureties were not liable for any damage done by the plaintiff's refusal to deliver material after the attachment was dissolved.⁴⁶

Generally injury to the credit and reputation of the party proceeded against by attachment has been held too remote and speculative,⁴⁷ though it is otherwise in Nebraska and in Alabama, if the writ was sued out on allegations of fraud;⁴⁸ and in Alabama if it is wrongfully sued out.⁴⁹ Where malice is properly charged, however, such damages have been allowed.⁵⁰ Mental suffering resulting from the wrongful and malicious

⁴⁶ *Fidelity & D. Co. v. Bucki L. Co.*, 189 U. S. 135, 47 L. ed. 744; *Bucki L. Co. v. Fidelity & D. Co.*, 109 Fed. 393, 48 C. C. A. 436.

⁴⁷ *Dorr C. Co. v. Des Moines Nat. Bank*, 127 Iowa 153, citing the text; *Plymouth G. M. Co. v. United States F. & G. Co.*, 35 Mont. 23; *Elder v. Kutner*, 97 Cal. 490; *Seattle C. Co. v. Haley*, 6 Wash. 302, 36 Am. St. 156; *Union Nat. Bank v. Cross*, *supra*, citing the text; *Mocerf v. Stirman*, 16 Ky. L. Rep. 587; *Campbell v. Chamberlain*, 10 Iowa 337; *Pettit v. Mercer*, 8 B. Mon. 51; *Heath v. Lent*, 1 Cal. 410; *Lowenstein v. Monroe*, 55 Iowa 82; *Oberne v. Gaylord*, 13 Ill. App. 30; *State v. Thomas*, 19 Mo. 613, 61 Am. Dec. 580; *Holliday v. Cohen*, 34 Ark. 707; *De Goey v. Van Wyck*, 97 Iowa 491.

In case of the stoppage of business the damages must be limited to the probable profits during the time it is suspended. Injury to credit and loss of prospective profits is too remote and speculative. *Holliday v. Cohen*, *supra*. See *Lawrence v. Hagerman*, 56 Ill. 68.

⁴⁸ *Marx v. Leinkauff*, 93 Ala. 453, 460; *Meyer v. Fagan*, 34 Neb. 184; *Birmingham D. G. Co. v. Finley*, 122 Ala. 534, 538. In *Alabama State L. Co. v. Reed*, 99 Ala. 19, loss of credit as the result of attaching money was held too remote. ⁴⁹ *Vandiver v. Waller*, 143 Ala. 411.

⁵⁰ *Mayer v. Duke*, 72 Tex. 445; *Goldsmith v. Picard*, 27 Ala. 142; *Flournoy v. Lyon*, 70 id. 308 (although there was no levy); *Donnell v. Jones*, 11 id. 689.

In Tennessee the recovery is to be had on the same principles as in the common-law action for malicious suits, modified by the nature of the case. The modification would be, in the case of a merchant, injury to his reputation and credit as a business man and the wrong done by the wrecking of his business caused by his being thrown into bankruptcy on a false and unfounded claim, with, perhaps, other elements, such as the costs of the wrongful suits. *Doll v. Cooper*, 9 Lea 576, 586.

suing out of an attachment is not an element of damages in an action on the bond.⁵¹ To enhance the damages it is admissible to show that the property attached was designed for a special use which, being thwarted by the attachment, has been materially lessened in value.⁵² Depreciation of the attached personal property while in the officer's hands is a legitimate subject of inquiry with a view to damages therefor;⁵³ though such depreciation be due to the negligence of the sheriff in not properly caring for it. "In serving the writ the sheriff is the agent of the attachment plaintiff, and for many purposes the acts of the officer are, in legal effect, the acts of the plaintiff. He is given possession and control of the attached property by the act of the plaintiff, and is, to a considerable extent, subject to his direction. Although he may be liable to the plaintiff for his negligence, yet we are of the opinion that, as between the plaintiff and the owner of the property, he should be treated as the agent of the former, so far as liability for his negligence is sought to be enforced. There is no good reason for requiring the owner of the property in such a case to split his cause of action and proceed against the plaintiff for a part and against the sheriff for the remainder."⁵⁴ There can be no recovery for a depreciation of real estate while subject to the attachment,⁵⁵ if there was no change of possession or interference with control.⁵⁶ The impairment of the credit of an attachment debtor whose realty has been levied on and his inability to sell or mortgage the same are not the proximate consequences of the attachment, and it is immaterial, so far as the sureties are concerned, that the attachment was malicious.⁵⁷ The sureties are

⁵¹ *Tisdale v. Major*, 106 Iowa 1; *Ames v. Chirburg*, 152 Iowa 278, 38 L.R.A.(N.S.) 120.

⁵² *Knapp v. Barnard*, 78 Iowa 347; *Carpenter v. Stevenson*, 6 Bush 259.

⁵³ *Vandiver v. Waller*, 143 Ala. 411; *McCarthy v. Boothe*, 2 Cal. App. 170 (value of stocks); *Crofford v. Vassar*, 95 Ala. 548, 551; *Lowenstein v. Monroe*, 55 Iowa 82; *Frankel v. Stern*, 44 Cal. 168;

Meshke v. Van Doren, 16 Wis. 319; *Fleming v. Bailey*, 44 Miss. 132.

⁵⁴ *Blaul v. Tharp*, 83 Iowa 665 (one judge dissented) *Ruthven v. Beckwith*, 84 Iowa 715.

⁵⁵ *Heath v. Lent*, 1 Cal. 410.

⁵⁶ *Tisdale v. Major*, 106 Iowa 1, 68 Am. St. 263; *Brandon v. Allen*, 28 La. Ann. 60; *Trawick v. Martin-B. Co.*, 79 Tex. 460.

⁵⁷ *Elder v. Kutner*, 97 Cal. 490.

not liable either for the failure of the officer to perform his duty under the writ or for a trespass committed by him.⁵⁸ It is not the natural or proximate result of a wrongful levy on property that inability to insure it shall result—a very doubtful proposition—or that the sale of a mortgage on it shall be prevented.⁵⁹ The plaintiff cannot recover for losses alleged to have resulted from his inability to consummate the purchase of land for which he had bargained, or for his being prevented from sowing a crop thereon. Such damages were regarded as too remote and speculative. The court said: It is not at all certain that the purchase in Mississippi would have been completed and the defendant have removed there even though no attachment had been levied on his property. If the Mississippi arrangement had been fully consummated it cannot be presumed that it would have inured to defendant's benefit. Whether or not the purchase would have proved a profitable investment is a matter purely speculative. So, also, the claim that defendant, if not prevented by these attachments, would have been sowing oats in the sunny South is a matter so devoid of certainty as not to be a proper element of damages.⁶⁰ The money paid as penalties because of the delay in the execution of another contract caused by the attachment of property used in the performance of it has been held to be recoverable, there being no unreasonable delay in securing the release of the attachment and it not having been practicable to secure other material in less time than it required to secure such release. But it was otherwise as to the traveling expenses and loss of time of the attachment defendant in securing the release of the property.⁶¹

§ 513. *Same subject.* As we have seen, there are cases which deny the right to recover damages on account of the loss of

⁵⁸ *Berwald v. Ray*, 165 Pa. 192; *Offerdinger v. Ford*, 92 Va. 636, 650; *Crow v. National Bank*, 62 Ill. App. 24; *Crofford v. Vassar*, *supra*. Compare *Blaul v. Tharp*, *supra*.

⁵⁹ *King v. Kehoe*, 91 Iowa 91.

⁶⁰ *De Goey v. Van Wyck*, 97 Iowa 491. See *Moore v. United States F. & G. Co.*, 52 Tex. Civ. App. 286.

⁶¹ *Smith v. American Bonding Co.*, 160 N. C. 574.

profits because they are too remote. On this theory it has been held that the plaintiff in a suit on the bond cannot prove that by reason of the attachment and the interruption of his business he lost advances which he had made and the opportunity to dispose of property which came to him as the result of the advances made to others.⁶² In a Kansas case⁶³ a herd of cattle was attached and taken from the range where they had been kept and placed on another range. The jury found that by reason of the inferiority of the latter the cattle did not increase in weight as they should have done; that they did not depreciate in value, but that they did not grow as they would if they had not been removed. Brewer, J., said: "It is a case of gain prevented rather than of loss sustained, and the questions are whether such gain prevented is proximate and certain—directly the result of the removal and inferior care—and the amount thereof susceptible of reasonably certain measurement. Both these questions the jury, by their verdict, answered in the affirmative, and we cannot say that the testimony did not fully warrant the answers. Of course, absolute certainty is not attainable, as in casting up the figures of an account; but nevertheless there are certain laws of feeding and growth, well understood among cattle men, and whose results work out with sufficient certainty for business calculations and judicial investigations. The raising of cattle for market has been an extensive and oftentimes profitable business in this state, and it would be strange if one could wrongfully take from the owner a herd of cattle, remove them to a poorer range, feed them on inferior food, and so treat them that during the growing season they do not grow at all, and then at its end return them, saying, as did the unfaithful servant in the parable who returned the single talent without increase, 'Lo! there thou hast that is thine,' and still be under no liability to respond in damages to such owner. We do not think the law is so deficient. It seems clear that the owner is damaged, that the damage may be determined to a reasonable certainty, and that the wrong-doer is bound to make good the damages."

⁶² Pollock v. Gantt, 69 Ala. 372,
44 Am. Rep. 519.

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⁶³ Hoge v. Norton, 22 Kan. 374.
See § 62 for analogous cases.

The rule that consecutive wrongs done independently by different persons cannot be joined to increase the responsibility of one wrong-doer applies to an action on an attachment bond. Hence the defendant is not liable for injury resulting from the sale of the attachment defendant's property under executions levied by his creditors simultaneously with the former's attachment although they were issued sooner than they would have been if the attachment had not been levied.⁶⁴ The attachment defendant cannot recover damages which would not have been sustained but for his own voluntary act.⁶⁵ Sureties are not bound beyond the letter of their contract; hence if a bond is payable to a partnership in the firm name and conditioned to pay all such damages as they may sustain there is no liability to one of the members of the firm for damages resulting to him by reason of the wrongful levying of the attachment on his individual property.⁶⁶ The usual bond does not hold the sureties responsible for the act of their principal in intervening after the levy and inducing the officer to sell the goods in unreasonably large quantities, thereby diminishing the sum realized.⁶⁷ The officer's return is not conclusive as to the quantity of goods he seized; if other goods seized were omitted from it by fraud or mistake the fact is open to proof in a suit on the bond.⁶⁸

§ 514. Exemplary damages. The code of Alabama permits the recovery of vindictive damages on attachment bonds where the attachments have been maliciously and wrongfully sued out. A case is within the statute if there is no reasonable foundation for believing that a statutory ground for the attachment exists, or if the process be sued out wantonly or recklessly without probable cause; or if it be resorted to in a mere race of diligence to obtain a first lien when no ground exists in fact, or is

⁶⁴ *Goodbar v. Lindsley*, 51 Ark. 380, 14 Am. St. 54; *Marqueze v. Sontheimer*, 59 Miss. 430; *Blum v. Davis*, 56 Tex. 423.

⁶⁵ *Charles City P. & M. Co v. Jones*, 71 Iowa 234.

⁶⁶ *Watts v. Rice*, 75 Ala. 289.

⁶⁷ *Jefferson County Bank v. Eborn*, 84 Ala. 529.

⁶⁸ *Hensley v. Rose*, 76 Ala. 373; *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529.

reasonably believed to exist.⁶⁹ But if one of the grounds for issuing an attachment exists exemplary damages cannot be recovered on account of the motive which prompted the plaintiff to issue it.⁷⁰ If the elements of wrong and malice exist the attachment defendant may recover for injury to his feelings.⁷¹ Corporations are liable for the acts of their agents in maliciously obtaining attachments.⁷² The mere fact that the plaintiff failed to establish the indebtedness of the defendant to him is not proof of malice in suing out the writ.⁷³ Whether the attachment plaintiff acted with malice is to be determined by the jury from all the circumstances; he cannot testify that he entertained no ill will or malice toward the defendant when the writ was sued out.⁷⁴ The amount of exemplary damages is within the discretion of the jury, subject to reasonable limitations. The plaintiff is not required to furnish the *data* for them to ascertain with reasonable certainty the amount of such damages.⁷⁵

The code of Washington also provides for exemplary damages if the attachment was maliciously sued out.⁷⁶ Such damages are not to be allowed as punishment, but as compensation for injury to reputation, feelings and other damage of an intangible nature.⁷⁷ Actual damage must be found as a predicate for punitive damages.⁷⁸

In Iowa exemplary damages are recoverable if the attach-

⁶⁹ City Nat. Bank v. Jeffries, 73 Ala. 183; Vandiver v. Waller, 143 Ala. 411.

⁷⁰ Plymouth G. M. Co. v. United States G. M. Co., 35 Mont. 23; City Nat. Bank v. Jeffries, *infra*.

If it is sought to recover exemplary damages the complaint must show that the attachment was wrongfully sued out, negative the ground on which it was issued, and aver that it was sued out without probable cause for believing such ground to be true. Painter v. Munn, 117 Ala. 322, 67 Am. St. 170; Schloss v. Rovelsky, 107 Ala. 596; Hamilton v. Maxwell, 119 Ala. 23.

⁷¹ City Nat. Bank v. Jeffries, 73 Ala. 183.

⁷² Jefferson County Bank v. Eborn, 84 Ala. 529.

⁷³ Hilfrich v. Meyer, 11 Wash. 186.

⁷⁴ Hamilton v. Maxwell, *supra*. This rule does not generally prevail.

⁷⁵ Mobile F. Com. Co. v. Little, 108 Ala. 399.

⁷⁶ Sloan v. Langert, 6 Wash. 26.

⁷⁷ Levy v. Fleischner, 12 Wash. 15.

⁷⁸ Hilfrich v. Meyer, 11 Wash. 186. See § 406.

ment was sued out maliciously. To bring a case within this condition it must be shown that the writ was procured without reasonable ground to believe the truth of the matters stated in the affidavit, and with the intention, design or set purpose of injuring the defendant.⁷⁹ But exemplary damages do not follow merely nominal damages.⁸⁰ Punitive damages are also awarded in Tennessee. It is settled there "that all such damages as might be recovered in an action on the case at common law, as well as vindictive damages, in case the wrongful suing out the attachment was also malicious, are recoverable in the action on the bond."⁸¹ Texas is, apparently, an exception to the rule that vindictive damages are not recoverable unless authorized by statute. There such damages are allowed to the extent of attorney's fees and injury to credit;⁸² but not against the sureties. It seems to be the practice in that state for the verdict to state separately the compensatory and punitive damages and when that is done it is proper to render judgment against the sureties for the former and against their principal for the latter.⁸³

In Alabama and Texas a principal is not responsible for the

⁷⁹ Nordhaus v. Peterson, 54 Iowa 68. See International H. Co. v. Iowa H. Co., 146 Iowa 172, 29 L.R.A. (N.S.) 272.

⁸⁰ Schwartz v. Davis, 90 Iowa 324, 330; Hilfrich v. Meyer, 11 Wash. 186; Levy v. Fleischer, 12 Wash. 15. See § 406 for cases holding otherwise.

An award of \$500 as exemplary damages was sustained, the actual damages being \$40. International H. Co. v. Iowa H. Co., *supra*.

In Union-M. Co. v. Prenzler, 100 Iowa 540, while the plaintiff, who had dealt with the defendant for years, was seriously ill, the latter fearing that the former might die, and that they would have to wait a year for the payment of their claim, endeavored, by intimidation and threats of legal process, to in-

duce the plaintiff's wife and daughter to turn over some of the property, and failing to succeed, sued out a writ of attachment on the ground that the plaintiff was about to convert the property into cash for the purpose of placing it beyond the reach of creditors. The court sustained a verdict for \$5,000 as exemplary damages.

⁸¹ Smith v. Story, 4 Humph. 172; Smith v. Eakin, 2 Sneed 461; Doll v. Cooper, 9 Lea 576; 585; Jerman v. Stewart, 12 Fed. 266.

⁸² Hughes v. Brooks, 36 Tex. 379; Wallace v. Finberg, 46 id. 47; Landes v. Eichelberger, 2 Tex. Civ. Cas. 127; Schwartz v. Burton, 1 id. 698; Tynburg v. Cohen, 67 Tex. 220.

⁸³ Emerson v. Skidmore, 7 Tex. Civ. App. 641.

malice of his agent in suing out an attachment unless he was the cause of or participated in it,⁸⁴ or ratified his act with knowledge of facts showing the agent's state of mind.⁸⁵ In Washington liability for exemplary damages results if the person whose direct act caused the attachment to be issued was actuated by malicious motives, although the principal for whom he acted as agent knew nothing of the transaction, unless it is shown that the agent had no authority to attach under any circumstances and that his act in doing so was affirmatively repudiated as soon as knowledge of it was received.⁸⁶ This general question is discussed in the chapter on exemplary damages, as is also the advice of counsel as evidence to rebut the charge of malice.⁸⁷ It is sufficient to add here that such advice must be given after a full and fair statement of the facts,⁸⁸ and after the exercise of due diligence to ascertain all the facts.⁸⁹ In Iowa the advice of an attorney not in actual practice, although he was a stockholder in the corporation which was plaintiff in the attachment proceedings, may be proven for what it is worth.⁹⁰

§ 515. What may be shown in defense or mitigation. If the attachment defendant has recovered against the plaintiff the general damages arising from loss of credit, impaired reputation and injured feelings he cannot subsequently sue on the bond to recover for the expense and loss of time in defending the attachment and the loss of or injury to the attached property.⁹¹ If the latter is taken out of the hands of the attachment defendant and an action on the bond accrues the obligors are, *prima facie*, liable for its value.⁹² The return of it, however, or its subsequent lawful seizure by the same officer on execution

⁸⁴ Pollock v. Gantt, 69 Ala. 373, 44 Am. Rep. 519; City Nat. Bank v. Jeffries, 73 Ala. 183; Jackson v. Smith, 75 id. 97.

⁸⁵ Tynburg v. Cohen, *supra*; Alabama State L. Co. v. Reed, 99 Ala. 19; Baldwin v. Walker, 94 Ala. 514.

⁸⁶ Seattle C. Co. v. Haley, 6 Wash. 302, 36 Am. St. 156.

⁸⁷ Ch. 9.

⁸⁸ Porter v. Knight, 63 Iowa 365; Sloane v. Langert, 6 Wash. 26; Levy v. Fleischner, 12 Wash. 15.

⁸⁹ Baldwin v. Walker, 94 Ala. 514.

⁹⁰ Charles City P. & M. Co. v. Jones, 71 Iowa 234.

⁹¹ Hall v. Forman, 82 Ky. 505.

⁹² Dunning v. Humphrey, *infra*.

or other authority against the owner and its appropriation to pay his debt for which the officer was empowered to make seizure will go in mitigation.⁹³ The Alabama court accepted this view,⁹⁴ but has receded from it. In a case ruled in 1895 it was said: To hold, in case of a suit on the attachment bond, counting upon the wrongful suing out of an attachment, that the measure of damages is the value of the property taken, but only that, less the amount of the attaching creditors' demand, would be to offer inducement for the unlawful substitution, and to make it answer the ends of a most unwarranted trespass, to secure a preference of payment over other creditors, and to deprive the debtor of his property otherwise than by due process of law. We are aware that there are respectable authorities to the contrary of the conclusion we announce, but we decline to follow them. In one of our own cases⁹⁵ the expression occurs, as embodied in the ninth headnote, "if it be shown that the property attached has yielded its full value this may be considered in mitigation of damages. It can go no further." This is relied on to support the proposition that if the property brought its fair value the proceeds of the sale, applied to the payment of the defendant's debt, for which judgment was rendered in the case, may be pleaded in mitigation of the damages for the wrongful suing out of the attachment. * * * It was possibly made without due consideration, and we disapprove it as being incorrect in principle.⁹⁶

Where the possession of the attachment defendant has not been disturbed he is still entitled to recover on the bond for any intermeddling with it.⁹⁷ Damages for being deprived of

⁹³ *Anvil G. M. Co. v. Hoxsie*, 125 Fed. 724, 60 C. C. A. 492; *Morrison v. Crawford*, 7 Ore. 473; *Earle v. Spooner*, 3 Denio 246; *Bennett v. Brown*, 31 Barb. 158, 20 N. Y. 99; *Boatwright v. Stewart*, 37 Ark. 614; *Trentman v. Wiley*, 85 Ind. 33; *Empire M. Co. v. Lovell*, 77 Iowa 100, 14 Am. St. 272; *Mayer v. Duke*, 72 Tex. 445. See *Wana-*

maker v. Bowers, 36 Md. 42; *Norman v. Fife*, 61 Ark. 33; § 510.

⁹⁴ *City Nat. Bank v. Jeffries*, 73 Ala. 183.

⁹⁵ *City Nat. Bank v. Jeffries*, *supra*.

⁹⁶ *Hundley v. Chadick*, 109 Ala. 575, 585.

⁹⁷ *Dunning v. Humphrey*, 24 Wend. 31. Compare *Groat v. Gillespie*, 25 id. 383.

the use of property do not embrace consequential and secondary losses. Thus, where a lot of merchandise was levied on, but, on the failure of the case, restored, it was held in an action on the bond that a loss to the plaintiff resulting from the attachment on his license to vend goods, and the services of himself and wife during the pendency of the suit should have been excluded from the consideration of the jury; that the inquiry in regard to the injury which the party sustained by being deprived of the use of his property should be limited to the actual value of the use; as, for example, the rent of the real estate, the hire or services of slaves, or the value of the use of any other species of property in itself productive. If not of that character the injury from being deprived of the use should be restricted to interest upon the value.⁹⁸ And where an attachment was levied upon a house which was being taken to pieces for removal to and erection upon other premises damages were not permitted to be recovered on the bond for injury to furniture by exposure in consequence of the plaintiff being prevented or delayed from rebuilding the house, nor for the additional expense of reconstructing it. The value of the use, it was said, must be predicated upon the condition of the property when it was attached, and not upon what its condition was before or what it was intended to be in the future.⁹⁹ A very restricted rule of liability was here announced and applied; and it is certain that unless considerably expanded it would often prevent the recovery of reasonable and fair compensation. Suppose an important part of a mill to be detached for some temporary purpose, necessitating its stoppage and the work of all the laborers and all the other dependencies; and when it is about to be put in place again it is taken under an attachment; is the value of its use to be estimated according to its condition when attached, without regard to what it had been, or what it was intended to be in the future? If the attached property is replevied by the defendant, who sells it and pays his debt with the proceeds, the liability of the sureties on the attach-

⁹⁸ Reidhar v. Berger, 8 B. Mon. 160. See Alexander v. Jacoby, 23 Ohio St. 358.

⁹⁹ Plumb v. Woodmansee, 34 Iowa

116.

ment is mitigated accordingly.¹ In New York if the plaintiff in attachment has been made a party to the action he may plead as an offset an independent counter-claim existing in his favor and not available to the sureties.² An action for damages on an attachment bond being *ex contractu* the defendant may set off whatever amount is due him from the plaintiff irrespective of any claim of the latter to exemptions.³ It is not a defense to an action on a bond that the suit in which it was given was predicated on a void contract;⁴ or that the approval of the bond was waived.⁵ It is a defense that an offer to redeliver property after judgment was declined.⁶ The sureties are released by the amendment of the complaint in a substantial respect after the bond was executed.⁷ They cannot question the validity of the levy where the parties have treated it as valid and a sale of the property has been made.⁸

§ 516. **Cost and expenses; attorneys' fees; loss of time.** The costs and expenses of defending against the attachment, procuring its discharge, and the restoration of the property may be recovered as part of the damages on such a bond.⁹ But a defendant who owned none of the property attached as his

¹ *Painter v. Munn*, 117 Ala. 322, 67 Am. St. 170.

² *Kinney v. Reid I. C. Co.*, 57 App. Div. (N. Y.) 206.

³ *State v. Lichtman*, 184 Mo. App. 225, 168 S. W. 367.

⁴ *State v. Fargo*, 151 Mo. 280.

⁵ *Fidelity & D. Co. v. Bowen*, 123 Iowa 356, 6 L.R.A. (N.S.) 1021.

⁶ *Rider v. Crowe M. Co.*, 36 Colo. 366.

⁷ *Cassidy v. Saline County Bank*, 7 Ind. Terr. 543.

⁸ *Hamilton v. Maxwell*, 119 Ala. 23.

⁹ *Anvil G. M. Co. v. Hoxsie*, 125 Fed. 724, 60 C. C. A. 492; *Vandiver v. Waller*, 143 Ala. 411; *Oakes v. Smith*, 121 Ga. 317 (though not paid); *Southern G. Co. v. Adams*, 112 La. 60; *State v. Seavey*, 137 Mo. App. 1; *Fourth Nat. Bank v.*

Mayer, 96 Ga. 728; *Green F. Co. v. Pate*, 99 Ga. 60; *Gonzales v. De Funiak H. T. Co.*, 41 Fla. 471; *Union M. Co. v. Prenzler*, 100 Iowa 540; *Dunning v. Humphrey*, 24 Wend. 31; *Groat v. Gillespie*, 25 id. 383; *Pettit v. Meroer*, 8 B. Mon. 51; *Burton v. Smith*, 49 Ala. 293; *Alexander v. Jacoby*, 23 Ohio St. 358; *Schuyler v. Sylvester*, 28 N. J. L. 487; *Bruce v. Coleman*, 1 Handy 515; *Northrup v. Garrett*, 17 Hun 497; *Raymond v. Green*, 12 Neb. 215, 41 Am. Rep. 763; *State v. Shobe*, 23 Mo. App. 474 (plaintiff's traveling expenses in attending the attachment suit); *State v. McHale*, 16 id. 478 (cash paid for the examination of the defendant's books and for a transcript of the record; compensation for a stenographer's services was refused);

cannot, after defeating a recovery on the issue of indebtedness, recover from the sureties the expenses incurred in defending the suit on the attachment issue.¹⁰ The damages for which the sureties are liable also include costs upon a *certiorari* on which a judgment for the plaintiff in the attachment was reversed.¹¹ The right to recover for reasonable attorney fees paid or incurred in obtaining a discharge of the attachment rests upon the same principle as the other costs and expenses incurred for the same purpose,¹² and is not defeated because the aggregate

Damron v. Sweetzer, 16 Ill. App. 339; *Flournoy v. Lyon*, 70 Ala. 308 (if there was an actual levy); *Dothard v. Sheid*, 69 id. 135 (while such damages are the proximate, they are not the necessary result of suing out the attachment, and therefore must be specially claimed).

¹⁰ *Tebo v. Betancourt*, 73 Miss. 868, 55 Am. St. 573; *Pinson v. Kirsh*, 46 Tex. 29.

¹¹ *Bennett v. Brown*, 20 N. Y. 99, 31 Barb. 158.

¹² *McLean v. Wright*, 137 Ala. 644, 97 Am. St. 67; *State v. Allen*, 124 Mo. App. 465; *State v. Parsons*, 109 Mo. App. 432; *Plymouth G. M. Co. v. United States F. & G. Co.*, 35 Mont. 23; *Marks v. Massachusetts B. & Ins. Co.* (N. Y. Misc.), 117 N. Y. Supp. 1019; *Bash v. Howland*, 27 Okla. 462; *Peters v. Snively-Ashton*, 144 Iowa 147; *Blakely v. Bogard*, 143 Ky. 377; *Fourth Nat. Bank v. Mayer*; *Union M. Co. v. Prenzler*; *Green F. Co. v. Pate*, *supra*; *Marchand v. York*, 10 Ky. L. Rep. 777 (Ky. Super. Ct.); *McClure v. Renaker*, 21 Ky. L. Rep. 360; *Buckley v. Van Diver*, 70 Miss. 622, citing the text; *State v. Gage*, 52 Mo. App. 464, 471; *State v. Immer*, id. 536; *State v. Goodhue*, 74 id. 162; *Territory v. Rindskopf*, 5 N. M. 93,

quoting the text; *Gonzales v. De Funiak H. T. Co.*, *supra*; *Barton v. Smith*, 49 Ala. 293; *Northrup v. Garrett*, 17 Hun 497; *Seay v. Greenwood*, 21 Ala. 491; *Swift v. Plessner*, 39 Mich. 178; *Ah Thaie v. Quan Wan*, 3 Cal. 216; *Prader v. Grim*, 13 Cal. 585; *Tyler v. Safford*, 31 Kan. 608; *Higgins v. Mansfield*, 62 Ala. 267.

In the last case it was held the reasonable amount paid or promised to be paid to attorneys for defending the attachment suit, and the value of time lost and expenses incurred in attending court for the trial may be recovered in an action on the bond for the wrongful and vexatious suing out of the attachment; but that damage resulting from the demoralization of the plaintiff's work, while he was absent from his farm and procuring attorneys to defend the suit, or from his being compelled to stop a double plow while he was absent, are too remote and should not be estimated in fixing the value of the plaintiff's services. *Morris v. Price*, 2 Blackf. 457; *Plumb v. Woodmansee*, 34 Iowa 116.

In Iowa attorneys' fees are expressly allowed by statute, where there was no reasonable cause to believe the ground upon which the writ was issued to be true. *Behrens*

recovery exceeds the penalty of the bond.¹³ Where exempt property is levied upon the expenses paid for preparing and filing the claim of exemption and establishing the right thereto may be recovered.¹⁴ In some jurisdictions, however, the right to costs and expenses is denied.¹⁵ As a rule the fees and other expenses incident to the defense of the principal suit on the

v. McKenzie, 23 Iowa 333, 92 Am. Dec. 428. They are limited, however, to the services rendered in the auxiliary proceeding. *Porter v. Knight*, 63 Iowa 365. But compare *Peters v. Snavelly-Ashton*, *supra*. They are taxed with reference to the exemplary damages awarded as well as those which are compensatory. *International H. Co. v. Iowa H. Co.*, 146 Iowa 172, 29 L.R.A. (N.S.) 272.

Such fees are not recoverable if no defense was made although services were rendered by the attorney in filing cross-interrogatories, requiring proof of the debt, etc. *Baldwin v. Walker*, 94 Ala. 514.

Nor when counsel is not employed until after a default judgment has been rendered, and then only to make an unsuccessful motion for a new trial. *Trammell v. Ramage*, 97 Ala. 666.

Such fees cannot be recovered under an allegation that the plaintiff engaged an attorney to represent him in the attachment suit and incurred attorney's fees in a sum stated. *Elder v. Kutner*, 97 Cal. 490.

And where payment of such fees is not required to authorize their recovery it must be alleged that a sum stated was incurred or promised. *Crofford v. Vassar*, 95 Ala. 548; *Schuessler & Sons v. Still*, 169 Ala. 239.

Loss of time and expenses incurred in counseling with attorneys with a view of getting release of an

attachment must be pleaded. *Armentrout v. Baldwin*, 163 Iowa 410.

¹³ *Union M. Co. v. Chandler*, 90 Iowa 650.

¹⁴ *Vandiver v. Waller*, 143 Ala. 411, citing the text.

¹⁵ *Elwell v. Seattle S. F. Co.*, 2 Alaska 617; *Keeler v. Ricker*, 3 Northampton Co. Rep. 48; *Stringfield v. Hirsch*, 94 Tenn. 425, 45 Am. St. 733; *Goodbar v. Lindsley*, 51 Ark. 380, 14 Am. St. 54; *Littleton v. Frank*, 2 Lea 300.

The federal courts usually deny such fees unless the law is settled otherwise by statute or the appellate court of the state in which the cause of action originated. *Jacobus v. Monongahela Nat. Bank*, 35 Fed. 395; *Insurance Co. v. Conard*, Baldwin, 138. If such liability exists under state law it cannot be gotten rid of by removing a case to a federal court. *Fidelity & D. Co. v. Bucki L. Co.*, 189 U. S. 135, 47 L. ed. 744.

In Pennsylvania the policy concerning such fees in other actions is so firmly established that it is reasonably certain they cannot be recovered. *Good v. Mylin*, 8 Pa. 51, 49 Am. Dec. 493; *Haverstick v. Gas Co.*, 29 Pa. 254; *Stopp v. Smith*, 71 id. 285. But see *Berwald v. Ray*, 165 Pa. 192.

In Texas they are not recoverable when compensatory damages only are claimed; they are allowed when exemplary damages are recovered and are an element thereof.

merits are not recoverable.¹⁶ In Indiana if the action and the attachment have both been defeated the reasonable attorneys' fees of the defendant in both may be recovered.¹⁷ In Missouri and Mississippi if the attachment is not dissolved until final judgment upon the merits and a contest upon them was necessary to procure its dissolution there may be a recovery of the whole costs and expenses.¹⁸ The execution of an attachment is necessary to the recovery of attorney's fees.¹⁹ Where the defendant gives bond to pay whatever judgment may be rendered and the attachment is dissolved, the case resulting in a judgment for the defendant, he cannot, in a suit on the bond, recover for attorneys' fees, costs and expenses incurred in the defense of the suit upon its merits after the attachment was dissolved.²⁰ Under a bond conditioned as the statute requires "to pay all costs that may be awarded to the defendant, and all damages that he may sustain by reason of the attachment," the sureties are liable for all costs awarded to the defendant in the action, and not merely such as resulted from the attachment.²¹

See *Hughes v. Brooks*, 36 Tex. 379, and other cases cited with it in note to sec. 514.

¹⁶ *Ames v. Chirburg*, 152 Iowa 278, 38 L.R.A.(N.S.) 120; *State v. Parsons*, *supra*; *Gonzales v. De Funiak H. T. Co.*, 41 Fla. 471; *Alexander v. Jacoby*, 23 Ohio St. 358; *Hilfrich v. Meyer*, 11 Wash. 186; *Seattle C. Co. v. Haley*, 6 Wash. 302, 36 Am. St. 156; *McClure v. Renaker*, 21 Ky. L. Rep. 360; *Vannatta v. Vannatta*, 21 Ky. L. Rep. 1464; *State v. Heckert*, 62 Mo. App. 427; *Adam v. Gomila*, 37 La. Ann. 479; *Damron v. Sweetzer*, 16 Ill. App. 339; *Northampton Nat. Bank v. Wylie*, 52 Hun 146; *Flournoy v. Lyon*, 70 Ala. 308; *Frost v. Jordan*, 37 Minn. 544 (although jurisdiction obtained by attaching property).

Attorney's fees incurred partly in defending the cause of action and partly in defending the cause of at-

tachment are recoverable in so far as services were rendered for the latter purpose. *McClure v. Renaker*, *supra*.

¹⁷ *Wilson v. Root*, 43 Ind. 486.

¹⁸ *State v. McHale*, 16 Mo. App. 478; *State v. Thomas*, 19 Mo. 613, 61 Am. Dec. 580; *State v. Beldsmeier*, 56 Mo. 226; *State v. Stark*, 75 id. 566; *Buckley v. Van Diver*, 70 Miss. 622.

¹⁹ *State v. Binney*, 127 Mo. App. 710.

²⁰ *State v. Fargo*, 151 Mo. 280, overruling *State v. O'Neill*, 4 Mo. App. 221, and *State v. Coombs*, 67 id. 199.

²¹ *Drake v. Sworts*, 24 Ore. 198; *Greaves v. Newport*, 41 Minn. 240; *Lee v. Homer*, 37 Hun 634; *Bing Gee v. Ah Jim*, 7 Fed. 811, 7 Sawyer 117; *Stauffer v. Garrison* 61 Miss. 67 (including attorneys' fees).

In New York, while sureties are not ordinarily liable for general counsel fees incurred in the action,²² a non-resident defendant whose property has been attached may, after failing to have the attachment vacated and then obtaining judgment, recover the counsel fees incurred in the action, they being "damages which the defendant may sustain" within the meaning of the bond.²³ Where a motion to vacate an attachment was granted, but such action was reversed on appeal, though apparently not on the merits, and on the trial of the action the complaint was dismissed, the sureties were liable for the costs and expenses of the proceedings to vacate the attachment as well as for those of defending the action.²⁴ Attorney's fees incurred in the successful defense of another action, thereby preventing a judgment against the defendant for the debt, are not an element of liability on the attachment bond.²⁵ On the settlement of the claim pending a motion to vacate the attachment on new facts, which is granted by consent, there cannot be a recovery for counsel fees in the proceeding to vacate.²⁶ The attaching creditor is liable for the rent of premises leased by the defendant for carrying on the business of selling the attached stock of goods from the time of taking the goods into custody. He is also liable for the defendant's loss of time on the basis of its value in the business in which he was engaged, and not on the basis of his earning capacity in other employments or on what he could have earned as wages.²⁷ Loss of time from the regular employment of the defendant, as well as attorney's fees and expense of attending court, may be recovered on the breach of a bond given to contest a claim of exemption and conditioned to pay all costs and damages that may be sustained.²⁸

²² *Northampton Nat. Bank v. Wylie*, 52 Hun 148.

²³ *Tyng v. American S. Co.*, 48 App. Div. (N. Y.) 240; *Fixel v. Tallman* (N. Y. Misc.), 116 Supp. 639.

²⁴ *Tyng v. American S. Co.*, 69 App. Div. (N. Y.) 137.

²⁵ *Flournoy v. Lyon*, 70 Ala. 308; *Stein v. Cozart*, 122 N. C. 280.

²⁶ *Braunstein v. American B. T. Co.* (N. Y. Misc.), 84 Supp. 982.

²⁷ *Lord v. Wood*, 120 Iowa 303.

²⁸ *Kirby v. Forbes*, 141 Ala. 234.

§ 517. **Forthcoming bonds.** These are usually conditioned for the delivery of the property to the officer to satisfy the judgment or execution which the plaintiff in an attachment may obtain in the cause, or when and where the court may direct. Sometimes the alternative is embraced of the delivery of the property or the satisfaction of the judgment recovered.²⁹ The right of action is complete on the failure to deliver at the stipulated time,³⁰ unless the property attached is in the hands of a third person and the bond is conditioned for its delivery "when and where the court shall direct," in which case an action cannot be begun until an order is made for its delivery.³¹ If the obligor was not the general owner of the goods at the time the bond was given he and his sureties are liable thereon notwithstanding the invalidity of the levy.³² If the condition to return is unqualified the bond is not satisfied by a tender of other property of the same kind and value, though that attached was perishable in its nature.³³ The whole property released must be returned.³⁴ If the condition is to deliver or pay the appraised value performance is not excused by the accidental destruction of the property by fire originating through human agency, without the obligor's fault;³⁵ but it is otherwise if delivery is prevented by an act of God or the law.³⁶ A surety may exonerate himself by delivering the property to the officer at any time before judgment is rendered against him on the bond.³⁷ The bond does not affect the lien on the property resulting from

²⁹ Drake on Attach., § 327.

³⁰ Naynant v. Dodson, 12 Iowa 22; Jennings v. Wall, 217 Mass. 278.

³¹ Brotherton v. Thompson, 11 Mo. 94.

³² Eisenbud v. Gellert, 26 N. Y. Misc. 367.

³³ Pearce v. Maguire, 17 R. I. 61.

³⁴ Metrovich v. Jovovich, 58 Cal. 341; Jones v. Short, 53 Ore. 525, citing the text.

³⁵ Doggett v. Black, 40 Fed. 439.

³⁶ Carr v. Houston G. & W. Co., 165 Ga. 268; Phillipi v. Capell, 38

Ala. 575; Haralson v. Walker, 23 Ark. 415; Irion v. Hume, 50 Miss. 419 (emancipation of slaves); Kinney v. Avery & Co., 14 Ga. App. 180; Early v. Hampton, 15 Ga. App. 95.

But a surrender of the property to a third party under an invalid process is no defense to an action on the bond. Kinney v. Avery & Co., 14 Ga. App. 180.

³⁷ Reagan v. Kitchen, 3 Martin 418; Hansford v. Perrin, 6 B. Mon. 595. See Payne v. Joyner, 7 Ark. 462.

the levy; hence it is immaterial, so far as the sureties' liability is concerned, that the attachment was not sustained on the ground on which it was obtained, but on a ground first presented after the bond was filed.³⁸ Such a bond given in a justice's court will be construed to cover the time until a final adjudication is made although that be in an appellate court, if that can be done without violence to its terms.³⁹

§ 518. **Same subject; measure of damages.** The measure of damages is the value of the property stipulated to be forthcoming, with interest from the time delivery became due,⁴⁰ not exceeding the amount of the judgment in the attachment suit.⁴¹ But this value should be computed subject to any paramount lien.⁴² Where a seizure was made under an attachment of property upon which the party having it in possession had a

³⁸ *Hobson v. Hall*, 13 Ky. L. Rep. 109.

³⁹ *Conrad v. Ehrman*, 61 Ill. App. 128.

⁴⁰ *Jennings v. Wall*, 217 Mass. 278.

⁴¹ *Mullally v. Townsend*, 119 Cal. 47; *Curtin v. Harvey*, 120 Cal. 620; *Keeler v. Ricker*, 3 Northampton Co. Rep. 48; *Jolley v. Rutherford*, 112 Ga. 342; *Schneider v. Wallingford*, 4 Colo. App. 150; *Stevenson v. Palmer*, 14 Colo. 565, 20 Am. St. 295; *Whelchel v. Duckett*, 91 Ga. 132; *Hammond v. Starr*, 79 Cal. 556; *Collins v. Mitchell*, 3 Fla. 4; *Moon v. Story*, 2 B. Mon. 354; *Weed v. Dills*, 34 Mo. 483; *Jones v. Hays*, 27 Tex. 1; *Marshall v. Bailey*, 27 Tex. 686; *Pearce v. Maguire*, 17 R. I. 61; *Reger v. Manhattan B. Co.*, 6 Pa. Super. 375; *McDonald v. Loewen*, *infra*; *Wallace v. Terry* (Tex. App.), 15 S. W. 35 (in the absence of a judgment the amount of the claim fixes the recovery if that is less than the value of the property). See *Anthony v. Comstock*, 1 R. I. 454.

Where the subject-matter of an

action of bail-trover was promissory notes which the defendant had pledged as collateral to the plaintiff and afterwards placed in the defendant's hands for collection, and the plaintiff had, in a former suit, recovered judgment on the debt thus secured, the measure of the plaintiff's damages was the amount due on the judgment rendered in such suit, at the date of the trial of the trover action, provided the value of the notes equaled or exceeded that amount, and if their value was less than the amount due on the judgment, the measure of damages was the value of the notes. The judgment was conclusive on the sureties as to the amount for which it was rendered, notwithstanding they were not parties to the action. *Holmes v. Langston*, 110 Ga. 861.

The sureties have been held liable also for a statutory penalty. *Mitchell v. Denbro*, 3 Blackf. 259.

⁴² *Hayman v. Hallam*, 79 Ky. 389; *Canfield v. McLaughlin*, 10 Martin 48; *Metrovich v. Jovovich*, 58 Cal. 341; *Dehler v. Held*, 50 Ill. 491.

lien and he procured a release of it by giving a forthcoming bond his lien was not thereby divested, and he was responsible on the bond only for the balance that remained in his hands after paying himself.⁴³ If the value be stated in the bond it will be conclusive on the obligors; otherwise it must be proved.⁴⁴ A recital that the value of the property does not exceed a sum named, while conclusive against a claim for a larger value, does not prove value;⁴⁵ neither is the value proven by the judgment in the attachment suit.⁴⁶ The attaching creditor is not concluded by a statement as to the value of the property in the officer's return.⁴⁷ It is no defense that the property was not the defendant's.⁴⁸ The condition of the bond requires the property to be returned in such a state that it may be taken and disposed of in satisfaction of the judgment. A mere physical return of it is not sufficient if it be incumbered after the execution of the bond.⁴⁹ If the property returned was wantonly injured or negligently allowed to go to waste or deteriorate while in the hands of the defendant or other custodian the sureties must answer for its diminished value,⁵⁰ to the extent that may be necessary to satisfy so much of the judgment as is unpaid.⁵¹ If the identical property is returned the sureties may have it sold and the proceeds applied on the judgment. The acceptance of the property by the officer in a damaged condition does not affect the plaintiff's right to sue on the bond to recover the lessened value of the property. If it is duly sold under the statute and the proceeds applied on the judgment as between the parties the price for which it sold is conclusive of its

⁴³ Canfield v. McLaughlin, *supra*.

⁴⁴ Blanchard v. Anderson, 27 Okla. 732; Jones v. Short, 53 Ore. 525, citing the text; Moon v. Story, 2 B. Mon. 354; Weed v. Dills, 34 Mo. 483.

⁴⁵ Smith v. Packard, 39 C. C. A. 294, 98 Fed. 793.

⁴⁶ Bruck v. Feiner, 26 N. Y. Misc. 724.

⁴⁷ Eisenbud v. Gellert, 26 N. Y. Misc. 367.

⁴⁸ Sartin v. Weir, 3 Stew. & P. 421; Waterman v. Frank, 21 Mo. 108; Gray v. McLeal, 17 Ill. 404; Dorr v. Clark, 7 Mich. 310; Dehler v. Held, 50 Ill. 491.

⁴⁹ Schuyler v. Sylvester, 28 N. J. L. 487; Mullally v. Townsend, 119 Cal. 47.

⁵⁰ Creswell v. Woodside, 8 Colo. App. 514; Lallande v. Trezevant, 39 La. Ann. 830.

⁵¹ S. C., 15 Colo. App. 468.

value.⁵² The sureties are only liable for interest after due demand.⁵³ If the bond stipulates for the payment of costs in a contingency not provided for by the statute such liability will be enforced.⁵⁴ Where the delivery of a part of the property is not a performance of the condition of the bond; if anything has been realized upon a sale of the remainder it is to be deducted from the judgment.⁵⁵

§ 519. **Conditions to pay the judgment.** A bond to satisfy the judgment is not discharged by a surrender of the property attached;⁵⁶ nor by pointing out property of the judgment debtor from which the judgment could be collected, even though money to pay the expenses and charges of the proceedings is tendered.⁵⁷ It is no defense to show that the property attached did not then belong to the defendant;⁵⁸ or that it was not subject to attachment;⁵⁹ or was worth less than the judgment.⁶⁰ The sureties on a bond given to dissolve an attachment are not released by the principal's discharge in a composition with creditors, the action having gone to judgment before the composition proceedings were begun.⁶¹ The judgment is the measure of damages irrespective of the value or the ownership of the property.⁶²

SECTION 7.

INJUNCTION BONDS.

§ 520. **Scope of obligation.** These are statutory obligations, and though various in their phraseology have a general similar-

⁵² *Id.*; *Jones v. Short*, *supra*.

⁵³ *McDonald v. Loewen*, 145 Mo. App. 49.

⁵⁴ *McElrath v. Whetstone*, 89 Ala. 623.

⁵⁵ *Lee v. Moore*, 12 Mo. 458.

⁵⁶ *Dorr v. Kershaw*, 18 La. 57.

⁵⁷ *Hill v. Merl*, 10 La. 108.

⁵⁸ *Dorr v. Clark*, 7 Mich. 310; *Beal v. Alexander*, 1 Rob. (La.) 277; *Hazelrigg v. Donaldson*, 2 Met. (Ky.) 445.

⁵⁹ *Moffitt v. Garrett*, 23 Okla. 398, 32 L.R.A. (N.S.) 401, 138 Am. St. §18; *McMillan v. Dana*, 18 Cal. 339.

⁶⁰ *Phanstieshl v. Vanderhoof*, 22 Mich. 296.

⁶¹ *Bernheimer v. Charak*, 170 Mass. 179; *Tapley v. Goodsell*, 122 Mass. 176, 182.

⁶² *Dackich v. Barich*, 37 Mont. 490; *Phanstieshl v. Vanderhoof*, *supra*; *Morange v. Edwards*, 1 E. D. Smith 414.

ity of purpose and effect, binding the obligors to pay all such damages, or costs and damages as the party enjoined shall sustain in consequence of the injunction if it shall be dissolved or if the court shall finally decide that the plaintiff was not entitled to it. When an action accrues there is a right to damages, first, for costs and expenses incurred in defending against the writ and in procuring its dissolution; and second, for losses or injuries from its operation in respect to the subject to which it refers. Subject to an exception presently to be noticed, the defendant's only remedy for damages resulting from the wrongful suing out of an injunction unless the plaintiff obtained the writ maliciously or without probable cause is an action upon the bond.⁶³ A bond voluntarily given, although not in compliance with the statute, is binding as a voluntary obligation according to its terms.⁶⁴ It is not an objection to the recovery of the damages sustained that the bond was silent as to the maximum liability assumed.⁶⁵ Damages for maliciously suing out an injunction are not recoverable in an action on the bond.⁶⁶ Neither can exemplary damages be recovered.⁶⁷

§ 521. **Power of a court of equity.** After an injunction has been granted without requiring a bond or other undertaking a court of equity has no power to award damages to the party injured thereby except so far as it may do so by a decree awarding costs or by virtue of a statute.⁶⁸ Before the writ is granted

⁶³ *American C. L. Co. v. Wilson*, 198 Mass. 182, 126 Am. St. 409; *Batson v. Paris Mountain W. Co.*, 73 S. C. 368; *Lawton v. Green*, 64 N. Y. 326; *Hayden v. Keith*, 32 Minn. 277; *St. Louis v. St. Louis G. L. Co.*, 82 Mo. 349; *Sturgis v. Knapp*, 33 Vt. 486; *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060; *Palmer v. Foley*, 71 N. Y. 106.

⁶⁴ *Babcock v. Reeves*, 149 Ala. 665; *Quinn v. Baldwin Star C. Co.*, 19 Colo. App. 497; *Wanless v. West Chicago St. R. Co.*, 77 Ill. App. 120; *Barrett v. Bowers*, 87 Me. 185. See § 475.

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⁶⁵ *Alexander v. Gardner*, 130 Ky. 785.

⁶⁶ *Chicago T. & T. Co. v. Chicago*, 110 Ill. App. 395, following *Burnap v. Wright*, 14 Ill. 301, a suit on a *ne exeat* bond.

⁶⁷ *Dempster v. Lansingh*, 128 Ill. App. 388.

⁶⁸ Under a statute providing that on the dissolution of an injunction and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting the nature and amount thereof, the court shall hear evidence and assess such damages as the case may require and to equity

a federal circuit court, in the absence of any statutory or other authority except such as is inherent in a court of equity, may impose terms and may relieve therefrom as the equities make it proper. Whenever the question of the right to damages arises under the order of the court its action in passing upon it approaches so nearly to the exercise of discretion that it will not be reversed unless a clear showing is made.⁶⁹ The obligation entered into under such an order is not in the nature of a contract with the opposite party, but is wholly between the obligor and the court.⁷⁰ The right to damages does not depend at all upon the motive, suppression or default of the plaintiff, but solely on the fact that he was not entitled to the injunction.⁷¹ A bond may be required in a case not within the statute, as where suit is brought by or on behalf of the state.⁷²

§ 522. Right of action, when it arises; who may sue. If the bond is conditioned to pay damages if it shall finally be decided that the injunction ought not to have been granted an action on it is prematurely brought if there has not been a final determination of the suit in which the injunction was obtained.⁷³ In the federal courts an action does not arise on a bond conditioned to pay such damages as may be awarded until their amount has been ascertained and the principal has refused to

appertain, to the party damnified, the right to assess is wholly irrespective of the existence of a bond or of the amount or penalty of it if one has been given. The assessment may be for such sum as will compensate the injured party for losses directly occasioned to him and such expenditures as necessarily resulted from the wrongful suing out of the injunction. *Kohlsaat v. Crate*, 144 Ill. 14; *Crate v. Kohlsaat*, 44 Ill. App. 274.

⁶⁹ *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060, distinguished in *Houghton v. Meyer*, 208 id. 149, 52 L. ed. 432; *Mica I. Co. v. Commercial M. Co.*, 157 Fed. 92.

⁷⁰ *Smith v. Day*, 21 Ch. Div. 421.

⁷¹ *Griffith v. Blake*, 27 Ch. Div. 474. *Jessel, M. R.*, expressed a contrary opinion in *Smith v. Day*, 21 id. 421; *Cotton, L. J.*, differed with him.

⁷² *Clay Center v. Williamson*, 79 Kan. 485.

⁷³ *State v. Friedman*, 74 W. Va. 11; *Lawlor v. Merritt*, 81 Conn. 715; *Lacey v. Davis*, 126 Iowa 675; *United States F. & G. Co. v. Jones*, 133 Ky. 621; *Tutty v. Ryan*, 13 Wyo. 134; *Redlich Mfg. Co. v. Rice*, 203 Fed. 722; *Dougherty v. Dore*, 63 Cal. 170; *Gray v. Veirs*, 33 Md. 159; *Penny v. Holberg*, 53 Miss. 567; *Bemis v. Gannett*, 8 Neb. 236.

pay.⁷⁴ This rule will be followed by state courts in actions on bonds given in federal courts.⁷⁵ In a suit brought for a perpetual injunction a right of action does not accrue on an undertaking given on the issue of a temporary injunction or restraining order until a final judgment in the suit in which it was issued is rendered.⁷⁶ A dismissal of the petition for want of prosecution is a final determination of the suit.⁷⁷ If the injunction is dissolved after a hearing upon the pleadings and upon affidavits and the action is subsequently dismissed for want of prosecution the right to damages is perfected.⁷⁸ Any order relieving a part or the whole of the subject-matter of the injunction from its operation is a dissolution *in toto* or *pro tanto*,⁷⁹ though an appeal is pending in the injunction suit.⁸⁰ The right of action is perfect where the dismissal is made at the plaintiff's request, although without prejudice to a future action;⁸¹ and where the injunction has been dissolved and a demurrer to the complaint sustained on the ground that the latter did not state facts sufficient to constitute a cause of action;⁸² and where an order is entered by the plaintiff's consent vacating the injunction and subsequently another order, pursuant to his *ex parte* motion, is made discontinuing the

⁷⁴ *Bein v. Heath*, 12 How. 168, 13 L. ed. 940; *Deakin v. Lea*, 11 Biss. 34.

⁷⁵ *Umbreit v. American B. Co.*, 144 Wis. 611.

⁷⁶ *Brown v. Galena M. & S. Co.*, 32 Kan. 528; *New York S. & T. Co. v. Lipman*, 83 Hun 569.

⁷⁷ *Pugh v. White*, 78 Ky. 210; *De Berard v. Prial*, 34 App. Div. (N. Y.) 502.

⁷⁸ *Manufacturers' & Traders' Bank v. Dare Co.*, 67 Hun 44; *Granger v. Smyth*, 70 Hun 9; *Kane v. Casgrain*, 69 Wis. 430; *French P. & O. Co. v. Porter*, 134 Ala. 302.

⁷⁹ *Shackleford v. Bennett*, 237 Ill. 523; *Keith v. Henkleman*, 173 Ill. 137, 68 Ill. App. 623; *Lambert v. Alcorn*, 144 Ill. 313, 21 L.R.A. 611;

Tulock v. Mulvane, 184 U. S. 497, 509, 46 L. ed. 657, 665.

⁸⁰ *New York Nat. Exch. Bank v. Reed*, 232 Ill. 123.

⁸¹ *Frahm v. Walton*, 130 Cal. 396; *Asevado v. Orr*, 100 Cal. 299; *Tullock v. Mulvane*, 61 Kan. 650; *Nansemond T. Co. v. Rountree*, 122 N. C. 45; *Sharpe v. Harding*, 65 Mo. App. 28; *Gyger v. Courtney*, 59 Neb. 555; *Nielsen v. Albert Lea*, 87 Minn. 285; *Mitchell v. Sullivan*, 30 Kan. 231.

⁸² *Fry v. Radzinski*, 219 Ill. 526; *Bennett v. Pardini*, 63 Cal. 154; *Fowler v. Frisbie*, 37 id. 34; *Wynkoop v. Van Beuren*, 63 Hun 500; *Alliance T. Co. v. Stewart*, 115 Mo. 236, 243.

action;⁸³ and on the granting of an order discontinuing the action in which the injunction was issued, the motion therefor being opposed by the defendant.⁸⁴ But it is otherwise where the discontinuance of the suit is by agreement,⁸⁵ or voluntarily by the plaintiff before the expiration of the time for the defendant to enter his appearance,⁸⁶ or for some other reason which arose after the injunction was issued,⁸⁷ or where there is no finding that the writ was improvidently issued.⁸⁸ Under the Mississippi statute the dissolution of the injunction, though that was the only relief sought, does not give a right of action unless a decree of dissolution is entered.⁸⁹ Except as noticed, the dissolution of the writ is *prima facie* evidence that the defendant has sustained damages and is *res judicata* as to the issues raised.⁹⁰ If the writ is wrongfully issued as to any part of the plaintiff's demand and is partially dissolved, to that extent the party enjoined will be entitled to such damages, within the limit of the penalty of the bond, as he has sustained.⁹¹ It is immaterial, so far as the defendant's right of action is concerned, that the purpose sought to be effectuated by the injunction was accomplished before it was dissolved and before the efforts of the defendant to be relieved from its restraints

⁸³ McGown v. Barnum, 42 N. Y. Misc. 585; Pacific Mail S. Co. v. Toel, 9 Daly 301, 85 N. Y. 646; Quinn v. Baldwin Star C. Co., 19 Colo. App. 497.

⁸⁴ Mica I. Co. v. Commercial M. Co., 157 Fed. 92; Mayor, etc. v. De Vore, 169 Ala. 237; Perlman v. Bernstein, 83 App. Div. (N. Y.) 203; Manning v. Cassidy, 80 Hun 127; New York Cent. etc. R. Co. v. Hastings-on-Hudson, 9 App. Div. (N. Y.) 256.

⁸⁵ Freifeld v. Sire, 96 App. Div. (N. Y.) 296; Columbus, etc. R. Co. v. Burke, 54 Ohio St. 98, 124, 32 L.R.A. 329; Large v. Steer, 121 Pa. 30; Palmer v. Foley, 71 N. Y. 106.

⁸⁶ Powell v. Woodbury, 85 Vt. 504.

⁸⁷ Scott v. Frank, 121 Iowa 218; Apollinaris Co. v. Venable, 136 N. Y. 46; Johnson v. Elwood, 82 N. Y. 362.

⁸⁸ Gray v. Bremer, 122 Iowa 110.

⁸⁹ Vicksburg W. Co. v. Mayor, etc. 99 Misc. 132, 33 L.R.A. (N.S.) 844.

⁹⁰ Lemeunier v. McClearley, 41 La. Ann. 411; Schuyler County v. Donaldson, 9 Mo. App. 385; Rice v. Cook, 92 Cal. 144; Fowler v. Frisbie, 37 Cal. 34.

⁹¹ Rice v. Cook, *supra*; White v. Clay, 7 Leigh 68; Walker v. Pritchard, 135 Ill. 103, 11 L.R.A. 577. Compare Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060.

were successful, as where he was restrained from doing an act which he could not do after a certain time and that time has expired.⁹²

Where the bond was conditioned for the payment of a sum named, if the court finally decides that the plaintiff was not entitled to the injunction, liability does not follow the making of an order for the punishment of the plaintiff for contempt for interfering to prevent the execution of a commission to take testimony, issued upon the application of the defendant, such order directing, as part of the penalty imposed on the plaintiff, the dismissal of his complaint and the dissolution of the temporary injunction granted at the commencement of the action.⁹³ After a temporary injunction was granted the parties stipulated to submit the issues of law and fact to arbitrators and bound themselves to abide the award; also stipulating that the execution of the award should not impair the liability of the obligors on the undertaking; no provision was made for judicial action on the award, which was in favor of the defendant. After it was made the action was dismissed by consent. It was ruled in an action on the undertaking that such award was not a judicial determination that the injunction ought not to have been granted, and that it would not support an action on the undertaking.⁹⁴ The liability for damages is determinable by the right of the plaintiff to the writ when it was obtained.⁹⁵

If the undertaking has not been assigned an action on it is maintainable only by the obligees.⁹⁶ And they should all be joined; but if one defendant has his damages assessed on motion in the injunction suit the assessment is conclusive as to the measure of his damages and establishes an individual right in him to sue therefor.⁹⁷ All the obligees may sue on a bond

⁹² *Bush v. Kirkbride*, 131 Ala. 405.

⁹³ *Apollinaris Co. v. Venable*, 136 N. Y. 46.

⁹⁴ *Columbus, etc. R. Co. v. Burke*, 54 Ohio St. 98, 32 L.R.A. 329.

⁹⁵ *Burroughs v. Jones*, 79 Miss.

214; *Taylor W. Co. v. Beolchi*, 37 N. Y. Misc. 691.

⁹⁶ *Newton v. Brown*, 152 N. C. 200; *Smith v. Atkinson*, 18 Colo. 255.

⁹⁷ *Jones v. Mastin*, 60 Mo. App. 578.

securing all the damages which any person may sustain for the use of one.⁹⁸ A person who becomes a party on his own initiative may recover if the bond was made for his benefit and his interest was adverse to that of the plaintiff.⁹⁹ On the breach of a bond to indemnify any person for damages sustained, one who is not named in it and was not a party to the proceeding in which the injunction issued may recover for the direct effects of it upon him.¹ The time at which the person enjoined had knowledge of the suit or appeared in it is immaterial if the order was wrongfully obtained without notice to him, and he suffered injury from observing it.² A writ against a member of a firm has the effect of enjoining the firm, and is the basis for an action to recover the resulting damages.³

§ 523. **Mode of assessing damages.** In so far as the mode of assessing damages upon injunction bonds is regulated by statutes or by local rules of practice the subject cannot be considered here. Mr. High gives a summary of the cases in several states in the last edition of his standard treatise on injunctions.⁴ That author says there has been much conflict of authority whether, in the absence of express legislation, a court of general equity powers might, upon dissolving an injunction, ascertain by reference or otherwise the amount of damages sustained by the injunction and decree payment of such amount without a new suit for that purpose. But, while courts of much respectability have insisted upon the exercise of such a jurisdiction, treating it as a cumulative remedy, entirely independent of and distinct from any action which might be brought upon the bond,⁵ the undoubted weight of authority and

⁹⁸ *Babcock v. Reeves*, 149 Ala. 665.

⁹⁹ *Sheets v. Hays*, 36 Ind. App. 106; *Alexander v. Gish*, 88 Ky. 13.

¹ *Marengo County v. Matkin*, 144 Ala. 574.

² *Hutchins v. Munn*, 209 U. S. 246, 52 L. ed. 776.

³ *Drews v. Williams*, 50 La. Ann. 579.

⁴ Vol. 2 (3d ed.), § 1657.

⁵ *Cimiotti U. Co. v. American F. R. Co.*, 158 Fed. 171; *Derdeyn v. Donovan*, 81 Miss. 696; *Sturgis v. Knapp*, 33 Vt. 486; *Edwards v. Pope*, 4 Ill. 465. See *Roberts v. Durst*, 4 Ohio St. 502; *Redlich Mfg. Co. v. Rice*, 203 Fed. 722, is to the same effect and cites several federal cases.

principle is against the exercise of such a jurisdiction.⁶ The court may hear suggestions of damages upon the dissolution of a temporary injunction ancillary to the cause.⁷

§ 524. **Costs and expenses; attorneys' fees.** In cases where the bond or undertaking embraces the payment of "costs," if the injunction be not sustained, taxable costs are meant, and they are necessarily a part of the damages by the very terms of the contract.⁸ They are also part thereof when costs *eo nomine* are not provided for.⁹ And when the stipulation is to pay the damages which may result if the injunction is dissolved,

⁶ *Spoonenburg v. Gloversville*, 96 App. Div. (N. Y.) 157; *Phelps v. Foster*, 18 Ill. 309; *Merryfield v. Jones*, 2 Curt. C. C. 306; *Garcie v. Sheldon*, 3 Barb. 232; *Lawton v. Green*, 64 N. Y. 326; *Bain v. Heath*, 12 How. 168, 13 L. ed. 940; *Easton v. New York, etc. R. Co.*, 26 N. J. Eq. 359; *Taylor v. Brownfield*, 41 Iowa 264; *Sortor v. Strassheim*, 8 Colo. 185; *Greer v. Stewart*, 48 Ark. 21; *Elliott v. Missouri, etc. R. Co.*, 77 Mo. App. 652, 660, citing the text. See *dictum* to the contrary in *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060; to same effect, *Lea v. Deakin*, 11 Biss. 40.

⁷ *Dempster v. Lansingh*, 234 Ill. 381. See *Canadian & A. M. & T. Co. v. Fitzpatrick*, 71 Miss. 347.

⁸ *Columbia A. Co. v. Pine Beach I. Co.*, 109 Va. 325; *Virginia Beach D. Co. v. Commonwealth*, 115 Va. 280; *Nolan v. Johns*, 126 Mo. 159; *Gibson v. Reed*, 54 Neb. 309; *State v. Corvin*, 51 W. Va. 19; *Corcoran v. Judson*, 24 N. Y. 106; *Derry Bank v. Heath*, 45 N. H. 524; *Troxell v. Haynes*, 49 How. Pr. 517, 16 Abb. Pr. (N. S.) 1; *Moore v. Harton*, 1 Port. 15.

⁹ *Id.*; *Edwards v. Bodine*, 11 Paige 223; *Coates v. Coates*, 1 Duer 664; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Andrews v. Glenville W.*

Co., 50 N. Y. 282; *Hovey v. Rubber T. P. Co.*, 50 N. Y. 335, 12 Abb. Pr. (N. S.) 360; *Disbrow v. Garcia*, 52 N. Y. 654; *Rose v. Post*, 56 N. Y. 603, 49 How. Pr. 517; *Noble v. Arnold*, 23 Ohio St. 264; *Strong v. Deforest*, 15 Abb. Pr. 427; *Taacks v. Schmidt*, 18 id. 307; *Wilde v. Joel*, 15 How. Pr. 320, 6 Duer 671; *Behrens v. McKenzie*, 23 Iowa 333, 92 Am. Dec. 528; *Langworthy v. McKelvey*, 25 Iowa 48; *Riddle v. Cheadle*, 25 Ohio St. 278; *School Directors v. Trustees*, 66 Ill. 247; *Elder v. Sabin*, 66 Ill. 126; *Misner v. Bullard*, 43 Ill. 470; *Ryan v. Anderson*, 24 Ill. 652; *McRae v. Brown*, 12 La. Ann. 181; *Ah Thaie v. Quan Wan*, 3 Cal. 216; *Wilson v. McEvoy*, 25 Cal. 169; *Prader v. Grimm*, 28 Cal. 11, 13 Cal. 585; *Gear v. Shaw*, 1 Pin. 608.

In Louisiana the statutory damages may be allowed without proof of the value of the services rendered. If a larger sum is claimed proof of their value is necessary. *Rivet v. Murrell P. & Mfg. Co.*, 121 La. 201, 126 Am. St. 320, and cases cited; *Schwann v. Sanders*, 121 La. 462.

The cases are not agreed as to the right of the injunction defendant to recover for his loss of time in collecting testimony to procure

attorneys' fees paid for obtaining a dissolution of it are recoverable in many states.¹⁰ Costs paid 'as a condition for a con-

a dissolution of the writ and in consultation with counsel. The affirmative is held in *Skrainka v. Dertel*, 14 Mo. App. 474; *St. Louis, etc. R. Co. v. Schneider*, 30 id. 620. In California loss of time and injury to business are not elements of damage. *Curtiss v. Bachman*, 110 Cal. 433, 52 Am. St. 111. And so in Illinois as to loss of time. *Densch v. Scott*, 58 Ill. App. 33. And in New Jersey, *Cook v. Chapman*, 41 N. J. Eq. 152. And in New York as to the personal service of the defendant in consulting counsel and attending a sale. *Edwards v. Bodine*, 4 Edw. Ch. 292, 11 Paige 223. But the expenses of the defendant in attending the hearing of a motion to dissolve the injunction have been allowed. *Lyon v. Hersey*, 32 Hun 253; *Williams v. Ballinger*, 125 Iowa 410.

It is said in *Cook v. Chapman*, *supra*: Every litigation requires more or less time and trouble. The law makes it the duty of litigants to be diligent and vigilant, but it has never been understood that a successful litigant was entitled, as against his adversary, to compensation for the time and attention which it was necessary for him to bestow upon the litigation. Time and attention thus bestowed the law has always regarded as having been given by the litigant to his own business, and that if he sustained loss in consequence thereof, it must be esteemed *damnum absque injuria*. The common law did not even allow a successful litigant to recover costs. The word "damages" in this contract embraces nothing, in my judgment, but such injuries as, according to

established principles, are the proper subjects of judicial redress by compensation in money.

The elements of damages are attorneys' fees, loss of time and expense incurred in attending the hearing of, and resisting the application for, a temporary injunction. *Helmkamp v. Wood*, 85 Mo. App. 227; *Gibson v. Reed*, 54 Neb. 309. *Contra*, as to loss of time by party. *Edwards v. Bodine*, 11 Paige 223; *Bartram v. Ohio, etc. R. Co.*, 141 Ky. 100. See *infra*, note to this section.

It seems reasonably clear that the expense of counsel in unsuccessfully resisting the allowance of an injunction are not rendered because of the writ, and in fact antedate it, and are not recoverable. *Curtiss v. Bachman*, 110 Cal. 433, 52 Am. St. 111; *Randall v. Carpenter*, 88 N. Y. 293.

The personal expenses of the defendant in attending the hearing are not recoverable. *Midgett v. Vann*, 158 N. C. 128. *Contra*, *Lyon v. Hersey*, 32 Hun 253.

A bond conditioned to pay all damages sustained covers only pecuniary loss arising from the restraint imposed by the injunction, not the expenditure made in defense of the suit. *Thurston v. Haskell*, 81 Me. 303; *Barrett v. Bowers*, 87 Me. 185.

¹⁰ *State v. Friedman*, 74 W. Va. 11; *Fidelity & D. Co. v. Walker*, 158 Ala. 129; *Marks v. Columbia Y. Club*, 219 Ill. 417; *Marks v. Chicago Y. Club*, 121 Ill. App. 308; *Lanum v. Patterson*, 151 id. 143; *Landis v. Wolf*, 109 id. 44; *Chicago, etc. R. Co. v. Whitney*, 143 Iowa 506; *Bartram v. Ohio, etc. R.*

tinuance cannot be recovered as part of the damages,¹¹ nor attorneys' fees for services in an unsuccessful attempt to dissolve the writ.¹² Where an injunction has been improvidently granted or obtained without good cause the defendant should take seasonable steps, probably, to relieve himself from its opera-

Co., 141 Ky. 100; Green v. Quisenberry, 133 Ky. 561; Martin v. Telotte, 115 La. 769; Augur v. Gulfport L. I. Co., 95 Miss. 292; Hinton v. Perry County, 84 Miss. 536; Akin v. Rice, 137 Mo. App. 147; Sutliff v. Montgomery, 115 Mo. App. 592; Stull v. Beddeo, 78 Neb. 114, 14 L.R.A.(N.S.) 507; McGown v. Barnum, 42 N. Y. Misc. 585; McLennon v. Fenner, 19 S. D. 492; Hanson L. Co. v. Mestayer, 130 La. 688; Quarnberg v. Chamberlain, 29 S. D. 377; Belmont M. & M. Co. v. Costigan, 21 Colo. 465; Keith v. Henkleman, 173 Ill. 137; Colby v. Meservey, 85 Iowa 555; Mulvane v. Tullock, 58 Kan. 622; Tullock v. Mulvane, 61 Kan. 650; Alliance T. Co. v. Stewart, 115 Mo. 236; Neiser v. Thomas, 46 Mo. App. 47; Sharpe v. Harding, 65 id. 28; Helmkamp v. Wood, 85 Mo. App. 227; Creek v. McManus, 13 Mont. 152; Cook v. Greenough, 14 Mont. 352; Helena v. Brule, 15 Mont. 429; Binford v. Grimes, 26 Ind. App. 481, citing local cases; San Diego W. Co. v. Pacific Coast S. Co., 101 Cal. 216; Gibson v. Reed, 54 Neb. 309; Nielsen v. Albert Lea, 87 Minn. 285; Wittich v. O'Neal, 22 Fla. 592; Richardson v. Allen, 74 Ga. 719; Swan v. Timmons, 81 Ind. 243; Ford v. Loomis, 62 Iowa 586; Aiken v. Leathers, 40 La. Ann. 23; Hammerslough v. Kansas City B., L. & S. Ass'n, 79 Mo. 80; Miles v. Edwards, 6 Mont. 180; Solomon v. Chesley, 59 N. H. 24; Livingston v. Exum, 19 S. C. 223; Nimocks v. Welles, 42 Kan. 39; Underhill v.

Spencer, 25 Kan. 71; Cook v. Chapman, 41 N. J. Eq. 152; Randall v. Carpenter, 88 N. Y. 293; Lyon v. Hersey, 32 Hun 253; State v. Corvin, 51 W. Va. 19; Wisconsin M. & F. Ins. Co. v. Durner, 114 Wis. 369.

Where a statute provides for five per cent. damages on the dissolution of injunctions to stay sales attorney's fees cannot be recovered where a sale is not threatened and cannot be made for two years. Wynne v. Mason, 72 Miss. 424.

A statute providing that if money or any proceedings for the collection of money shall have been enjoined the damages thereon shall not exceed ten per cent. of the amount released, exclusive of legal interest and costs, does not limit the damages allowable on the dissolution of an injunction to ten per cent. on the amount released, nor prevent the allowance of an attorney's fee or other expense caused by the injunction. Wabash R. Co. v. McCabe, 118 Mo. 640.

¹¹ Bullock v. Ferguson, 30 Ala. 227. Nor costs on appeal. Woodson v. Johns, 3 Munf. 230; Guilford v. Cornell, 4 Abb. Pr. 220. But see *infra*.

¹² Pollock v. Whipple, 57 Neb. 82; Garlington v. Copeland, 43 S. C. 389; Curtiss v. Bachman, 110 Cal. 433, 52 Am. St. 111 (unless the decision of the motion is deferred by the court until the merits are heard); Cunningham v. Finch, 63 Neb. 189; Lamb v. Shaw, 43 Minn. 507; Lyon v. Hersey, 32 Hun 253.

tion and thus prevent damages.¹³ A party who slept upon his rights and neglected this duty, so that the demand enjoined became barred by the statute of limitations before he finally made a successful motion to dissolve the injunction, was not permitted to recover on the bond for that loss.¹⁴ It is, therefore, one of the direct effects of a groundless injunction to necessitate exertion and costs to get rid of it. Accordingly, costs and expenses, reasonable in amount, incurred for the single object of obtaining a discharge of the injunction are generally allowed as a part of the damages on such obligations.¹⁵

¹³ See § 88; *McDonald v. James*, 47 How. Pr. 474; *Hovey v. Rubber T. P. Co.*, 50 N. Y. 335; *Smith v. Day*, 21 Ch. Div. 421.

¹⁴ *Dunn v. Davis*, 37 Ala. 95.

¹⁵ *Miller v. Donovan*, 13 Idaho 735; *Bartram v. Ohio, etc. R. Co.*, 141 Ky. 100 (expense of party in traveling); *Citizens' T. & G. Co. v. Ohio Valley T. Co.*, 138 Ky. 421; *Martin v. Tellotte*, 115 La. 769; *Reeves v. Sullivan*, 117 App. Div. (N. Y.) 814; *Montgomery v. Gilbert*, 24 Mont. 121; *State v. Corvin*, 51 W. Va. 19, allowing traveling expenses, but disallowing for loss of time.

In *Crounse v. Syracuse, etc. R. Co.*, 32 Hun 497, the expense of hiring a special train in order to secure a prompt dissolution of an injunction was recovered, the circumstances being peculiar. The defendant's personal expenses were also allowed. But these as well as the defendant's claims for his services are denied in some cases. *Lyon v. Hersey*, 32 Hun 253; *Cook v. Chapman*, 41 N. J. Eq. 152; *Galveston, etc. R. Co. v. Ware*, 74 Tex. 47.

In *Edwards v. Bodine*, 11 Paige 223, a sale under a decree of foreclosure was restrained. On the dissolution of the injunction it was

held that, under the thirty-first chancery rule, fees were properly allowed for services in relation to the sale which would necessarily have to be performed a second time, and also the expense of readvertising the sale, counsel fees in procuring a dissolution of the injunction and taxable costs. It was improper to allow, as the master in chancery had done, fees for commissions on a sale not made, for the personal services, etc., of the parties in attending the sale and going to see and consult with counsel and the charge of the solicitor for attending to advise them at the sale. *Baggett v. Beard*, 43 Miss. 120; *Brown v. Jones*, 5 Nev. 374; *Raupman v. Evansville*, 44 Ind. 392; *Campbell v. Metcalf*, 1 Mont. 379; *State v. Thatcher*, 56 Ill. 257; *Tamaroa v. Southern Illinois University*, 54 Ill. 334; *Willett v. Scoville*, 4 Abb. Pr. 415; *Fitzpatrick v. Flagg*, 12 Abb. Pr. 189; *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5.

In *Lyon v. Hersey*, 32 Hun 253; *Edwards v. Bodine*, *supra*, is distinguished on the question of the allowance of the expenses of the defendant in attending the hearing of a motion to dissolve the writ, though it was vacated by consent.

This is the rule regardless of the extent of the actual injury if the defendant was interfering with the exercise of a substantial and lawful right,¹⁶ or if it was necessary to move to dissolve it either because damage was being inflicted by the restraint or the case could not have been otherwise as expeditiously disposed of.¹⁷ The law sanctions a resort to appropriate means, and the employment of counsel is such, for obtaining relief from an injunction; and hence the bond is almost universally construed to include expenses for such service.¹⁸ It is otherwise, however, in Arkansas, Maryland, Texas, Tennessee, Virginia, North Carolina, Pennsylvania, and in the federal courts.¹⁹

Giving notice of motion and attendance upon court for the purpose of being heard are such services as may be compensated for. *Lamphere v. Glover*, 60 Ill. App. 564.

¹⁶ *Weirhauser v. Cole*, 132 Iowa 14.

¹⁷ *Middleditch v. Kalaniaole*, 18 Hawaiian 272.

¹⁸ See cases in first three notes to this section; *Curtiss v. Bachman*, 110 Cal. 433, 52 Am. St. 111; *Canadian & A. M. & T. Co. v. Fitzpatrick*, 71 Miss. 347; *State v. Medford*, 34 W. Va. 633; *Kerz v. Wolf*, 131 Ill. App. 387; *Lallande v. Trezevant*, 39 La. Ann. 830.

¹⁹ *Sullivan v. Cartier*, 147 Fed. 222, 77 C. C. A. 448; *Lindberg v. Howard*, 146 Fed. 467, 77 C. C. A. 23; *Revell v. Smith*, 25 Okla. 508 (Arkansas law applied); *Carpenter v. First Nat. Bank*, 53 Tex. Civ. App. 23; *Midgett v. Vann*, 158 N. C. 128; *Sensenig v. Parry*, 113 Pa. 115; *Oliphint v. Mansfield*, 35 Ark. 191; *Wallis v. Dilley*, 7 Md. 237; *Wood v. State*, 66 id. 61; *Galveston, etc. R. Co. v. Ware*, 74 Tex. 47; *Browning v. Porter*, 2 McCrary, 581; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. ed. 43; *Tullock v. Mulvane*, 184 U. S. 497, 46 L. ed. 657; *Missouri, etc. R. Co. v. Elliott*, 184

U. S. 530, 46 L. ed. 673; *Wisecarver v. Wisecarver*, 97 Va. 452; *Stringfield v. Hirsch*, 94 Tenn. 425, 45 Am. St. 733; *Davenport v. Harbert*, 2 Tenn. Cas. 287.

It is said in the opinion in the last case that counsel fees are not recoverable in Arkansas, Maryland, North Carolina, South Carolina (but see *Garlington v. Copeland*, 43 S. C. 389), South Dakota, Texas, Vermont (but see *Barre W. Co. v. Carnes*, 68 Vt. 23), and that the question is open in Connecticut, Massachusetts, North Dakota and Rhode Island. See *Union S. Co. v. Arkansas S. R. Co.*, 123 La. 555.

In the Pennsylvania case cited the rule laid down in tort actions, that the plaintiff cannot recover compensation for the trouble and expense of establishing his right, is followed (see *Stopp v. Smith*, 71 Pa. 285; *Good v. Mylin*, 8 id. 51), without making any distinction because of the difference in the form of action or the terms of the bond.

In *Oelrichs v. Spain*, 15 Wall. 211, 21 L. ed. 43, the bond was required to contain a condition "to pay the defendants such costs and damages as they may respectively sustain," and as executed it substantially conformed to the order.

Expenses incurred before the bond was given are not recoverable if its language does not include them.²⁰ It seems that the federal courts will recognize the rule of liability prevailing in the state courts where cases are removed from the latter to the former, because liability for counsel fees having been assumed by the parties it should be enforced in every court in which an action on the bond is brought.²¹

Counsel fees will not be denied in a state court because the bond was given in a suit pending in a federal court. It will not be assumed that, because the federal courts do not allow such fees the sureties contracted with that rule of law in view.²² Nor is it cause for refusing their recovery that the ac-

The case was heard on the merits "four years, eight months and sixteen days after the injunction issued"—as the reporter very precisely mentions,—and the decree dissolved the injunction. Swayne, J., delivered the opinion: "Upon looking into the report, we find it clear and able, and we are entirely satisfied with it, except in one particular. We think that both the master and the court erred in allowing counsel fees as part of the damages covered by the bonds. * * * The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to (*Day v. Woodworth*, 13 How. 370, 14 L. ed. 184), and we think is substantially determined by that adjudication. In debt, covenant and *assumpsit* damages are recovered; but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subject-

ed. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master or an issue to a jury might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary. We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law, and sound public policy."

²⁰ *Chicago, etc. v. Whitney*, 143 Iowa 506.

²¹ *Fidelity & D. Co. v. Bucki L. Co.*, 189 U. S. 135, 47 L. ed. 744.

²² *Mulvane v. Tullock*, 58 Kan. 622; *Missouri, etc. v. Smith*,

tion would have had the same effect as the injunction, the latter being a mere incident.²³ The amount recoverable is not limited to the rates at which the fees would be taxed as costs.²⁴ On the other hand, the sum to be allowed is not to be controlled by the agreement between the defendant and his attorney; it cannot exceed a reasonable sum for the service rendered.²⁵ The usual and customary fee for like services in the court in which they were rendered and the agreement are the elements by which the allowance is to be measured.²⁶ The discretion of the court in which the services were rendered in fixing the fee will not be interfered with in the absence of proof of its abuse.²⁷ The fee agreed upon is a limitation upon the sum recoverable, though the services were worth more; it is the amount of damage sustained.²⁸ Courts will exercise vigilance to keep the liability of the plaintiff within just and reasonable limits.²⁹ Hence if a modification of the injunction is

154 Mo. 300; *Elliott v. Missouri*, etc. R. Co., 77 Mo. App. 652; *Mitchell v. Hawley*, 79 Cal. 301; *Aiken v. Leathers*, 40 La. Ann. 23; *Wash v. Lackland*, 8 Mo. App. 122. But see *Fidelity & D. Co. v. Bucki L. Co.*, *supra*. *Contra*, *National Soc. v. American S. Co.*, 56 N. Y. Misc. 627.

²³ *Elms v. Wright-B. Co.*, 106 La. Ann. 19.

²⁴ *Wilde v. Joel*, 6 Duer 671.

²⁵ *Dempster v. Lansingh*, 234 Ill. 381; *Wittich v. O'Neal*, 22 Fla. 592; *French P. & O. Co. v. Porter*, 134 Ala. 302.

²⁶ *Crane v. Roselle*, 157 Ill. App. 595; *Kerz v. Wolf*, 131 id. 387; *Stinnett v. Wilson*, 19 Ill. App. 38; *Jevne v. Osgood*, 57 Ill. 340, 347; *Lomax v. Ragor*, 85 Ill. App. 679; *Iliff v. School Directors*, 45 Ill. App. 419; *Elms v. Wright-B. Co.*, 106 La. 19.

The expenses incurred are presumed to be reasonable. *Williams v. Ballinger*, 125 Iowa 410; *Smith v. Gregg*, 9 Neb. 212.

In addition to opinion evidence of the value of the services rendered, it should be shown that the attorney was retained upon a *quantum meruit*. *Steele v. Thatcher*, 56 Ill. 257.

²⁷ *New Orleans, etc. R. Co. v. Martin* (Miss.), 62 So. 228.

²⁸ *Cors v. Tompkins*, 51 Ill. App. 315.

²⁹ *Hotchkiss v. Platt*, 8 Hun 46 (unnecessary counsel employed); *Crane v. Roselle*, *supra*; *Curphy v. Terrell*, 89 Miss. 624; *Ady v. Freeman*, 90 Iowa 402; *Alexander v. Colcord*, 85 Ill. 323; *Cook v. Chapman*, 41 N. J. Eq. 152 (setting aside an allowance as excessive); *Edwards v. Bodine*, 11 Paige 223, 4 Edw. Ch. 292 (unnecessary attendance of counsel at a sale); *Jevne v. Osgood*, 57 Ill. 340.

The amount is largely discretionary with the trial court. An allowance will not be reversed merely because it is less than the sum fixed by any witness. *Lichtenstadt v. Fleisher*, 24 Ill. App. 92.

all that a defendant is entitled to and he secures nothing further there can be no recovery for services in attempting to obtain its dissolution;³⁰ and if the petition is insufficient to authorize the issuing of the writ no allowance will be made for services in preparing affidavits to show that the merits are against the plaintiff.³¹ The amount of the fee is to be fixed by the jury³² and the right to recover it is not waived by accepting the statutory attorney's fee.³³ A municipality defending an injunction by its attorney, who is paid a salary for his services, cannot recover counsel fees; it is not damaged.³⁴ Fees for special counsel may be recovered if the municipality shows the necessity for the employment thereof.³⁵ It has been said that the law does not intend that an attorney may claim a fee for attending to his own suit;³⁶ and that where solicitors render services *ex officio* to public officers or servants there cannot be a recovery therefor.³⁷ It is not, however, cause for denying the recovery of a fee if another than the officer whose duty it might have been to make the defense appears and defends, it not appearing that the former could have done so.³⁸ The allowance for services may be rightfully made in view of the special importance of the litigation to the client, and if fees have been paid to correspond with the interests involved the facts may be proved and a hypothetical question put to a witness based thereon. The natural and probable result of the injunction was the employment of attorneys and payment to them of fees commensurate with the services performed to get it dissolved.³⁹ The discontinuance of the injunction proceedings by agreement of the principal parties thereto will not affect the right

³⁰ Ford v. Leomis, 62 Iowa 586.

³¹ Ellwood Mfg. Co. v. Rankin, 70 Iowa 403.

³² Chicago, etc. R. Co. v. Whitney, 143 Iowa 506 (though the only testimony is that given by the plaintiff); Citizens' T. & G. Co. v. Ohio Valley T. Co., 138 Ky. 421.

³³ Steel v. Gordon, 14 Wash. 521.

³⁴ Nixon v. Biloxi, 76 Miss. 810; 2 High on Inj., § 1688.

³⁵ Vicksburg W. Co v Mayor, etc., 99 Miss. 132, 33 L.R.A. (N.S.) 844.

³⁶ Jevne v. Osgood, 57 Ill. 340; Stinnett v. Wilson, 19 Ill. App. 38.

³⁷ Kerz v. Wolf, 131 Ill. App. 387; Wilson v. Weber, 3 id. 125.

³⁸ Fordham v. Thompson, 144 Ill. App. 342.

³⁹ Tullock v. Mulvane, 61 Kan. 650, 661.

of one whose business in relation to others was affected by it from recovering fees paid counsel to secure a modification of the injunction, although he was made a party only because it was necessary to secure a complete adjudication of the controversy.⁴⁰ A party whose action is not affected by the writ cannot recover damages or expenses.⁴¹

§ 525. **Same subject.** The authorities are not agreed whether the party seeking to recover for attorneys' fees and expenses must have actually paid them or may recover where he has merely become liable therefor.⁴² But on principle, and according to the general course of decision in analogous cases, the expenses incurred and for which the plaintiff is liable should be included.⁴³ No recovery can be had for services gratuitously rendered.⁴⁴ The recovery, however, is not affected because no charge was made against one of the injunction defendants, the suit being by all the obligees for the use of one of them.⁴⁵ But where the attorneys' fees and expenses are incurred in defeating the action, and the dissolution of the injunction is

⁴⁰ *London & B. Bank v. Walker*, 74 Hun 395.

⁴¹ *Holloway v. Holloway*, 103 Mo. 274.

⁴² *Wilson v. McEvoy*, 25 Cal. 169; *Prader v. Grimm*, 28 Cal. 11, 13 Cal. 585; *McRae v. Brown*, 12 La. Ann. 181; *Mills v. Jones*, 9 id. 11; *Wilde v. Joel*, 6 Duer 671; *Corder v. Martin*, 17 Mo. 41.

On the retrial of an action on the bond of a receiver proof of the payment of attorneys' fees paid in an action seeking the appointment of a receiver may be made though they were not recoverable on the first trial because not paid. *Cook v. Terry*, 19 Cal. App. 765.

⁴³ *Holthaus v. Hart*, 9 Mo. App. 1; *C. H. Albers Commission Co. v. Milliken*, 183 Mo. App. 662; *Fidelity & D. Co. v. Walker*, 158 Ala. 129; *Green v. Quisenberry*, 133 Ky. 561; *Plymouth G. M. Co. v. United States F. & G. Co.*, 35 Mont. 23;

Lambert v. Alcorn, 144 Ill. 313, 21 L.R.A. 611; *Lawrence v. Traner*, 136 Ill. 474, 488; *Patterson v. Rinard*, 81 Ill. App. 80; *Frahm v. Walton*, 130 Cal. 396; *Wittich v. O'Neal*, 22 Fla. 592; *Underhill v. Spencer*, 25 Kan. 71; *Garrett v. Logan*, 19 Ala. 344; *Miller v. Garrett*, 35 id. 96; *Brown v. Jones*, 5 Nev. 374; *Lomax v. Ragor*, 85 Ill. App. 679; *Noble v. Arnold*, 23 Ohio St. 264; *Steele v. Thatcher*, 56 Ill. 257; *Leisse v. St. Louis, etc. R. Co.*, 2 Mo. App. 105; *Crounse v. Syracuse, etc. R. Co.*, 32 Hun 497; *Meaux v. Pittman*, 35 La. Ann. 360. See § 85.

Payment or liability to pay must be shown. *Reed v. New York Nat. Exch. Bank*, 230 Ill. 50.

⁴⁴ *Schening v. Cofer*, 97 Ala. 726. See *Shultz v. Morrison*, 3 Met. (Ky.) 98.

⁴⁵ *Babcock v. Reeves*, 149 Ala. 665.

only incident to that result they are not damages sustained by reason of the injunction.⁴⁶ The reason is obvious: expenses for another purpose, and which would have to be incurred whether a preliminary injunction had been granted or not,

- ⁴⁶ *Granulator Soap Co. v. Had-*
dow, 159 App. Div. (N. Y.) 563;
Dempster v. Lansingh, 234 Ill. 381;
Landis v. Wolf, 206 Ill. 392; *Chi-*
cago, etc. R. Co. v. Whitney, 143
Iowa 506; *Bartram v. Ohio, etc.*
R. Co., 141 Ky. 100; *Lee L. Co. v.*
Hotard, 122 La. 850, 129 Am. St.
 368; *First Nat. Bank v. Hockett*, 2
Neb. (Unof.) 512; *Barr's Est. v.*
Post, 4 Neb. (Unof.) 32; *Collins*
v. Huffman, 48 Wash. 184; *Harri-*
son v. Harrison, 75 Hun 191;
Brooks v. Racich A. Mfg. Co., 137
 App. Div. (N. Y.) 280; *Burnett v.*
Stark, 155 Iowa 588; *Hanson L. Co.*
v. Mestayer, 130 La. 688; *Quarnberg*
v. Chamberlain, 29 S. D. 377; *Jack-*
son v. Millspaugh, 100 Ala. 285;
Curry v. American Freehold L. M.
Co., 124 Ala. 614; *Lambert v. Al-*
corn, 144 Ill. 313, 21 L.R.A. 611;
Lawrence v. Traner, 136 Ill. 474;
Densch v. Scott, 58 Ill. App. 33;
Goff v. Eckert, 65 id. 616; *Bullard*
v. Harkness, 83 Iowa 373; *Mulvane*
v. Tullock, 58 Kan. 622, 636; *Ben-*
nett v. Lambert, 100 Ky. 737; *Wil-*
liams v. Allen, 21 Ky. L. Rep.
 1191; *Levert v. Sharpe*, 52 La. Ann.
 599; *Brown v. Baldwin*, 121 Mo.
 126; *Anderson v. Anderson*, 55 Mo.
 App. 268; *Louisville B. Co. v. Mon-*
arch Co., 68 id. 603; *Creek v. Mc-*
Manus, 17 Mont. 445; *Trester v.*
Pike, 60 Neb. 510, citing the text;
Whiteside v. Noyac C. Ass'n, 84
 Hun 555; *Phoenix B. Co. v. Key-*
stone B. Co., 10 App. Div. (N. Y.)
 176, affirmed without opinion, 153
 N. Y. 644; *Bock v. Bohn*, 29 N. Y.
 Misc. 102; *Garlington v. Copeland*,
 43 S. C. 389; *Barre W. Co. v. Carnes*,
 68 Vt. 23; *Donahue v. Johnson*, 9
 Wash. 187; *San Diego W. Co. v.*
Pacific Coast S. Co., 101 Cal. 216;
Walker v. Pritchard, 135 Ill. 103,
 11 L.R.A. 577; *Noble v. Arnold*, 23
 Ohio St. 264; *Hovey v. Rubber T.*
P. Co., 50 N. Y. 335; *Disbrow v.*
Garcia, 52 N. Y. 654; *Langworthy*
v. McKelvey, 25 Iowa 48; *McDonald*
v. James, 47 How. Pr. 474; *Bolling*
v. Tate, 65 Ala. 417; *Bustamente*
v. Stewart, 55 Cal. 115; *Blair v.*
Reading, 99 Ill. 600, 615; *Gerard v.*
Gateau, 15 Ill. App. 520; *McQuown*
v. Law, 18 id. 34; *Moriarty v. Galt*,
 23 id. 213; *Swan v. Timmons*, 81
 Ind. 243; *New Nat. T. Co. v. Du-*
laney, 86 Ky. 516; *Burgen v*
Sharer, 14 B. Mon. 497; *Aiken v.*
Leathers, 40 La. Ann. 23; *Lemeun-*
ier v. McClearly, 41 La. Ann. 411;
Thurston v. Haskell, 81 Me. 303;
Lamb v. Shaw, 43 Minn. 507; *Par-*
ker v. Bond, 5 Mont. 1; *Newton v.*
Russell, 87 N. Y. 527; *Randall v.*
Carpenter, 88 id. 293; *Olds v. Cary*,
 13 Ore. 362; *Hill v. Thomas*, 19 S.
 C. 230; *Lillie v. Lillie*, 55 Vt. 470;
Curtiss v. Bachman, 110 Cal. 433,
 52 Am. St. 111; *State v. Taylor*, 67
 W. Va. 585; *Baldwin Star C. Co. v.*
Quinn, 46 Colo. 590; *Quinn v. Bald-*
win Star C. Co., 19 Colo. App. 497;
Darling v. McBride, 86 Neb. 481;
Williams v. Ballinger, 125 Iowa
 410; *Holloway v. Holloway*, 103
 Mo. 274; *Dwelle v. Wilson*, 14 Ohio
 C. C. 551; *Lewis v. Leahey*, 14 Mo.
 App. 564; *Church v. Baker*, 18 Colo.
 App. 369; *Allport v. Kelley*, 2
 Mont. 343; *Citizens' T. & G. Co. v.*
Ohio Valley T. Co., 138 Ky. 421.

If, however, extra expense has

cannot be set down to the account of the injunction. But where no other relief is asked for but an injunction, the expense to get rid of it on a final hearing, as well as on motion, may be recovered.⁴⁷ If a temporary injunction is continued during the pendency of the action, notwithstanding the objection of the defendant, thus obliging him to try the action in order to secure the dissolution of the injunction, counsel fees incurred for the trial may be recovered; but not for services rendered before the entry of an order continuing the injunction.⁴⁸ Counsel fees incurred in opposing the issuance of an injunction after the hearing on an order to show cause why an injunction *pendente lite* should not be granted have been recovered upon the refusal to grant such injunction notwithstanding the preliminary injunction was technically terminated with the disposition of the order to show cause.⁴⁹ In Illinois expenses and

been occasioned the defendant by reason of the injunction it may be recovered. *Wallace v. York*, 45 Iowa 81; *Olds v. Cary*, *supra*.

If the matters covered by a deposition are so blended that those which relate to the principal case cannot be separated from those relating to the injunction the whole expense of taking it may be allowed. *Alliance T. Co. v. Stewart*, 115 Mo. 236.

If part of the expense of trying the general issue is owing to the injunction the defendant therein must show what part, in which case, it seems there may be a recovery to that extent. *Church v. Baker*, *supra*; *Lambert v. Alcorn*, 144 Ill. 313, 21 L.R.A. 611; *Creek v. McManus*, 17 Mont. 445; *Campbell v. Metcalf*, 1 Mont. 378.

⁴⁷ *Brooks v. Racich A. Mfg. Co.*, 137 App. Div. (N. Y.) 280; *Perlman v. Bernstein*, 93 App. Div. (N. Y.) 335; *Colby v. Meserve*, 85 Iowa 555; *School Directors v. Mathis*, 168 Ill. App. 174.; *Jack-Suth. Dam. Vol. II.*—21.

son v. Millsbaugh, 100 Ala. 285; *Robertson v. Smith*, 129 Ind. 422, 15 L.R.A. 273; *Thomas v. McDanel*, 77 Iowa 302; *Jamison v. Dulaney*, 74 Miss. 890; *Creek v. McManus*, 13 Mont. 152; *Andrews v. Glenville W. Co.*, 50 N. Y. 282; *Newton v. Russell*, 24 Hun 40; *Reece v. Northway*, 58 Iowa 187; *French P. & O. Co. v. Porter*, 134 Ala. 302; *Nielsen v. Albert Lea*, 87 Minn. 285.

⁴⁸ *Youngs v. McDonald*, 56 App. Div. (N. Y.) 14, affirmed without opinion, 166 N. Y. 639; *Curtiss v. Bachman*, 110 Cal. 433, 52 Am. St. 111; *Lewis v. Leahey*, 14 Mo. App. 564.

⁴⁹ *Sargent v. St. Mary's Asylum*, 190 N. Y. 394. But compare *White Pine L. Co. v. Aetna Ind. Co.*, 42 Wash. 569, holding that expenses incurred in resisting the issuance of an injunction *pendente lite* may not be recovered upon a bond given on an order to show cause, no effort being made to have it set aside.

attorneys' fees incurred after an injunction has been made perpetual cannot be allowed on suggestion of damages filed upon the reinstatement of the cause after the reversal of the decree although the injunction was the only relief sought.⁵⁰ The Indiana appellate court has, admittedly, gone beyond the rule laid down by the supreme court of that state in holding that attorneys' fees for defending the injunction suit at the trial on the merits may be recovered although the injunction was not the sole object of the action.⁵¹ Fees and costs expended in the defense of rules to show cause why the defendant should not be punished for contempt in violating an injunction are not recoverable.⁵²

It was formerly the rule in Alabama that counsel fees in the appellate court were not recoverable though the appeal was from a judgment sustaining the injunction and such judgment was reversed;⁵³ the contrary is now well established.⁵⁴ Generally no distinction is made between such fees in the trial and appellate courts;⁵⁵ though an allowance will not be made when the appeal is from the order of dissolution.⁵⁶ In Ala-

⁵⁰ *Bennett v. Lambert*, 100 Ky. 737.

⁵¹ *Milligan v. Nelson*, 188 Ill. 139, and local cases cited. See *Dempster v. Lansingh*, 128 Ill. App. 388.

⁵² *Hyatt v. Washington*, 20 Ind. App. 148.

⁵³ *Ferguson v. Baber*, 24 Ala. 402; *Bullock v. Ferguson*, 30 id. 227.

⁵⁴ *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5; *Cooper v. Hames*, 93 id. 280; *French P. & O. Co. v. Porter*, 134 Ala. 302.

⁵⁵ *Miller v. Donovan*, 13 Idaho 735; *Curphy v. Terrell*, 89 Miss. 624; *Lambert v. Haskell*, 80 Cal. 611; *Porter v. Hopkins*, 63 Cal. 53; *Reece v. Northway*, 58 Iowa 197; *Roberts v. White*, 73 N. Y. 375; *Lewis v. Leahey*, 14 Mo. App. 564.

Where an intermediate court reversed a judgment granting an injunction and made an order con-

tinuing the writ in effect until decision was made by the court of last resort, it was held that the expenses of the appeal were not caused by the injunction, but were damages resulting from the appeal. *Guilford v. Cornell*, 4 Abb. Pr. 220.

A bond conditioned to pay the damages if the writ shall be dissolved "by the said chancery court" has been construed as if it read as the statute provides, and covers the damages resulting from a dissolution by the supreme court. *Bolling v. Tate*, *supra*.

In Georgia counsel fees in the supreme court may not be recovered. *Jones v. Rountree*, 11 Ga. App. 181.

⁵⁶ *Albers C. Co. v. Spencer* (Mo. App.), 139 S. W. 321; *Elwood Mfg. Co. v. Rankin*, 70 Iowa 403; *Cors v. Tompkins*, 5 Ill. App. 315.

bama there may be a recovery for services of counsel in investigating the defendant's status and rights with reference to the injunction and for his advice thereon, and for services in any proceeding or effort for the lifting of the restraint of the writ.⁵⁷ In a case⁵⁸ where the injunction was not disallowed until the final hearing the party enjoined recovered also the expenses of an unsuccessful motion to dissolve; and on this point Rapallo, J., said: "It (that motion) was not denied on the merits, nor for any irregularity in making the motion, but because the court, in its discretion, thought it more advisable to defer the inquiry into the merits until the final hearing. It was proper that the defendant should move at the earliest opportunity to dissolve the injunction. His motion did not fail through any fault on his part, or any defect in the merits of his case. The court simply deferred its decision upon the merits until the trial. The result, which, for the purposes of this application, may be assumed to be correct, shows that if the decision had not been thus deferred the motion should have been granted when made." Those expenses were allowed under these exceptional circumstances; for, as Church, C. J., remarked in a subsequent case,⁵⁹ "a motion had been made to dissolve the injunction, which was denied upon the ground that, as the motion involved the whole merits of the action which was brought to secure a permanent injunction, it was more appropriate that it should be determined upon a trial. The defendant was, therefore, compelled to go to trial to secure a decision that the party was not entitled to the injunction in order to recover the damages which he had sustained in endeavoring to procure a dissolution."⁶⁰ Generally the costs and expenses of an unsuccessful application to dissolve will not be allowed though the motion is regular and the court in its discretion continues the injunction

⁵⁷ Bush v. Kirkbride, 131 Ala. 405.

⁵⁸ Andrews v. Glenville W. Co., 50 N. Y. 282.

⁵⁹ Hovey v. Rubber T. P. Co., 50 N. Y. 335.

⁶⁰ See comments on the same case in Troxell v. Haynes, 16 Abb. Pr. (N. S.) 1; Langworthy v. McKelvey, 25 Iowa 48; Lyon v. Hersey, 32 Hun 253.

to the final hearing and then dissolves it on the merits.⁶¹ This is the rule where a gross sum was paid as counsel fees, no separate charge being made for a futile attempt to procure a dissolution.⁶² The voluntary dismissal of the injunction is not an admission that it was wrongfully obtained, and does not carry liability for attorney's fees in an unsuccessful attempt to have it dissolved on appeal.⁶³

Not only are the costs and expenses incurred directly to obtain dissolution of the injunction allowed as damages, but also those which are incident to executing the references that courts of equity in many jurisdictions direct under local statutes or rules of practice to ascertain the damages sustained by the enjoined party in consequence of the injunction,⁶⁴ notwithstanding the damages recovered equal the amount of the undertaking.⁶⁵ Inconvenience and expense resulting from attending the suit are not elements of damage for which a recovery may be had on the bond.⁶⁶ If several defendants release the sureties on the injunction bond from all liability, the fact that one of them, who did not join in such release, had assumed liability for the attorneys' fees of those who had joined in it, the injunction plaintiff not knowing thereof, will not prevent the release from being absolute.⁶⁷

In Montana a restraining order is regarded as serving much the same purpose and as being subject to the same rules as a temporary injunction, and on the dissolution thereof there may be a recovery of attorneys' fees paid for procuring its dissolution and in resisting the application for the final injunc-

⁶¹ *Allen v. Brown*, 5 Lans. 511.

⁶² *Mitchell v. Hawley*, 79 Cal. 301.

⁶³ *Thompson v. Benson*, 41 Wash. 70.

⁶⁴ *Brooks v. Racich A. Mfg. Co.*, 137 App. Div. (N. Y.) 280; *Phoenix B. Co. v. Keystone B. Co.*, 10 App. Div. (N. Y.) 176, affirmed without opinion, 153 N. Y. 644; *Holcomb v. Rice*, 119 N. Y. 598; *Lawton v. Green*, 64 N. Y. 326; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Rose v.*

Post, 56 N. Y. 603; *Ryan v. Anderson*, 24 Ill. 652; *Wisconsin M. & F. Ins. Co. v. Durner*, 114 Wis. 369.

⁶⁵ *O'Connor v. New York & Y. L. I. Co.*, 8 N. Y. Misc. 243, indicating a change in the code since *Lawton v. Green*, 64 N. Y. 326, was decided.

⁶⁶ *Williams v. Allen*, 21 Ky. L. Rep. 1191. But see n. 15, p. 1722, and n. 9, p. 1719.

⁶⁷ *Mulvane v. Tullock*, 58 Kan. 622.

tion, notwithstanding the services were rendered after the time fixed in such order for hearing the application for the injunction.⁶⁸ In Nebraska the rule is that, ordinarily, attorneys' fees are not recoverable for services in an attempt to secure the dissolution of such an order.⁶⁹ But such fees may be allowed if there has been unreasonable delay in hearing the application for a temporary injunction,⁷⁰ though they must be limited to the services rendered in securing the dissolution of the order.⁷¹ In New York counsel fees incurred in resisting the granting of an injunction after an order to show cause has been granted are not damages resulting from the granting of the injunction, but the result of efforts made to prevent the granting of it; and if no damages resulted from the injunction there cannot be a recovery of such fees.⁷²

It is convenient to note in this connection that the liability of sureties in an undertaking to pay the damages which may result from executing an order of arrest is much the same as their liability on an injunction bond. The undertaking does not cover damages claimed for a personal wrong or injury; but covers taxable costs to be awarded in the action and such other legitimate damages as flow from the arrest and are made necessary by it, such as counsel fees, expense in money to vacate the arrest and loss of time occasioned the party arrested in getting bail and in and about moving for his discharge.⁷³ In addition to the expenses involved in employing an attorney, if there has been an arrest and imprisonment there may be a recovery for mental distress and physical illness resulting in the deprivation of liberty, humiliation, disappointment, mortification and disgrace.⁷⁴

§ 526. Damages from restraint of injunction. The damages which the enjoined party may be entitled to for losses and

⁶⁸ *Miles v. Edwards*, 6 Mont. 180.

⁶⁹ *Carnes v. Heimrod*, 45 Neb. 364.

⁷⁰ *Gyger v. Courtney*, 59 Neb. 555.

⁷¹ *Trester v. Pike*, 60 Neb. 510.

⁷² *Sweet v. Mowry*, 71 Hun 381;

Whiteside v. Noyac C. Ass'n, 84 Hun 555.

⁷³ *Banberger v. Kahn*, 43 Hun 411; *Krause v. Rutherford*, 45 App. Div. (N. Y.) 132.

⁷⁴ *Vanderberg v. Connolly*, 18 Utah 112.

injuries sustained by the operation of the writ are as various as the subjects which may be affected by its restraint. These damages, however, are ascertained and measured by the principle of giving just and adequate compensation for actual loss, which is the natural and proximate result of the injunction.⁷⁵ If those for which a claim is made are conjectural they can-

⁷⁵ *Elms v. Wright*, B. Co., 106 La. 19; *Hutchins v. Munn*, 28 App. D. C. 271; *Cortelyou v. Houghton*, 27 id. 188; *Marengo County v. Matkin*, 144 Ala. 574; *Chicago T. & T. Co. v. Chicago*, 209 Ill. 172; *Clay Center v. Williamson*, 79 Kan. 485; *Phoenix P. Co. v. American C. & P. Co.*, 111 Md. 549; *Albers C. Co. v. Spencer*, *supra*; *Frantz v. Saylor*, 12 Okla. 39; *Belmont M. & M. Co. v. Costigan*, 21 Colo. 465; *Rhodes v. Auld*, 5 Kan. App. 225; *Sweet v. Mowry*, 71 Hun 381; *Edmison v. Sioux Falls W. Co.*, 10 S. D. 440; *Donahue v. Johnson*, 9 Wash. 187; *Coosaw M. Co. v. Carolina M. Co.*, 75 Fed. 860; *Bullock v. Ferguson*, 30 Ala. 227; *Collins v. Sinclair*, 51 Ill. 328; *Hale v. Meegan*, 39 Mo. 272; *Brown v. Tyler*, 34 Tex. 168; *Moulton v. Richardson*, 49 N. H. 75; *Hurd v. Trimble*, 1 Litt. 413; *Galveston, etc. R. Co. v. Ware*, 74 Tex. 47; *Rohwer v. Chadwick*, 7 Utah 385, quoting the text.

In *Findlay v. Carson*, 97 Iowa 537, the recovery included, besides attorneys' fees and loss of profits, expenses, loss of time and for interruption to business.

In Louisiana punitive damages are recoverable under some circumstances. *Conery v. Coons*, 33 La. Ann. 372.

Under a statute providing for such damages as the court shall award, not exceeding a fixed per centum, the actual damages must be

shown. *Reed v. New York Nat. Exch. Bank*, 230 Ill. 50.

The full sum specified as a penalty in an injunction may not be recovered for its violation, but only the actual damages. *Lawton v. Herrick*, 83 Conn. 417.

In *Moulton v. Richardson*, *supra*, an injunction was obtained against Richardson and a corporation, of whose stock he held a large majority of the shares, to prevent the removal of the personal property out of the state. Later the writ was modified so as to allow such removal on condition that a bond be given to pay the plaintiff, a creditor of Richardson, such sum as might be awarded upon the final decree. In an action upon that bond the measure of damages depended upon these considerations: The injury to the plaintiff caused by the removal of the personal property; did that impair the value of the stock, and, if so, to what extent? And to what extent did it injure the plaintiff? And in determining these questions it is proper to consider whether the removal depreciated the stock so as to prevent a decree for its transfer which might otherwise have been made, and whether the plaintiff was injured thereby. So in view of the decree to pay money, was the plaintiff injured by having his means of enforcing the decree impaired, and to what extent?

not be recovered for.⁷⁶ The doctrine of non-liability for avoidable consequences applies to actions on injunction bonds and any damages resulting from the failure to use reasonable exertion and care are not recoverable.⁷⁷ On the other hand, the principles which apply generally in favor of an injured party who incurs expense or performs labor for the benefit of the wrongdoer govern in actions on injunction bonds, and there may be a recovery therefor and for the expense of restoring the condition of things which existed before the writ issued.⁷⁸ There cannot be a recovery for the expense resulting from idle men and horses unless it is shown that an effort to find employment for them failed.⁷⁹ But the rule does not require the injunction defendant to enter into a speculation with respect to the property affected by the writ.⁸⁰ The damages recoverable by one who has dramatized a copyrighted novel

⁷⁶ *McCormick v. United States*, 185 Fed. 748, 108 C. C. A. 86; *Lewis v. Collier*, 157 Ala. 533; *Whitehead v. Cape Henry Syndicate*, 111 Va. 193; *Clippens O. Co. v. Edinburgh & D. W. Trustees* (1907), App. Cas. 291; *Bullard v. Harkness*, 83 Iowa 373; *Colby v. Meservey*, 85 Iowa 555; *Alliance T. Co. v. Stewart*, 115 Mo. 236; *Coosaw M. Co. v. Carolina M. Co.*, *supra*; *San Jose F. P. Co. v. Cutting*, 133 Cal. 237; *Elms v. Wright-B. Co.*, 106 La. 19 (remote, conjectural profits claimed to have been lost); *South Penn Oil Co. v. Stone* (Tenn. Ch. App.), 57 S. W. 374; *Chicago T. & T. Co. v. Chicago*, 209 Ill. 172, 110 Ill. App. 395; *Johnson v. Moser*, 72 Iowa 654.

The recovery is limited to such damages as are itemized in the petition. *Sullivan v. Cartier*, 147 Fed. 222, 77 C. C. A. 448.

Where a city was enjoined from issuing bonds for which a bank, prior to the injunction, had concluded to offer a given sum and

later the bank decided not to bid and the bonds were sold after the determination of the suit at less than the sum the bank was to offer, it was held that its refusal to bid was not necessarily the result of the injunction, but rather the doubt as to the validity of the bonds based upon the litigation. *Sweet v. Mowry*, 71 Hun 381, 25 Supp. 32.

⁷⁷ *Hermann v. Allen* (Tex. Civ. App.), 128 S. W. 115; *United States F. & G. Co. v. Jones*, 133 Ky. 621; *Alliance T. Co. v. Stewart*, *supra*; *Citizens' Trust & Guaranty Co. v. Ohio Val. Tie Co.*, 138 Ky. 421; *Mack v. Jackson*, 9 Colo. 536; *Nansemond T. Co. v. Rountree*, 122 N. C. 45.

⁷⁸ *Freneh v. McCreedy* (Tex. Civ. App.), 57 S. W. 894; *Rohwer v. Chadwick*, 7 Utah 385. See § 88, *et seq.*

⁷⁹ *Nansemond T. Co. v. Rountree*, *supra*.

⁸⁰ *O'Connor v. New York & Y. L. I. Co.*, 8 N. Y. Misc. 243; *Roberts v. White*, 73 N. Y. 375.

on the dissolution of an injunction restraining him from presenting it should not include the loss of profits on the tour of a dramatic company which was to produce the drama in their repertory, but must be limited to the profits lost on the drama in question.⁸¹ Although the bond of a receiver appointed in an injunction suit may not cover the damages resulting from his improper appointment the sureties on the injunction bond are not liable therefor.⁸² If a fund *in custodia legis* is impounded by a wrongful injunction the taxes thereon accruing during the litigation and paid out of it are not an element of damages against the sureties; neither is the compensation of the receiver for loaning the fund during that time, he having been paid out of the accruing interest.⁸³ Where the officers of a street-railway company were enjoined from making repairs necessary to the operation of their road in its entirety, passengers being obliged, before the injunction was issued, to walk around the place where it was sought to make repairs and, after the writ issued, the running of cars from one end of the line was discontinued and the fare reduced, the damages were composed of the extra expense of operating the cars during the continuance of the injunction in the manner in which they had previously been operated, and also the decrease in tolls arising from diminished travel caused by the prevention of the repairs; but there was no liability for the decrease in tolls caused by stopping the running of the cars at one end of the line and the reduction of the fare.⁸⁴ One who is restrained from doing unlawful acts cannot recover damages on the bond⁸⁵—as a mortgagor who would have committed a trespass against the mortgagee.⁸⁶

The damages contemplated by the law in requiring a bond are such as are real; merely nominal damages cannot be re-

⁸¹ *Schlesinger v. Bedford*, [1893] W. N. 57, 9 T. L. Rep. 370.

⁸² *Wood v. Hollander*, 84 Tex. 394.

⁸³ *Stringfield v. Hirsch*, 94 Tenn. 425, 45 Am. St. 733.

⁸⁴ *Hawthorne v. McArthur*, 8 Ky. L. Rep. 526 (Ky. Super. Ct.).

⁸⁵ *Guthrie v. Biethan*, 25 Idaho 706.

⁸⁶ *Dole v. Hickey*, 67 N. H. 496; *Crawford v. Atlantic C. L. Co.*, 89 S. C. 456.

covered.⁸⁷ The sum designated is the limit of liability,⁸⁸ except where interest is allowed from the time of the breach.⁸⁹ Bonds are not to be extended in their operation by liberal construction.⁹⁰ If, however, their terms are clear they will be given

⁸⁷ *Grove v. Wallace*, 11 Colo. App. 160; *Iliff v. School Directors*, 45 Ill. App. 419, 425; *Foster v. Stafford Nat. Bank*, 58 Vt. 658; *Smith v. Day*, 21 Ch. Div. 421. See *Mack v. Jackson*, 9 Colo. 536.

Where expense was incurred for attorneys' fees nominal damages for preventing the exercise of the right to fish in public waters were allowed. *Dwelle v. Wilson*, 14 Ohio C. C. 551. The right to recover such damages is recognized independent of any special injury. *Brown v. Cunningham*, 82 Iowa 512, 12 L.R.A. 583. And this appears to be in accordance with correct principles. See ch. 2; *Rohwer v. Chadwick*, 7 Utah 385.

⁸⁸ *United States v. Lewis P. Co.*, 160 Fed. 989; *Cimiotti U. Co. v. American F. R. Co.*, 158 Fed. 171; *Terry v. Robbins*, 122 Fed. 725; *Pee Dee River L. Co. v. Fountain*, 90 S. C. 122; *Crawford v. Atlantic C. L. Co.*, 89 S. C. 456; *Rogers v. Clough*, 76 N. H. 272; *Pyott L. & M. Co. v. Tarwater*, 126 Tenn. 601; *Grove v. Bush*, 86 Iowa 94; *Nansemond T. Co. v. Rountree*, 122 N. C. 45; *Pacific Mail S. Co. v. Toel*, 9 Daly 301; *Glover v. McGaffey*, 56 Vt. 294; *Lawton v. Green*, 64 N. Y. 326 (referee fees after judgment are not allowable).

An award by arbitrators appointed to assess the damages resulting from the breach of a bond will not be set aside *in toto* because it exceeds the penalty of the bond, unless it appears that an unauthorized element of damage was considered; it will be sustained to the extent of

their authority. *Ehrman v. Stanfield*, 80 Ala. 118.

⁸⁹ *Perry v. Horn*, 22 W. Va. 381; *State v. Purcell*, 31 W. Va. 44. *Contra*, *Hughes v. Wickliffe*, 11 B. Mon. 202; *Roberts v. White*, 73 N. Y. 375. See §§ 331, 477, 478.

If money is tied up the allowance of interest up to the dissolution of the writ is proper; it ought not to be allowed from the latter event to the time of the affirmance of the action of the trial court. *Albers C. Co. v. Spencer* (Mo. App.), 139 S. W. 321.

At law the penalty of the bond is the limit of liability; but where the execution of a judgment at law is restrained and the interest accrued on it renders the amount due greater than the penalty, equity will allow interest on the penalty to a sum equal to the principal and interest due on the judgment. *Marshall v. Minter*, 43 Miss. 666.

There is a dictum in *Pyott L. & M. Co. v. Tarwater*, *supra*, to the effect that punitive damages may be collected on the bond within the limit it fixes, and that the principal will be liable individually for such damages after the penalty of the bond is satisfied.

⁹⁰ *Houghton v. Meyer*, 208 U. S. 149, 52 L. ed. 432.

In Louisiana the liability of an obligor is fixed by statute, and not by the terms of the bond; hence if the latter names an obligee not within the statute his name will be disregarded. *Hays v. Fidelity & D. Co.*, 112 Fed. 872, 50 C. C. A. 569.

effect though by so doing the obligors are made liable for damages sustained before they executed their obligation.⁹¹ Damages suffered after the return day may be recovered if it was necessary to postpone the hearing in order that a party might have time to prepare for it.⁹² If the damages are fixed by statute for a class of cases no more than are specified can be recovered;⁹³ and if exceptional cases arise to which the statute is not applicable the damages therein provided for are not to be added to those allowed.⁹⁴ The rule of strict construction applied to bonds does not govern injunction; it is the spirit, not the letter of the latter, which must be obeyed. The defendant may recover damages caused by his obeying the writ as he had the right to understand it. "If the party obtaining an injunction would be safe from the possible consequences of a construction by the other party that would enlarge the scope of it beyond what he intended it should be, let him see to it that it is made too plain to admit of such construction."⁹⁵ Where an injunction restrains the collection of both the principal and interest of a judgment the bond will be read in connection with the facts, and an uncertain phrase in it will be construed to cover the interest.⁹⁶

The liability of the sureties is confined to responsibility for the direct effects of the injunction.⁹⁷ Illustrations of this have been given in the two last preceding sections. The importance of the question merits further consideration. If two persons are enjoined one of them cannot recover on the bond because

⁹¹ *Fidelity & D. Co. v. Walker*, 158 Ala. 129; *Meyers v. Block*, 120 U. S. 206, 30 L. ed. 642; *Block v. Myers*, 35 La. Ann. 220; *Goodrich v. Foster*, 131 Mass. 217; *Dodge v. Cohen*, 14 D. C. App. Cas. 582.

Ordinarily an employer is not entitled to damages because his employee is restrained from prosecuting his business, the bond not including the former and the writ not being effectual to restrain him. *Dunham v. Seiberling*, 12 Ind. App. 210.

⁹² *Maughlin M. Co. v. Hamilton*, 61 Wash. 66.

⁹³ *Nixon v. Seal*, 78 Miss. 363.

⁹⁴ *Williams v. Bank*, 71 Miss. 858, 871, 42 Am. St. 503.

⁹⁵ *Webb v. Laird*, 62 Vt. 448, 22 Am. St. 121.

⁹⁶ *Weatherby v. Shackleford*, 37 Miss. 559.

⁹⁷ *Woolfolk v. Jones*, 216 Fed. 807; *Citizens' T. & G. Co. v. Ohio Valley T. Co.*, 138 Ky. 421; *Edmison v. Sioux Falls W. Co.*, 14 S. D. 486.

of the inability of the other to fulfill a pre-existing contract between them though but for the injunction there might have been no default.⁹⁸ The defendant cannot recover damages caused by a lessee refusing to abide by the terms of his lease because of consequences following an injunction. In an English case the erection of a building was restrained. The owner sought to recover damages on the ground that he thereby lost a tenant. The court thought no binding lease had been entered into; but nevertheless considered the case as if it were otherwise. Jessel, M. R., was of the opinion that the damage was the difference between the rent agreed to be paid by the lessee and the value of the expectation of rent to be received from some other tenant. "Is that a kind of damage as to which the court should direct an inquiry? It seems to me that it is not." Brett, L. J., said: "If damages are granted at all, I think the court would never go beyond what would be given if there were an analogous contract with or duty to the opposite party. The rules as to damages are shown in *Hadley v. Baxendale*.⁹⁹ If the injunction had been obtained fraudulently or maliciously the court, I think, would act by analogy to the rule in case of fraudulent or malicious breach of contract, and not confine itself to proximate damages, but give exemplary damages. In the present case there is no ground for alleging fraud or malice. The case then is to be governed by analogy to the ordinary breach of contract or duty, and in such a case the damages to be allowed are the proximate and natural damages arising from such a breach, unless, as in *Hadley v. Baxendale*, notice had been given to the opposite party of there being some particular contract which would be affected by the breach. This doctrine of notice has introduced some difficulty into these cases, and it is not settled what sort of notice is sufficient. Here an alleged agreement for a lease is relied on. In the first place I do not think the existence of such agreement proved. If it did exist the next question is, whether the injunction so interfered with the erection of the buildings as to entitle the tenant

⁹⁸ *Livingston v. Exum*, 19 S. C. 223. ⁹⁹ 9 Ex. 341.

to throw up the agreement. I am not satisfied that it did. But assume that it did, and that the agreement was broken in consequence of the injunction, still I agree with the vice-chancellor in thinking that the breach is not by reason of the injunction, but is a consequence too remote to be regarded. If any one obtains an injunction preventing another from proceeding with a building he must be taken to have notice of everything in the building contract, and all liabilities which the person stopped incurs to his contractor by reason of the stoppage are a natural and immediate consequence of the injunction. But the fact that the injunction prevents the carrying out of an entirely independent agreement as to the property is too remote." Cotton, L. J., was of the same opinion.¹ Where the contemplated building is not erected, but a new and different one is, the rental value of the former cannot be recovered;² and it has been held that the increased cost of erection of a structure occurring during the period work on it was restrained cannot be recovered, a view from which, with the greatest deference to the court which so held, it is difficult not to differ.³ There can be no recovery for the mental strain and anxiety resulting from an injunction.⁴ The effect of a bond to pay all costs and damages that may accrue by reason of a temporary injunction remaining in force during the pendency of an appeal, is to create a new status not contemplated before it was given, and every element of that status, including damages caused by the breach of the original contract or arising out of the original cause of action. Hence sub-contracts are admissible as tending to prove damages arising from the continuance of the injunction and on the undertaking to pay damages caused thereby.⁵

§ 527. **Same subject.** If the restraint keeps the owner of money or property out of possession or deprives him of its use compensation is given upon the same principle as in other cases of wrongful deprivation.⁶ But the difference between the

¹ *Smith v. Day*, 21 Ch. Div. 421.

² *Southern R. Co. v. Pardue*, 123 Tenn. 376.

³ *Clay Center v. Williamson*, 79 Kan. 485.

⁴ *Cook v. Chapman*, 41 N. J. Eq. 152.

⁵ *Mead v. Kalberg*, 70 Wash. 517.

⁶ *Kansas B. P. Co. v. United States F. & G. Co.*, 81 Kan. 596

legal rate of interest on money and the amount it earned cannot be recovered where the custodian of it was merely restrained from distributing it among the individual members of an association as their property.⁷ Where a party was prevented from enjoying the benefit of his real estate by an injunction obtained without cause the value of the use and occupation was given as damages.⁸ Depreciation in the value

(loss of interest and depreciation in value of securities); *Newton v. Brown*, 152 N. C. 200; *Crawford v. Atlantic C. L. Co.*, 89 S. C. 456; *Guinn v. Eaves*, 117 Tenn. 524; *Columbia A. Co. v. Pine Beach I. Co.*, 109 Va. 325; *Smith v. Atkinson*, 18 Colo. 255; *Belmont M. & M. Co. v. Costigan*, 21 Colo. 465; *Ten Eyck v. Sayer*, 76 Hun 37; *DeCamp v. Burns*, 33 App. Div. (N. Y.) 517; *Richardson v. Allen*, 74 Ga. 719; *Wood v. State*, 66 Md. 61; *Dodge v. Cohen*, 14 D. C. App. Cas. 582; *Post-B. S. Co. v. Williams*, 57 Ill. App. 434. See *Dreyfus v. Peruvian G. Co.*, 42 Ch. Div. 66.

In *Gadsden v. Bank*, 5 Rich. L. 336, the right to recover interest by one entitled to money in an officer's hands, the payment of which was enjoined, is denied.

A debtor enjoined only so far as payment of money to his creditor is concerned, and who has not paid it into court, may not recover interest in an action on the injunction bond. *Bullock v. Ferguson*, 30 Ala. 227.

It is immaterial to the right of a judgment creditor restrained from selling the debtor's land to recover interest during the period of delay that the land appreciated largely in value. *Hill v. Thomas*, 19 S. C. 230.

It is a fixed and arbitrary rule that the only damages which the law allows for the detention of

money under its process is legal interest. *Heyman v. Landers*, 12 Cal. 107. But that is recoverable as matter of right and is computed up to the day of its payment into court. *Wallis v. Dilley*, 7 Md. 237. In an early case in Virginia the computation of principal, interest, and costs was made as of the time the injunction took effect. *Washington v. Parks* (1835), 6 Leigh 581.

If the process of building is interrupted and a building is completed after the injunction is dissolved and for the uses contemplated, the rental value of the improved property may be recovered. *Stone v. Hunter Tract I. Co.*, 68 Wash. 28, 39 L.R.A.(N.S.) 180.

The right to recover the rental value of a home from which the owner is excluded is not affected because he did not rent other premises in the locality of it. *Hutchins v. Munn*, 28 App. D. C. 271.

⁷ *Phoenix B. Co. v. Keystone B. Co.*, 10 App. Div. (N. Y.) 176, affirmed without opinion, 158 N. Y. 644.

⁸ *Hutchins v. Munn*, 209 U. S. 246, 52 L. ed. 776, affirming 28 App. D. C. 271; *McLennon v. Fenner*, 19 S. D. 492; *Spears v. Armstrong* (Tenn. Ch.), 42 S. W. 37; *Webb v. Laird*, 62 Vt. 448, 22 Am. St. 121; *Hosmer v. Campbell*, 98 Ill. 572; *Winship v. Clendenning*, 24 Ind. 439; *Virginia Beach D. Co. v. Com-*

of bonds during the time their issue was restrained carries liability for the difference in their value when the writ issued and when it was dissolved.⁹ In a recent case the court announced that in awarding damages for depriving the person entitled thereto of the use of his land equitable principles would control. The award made included damages for the loss of the crop.¹⁰ In a case in which the party suing out the injunction was sought to be charged with the value of land for pasturage he was allowed the cost of fencing it for such use. If the land was unfenced when the injunction issued and was fit only for pasture, and the defendant was not intending to use it for that purpose, or was not prepared to do so, he was not entitled to any compensation; if his intention was to use it and inclose it for use he was entitled to the value of the use, less the expense of inclosing it. If he had procured materials to fence it and was prevented from doing so he was entitled to be reimbursed for any loss necessarily resulting.¹¹ If he was prevented from protecting timber land and the complainant had taken away timber and wood and removed sand there could be a recovery for the value thereof in the condition they were in before they were converted.¹² There may also be a recovery for waste committed while the owner is kept out of possession.¹³ But an injunction interfering with the collection of rents due does not change the legal relation of landlord and

monwealth, 115 Va. 280; *Rutherford v. Moore*, 24 Ind. 311; *Holloway v. Holloway*, 103 Mo. 274; *Roberts v. White*, 73 N. Y. 375; *Fleming v. Bailey*, 44 Miss. 132. See *Sturges v. Knapp*, 36 Vt. 439, where damages were assessed and distributed upon peculiar facts; also *Johnson v. Moser*, 72 Iowa 654.

Where the cultivation of land was enjoined it was held proper to prove its rental value for any and all purposes for which it was suitable and could have been used. *Wadsworth v. O'Donnell*, 7 Ky. L. Rep. 837.

⁹ *Clay Center v. Williamson*, 79 Kan. 485.

¹⁰ *Rice v. Cook*, 92 Cal. 144; *Edwards v. Edwards*, 31 Ill. 474; *Richardson v. Allen*, 74 Ga. 719; *De Camp v. Burns*, 33 App. Div. (N. Y.) 517.

¹¹ *Stone v. Hunter Tract I. Co.*, *supra*, quoting the text.

¹² *Alexander v. Colcord*, 85 Ill. 323; *Miller v. Smythe*, 122 Ky. 699; *Densch v. Scott*, 58 Ill. App. 33.

¹³ *McLennon v. Fenner*; *Winship v. Clendenning*, *supra*; *Richardson v. Allen*, 74 Ga. 719; *De Camp v. Burns*, *supra*; *Nansemond T. Co. v. Rountree*, 122 N. C. 45.

tenant so as to entitle the former to recover for use and occupation; the true basis of recovery is the losses from the insolvency of the tenants during the pendency of the injunction. In a case where a landlord was restrained from interfering with the possession of real estate occupied by tenants it was held that the inquiry of damages should be, what rent has the defendant lost by reason of the injunction? If the tenants were and are still responsible then their covenant can be enforced and the rent recovered, and there would be no actual loss. If, however, they have become irresponsible or have abandoned the premises pending the injunction, or the premises, or any part of them, were unoccupied and might have been rented there may be a claim for the loss of rent. In short, the loss must be ascertained in view of the responsibility of the parties and their several remedies; and also in view of the condition of the premises and the landlord's ability to have leased them or collected rent while the injunction continued, which he is unable now to do by reason of the irresponsibility of the tenants or by reason of the premises being unoccupied; for such items the defendants should recover as legitimate damages sustained by reason of the injunction.¹⁴ If the plaintiff, pending the action, collected any rent of the tenants the amount will form part of the damages.¹⁵ The rent of land, the sale of which has been enjoined, cannot be recovered; the injunction did not prevent the appointment of a receiver and the collection of rent.¹⁶ The assignee of a mortgagee who has not taken possession may not recover the rents he was restrained from collecting unless he shows that the price obtained on a foreclosure sale failed to meet the sum due on the mortgage.¹⁷ And a judgment creditor may not re-

¹⁴ The text is quoted in *Edmison v. Sioux Falls W. Co.*, 10 S. D. 440. See same case, 14 S. D. 486. To the same effect is *Rosenthal v. Boaz*, *infra*.

¹⁵ *Rosenthal v. Boaz*, 27 Ill. App.

430; *McDonald v. James*, 47 How. Pr. 474.

¹⁶ *Curry v. American Freehold L. M. Co.*, 124 Ala. 614.

¹⁷ *Schening v. Cofer*, 97 Ala. 726; *Fidelity & D. Co. v. Walker*, 158 Ala. 129.

cover the rental value of property or the interest on its purchase price because he was enjoined from selling it under execution.¹⁸

Where the injunction prevented the owner from clearing away certain timber upon agricultural lands the damages for the delay were held too remote and consequential.¹⁹ A party so prevented from working a mine and thereby kept out of employment was treated as having a just demand for damages on the basis of a loss of time to be compensated at the usual rate of wages.²⁰ But in Nevada it was held that where an injunction was obtained to restrain a party from cutting and drawing wood neither the loss occasioned by reason of his cattle or wagon being thrown out of employment, the expense of making a road which became useless nor the injury to his credit could be taken into consideration.²¹ In a case in South Carolina the defendant recovered for the loss of profits he would have made on the wood he could have cut and sold under an existing contract while restrained; but the loss of profits he could subsequently have made because of the departure of those employed by him could not be recovered.²² Damages which result from a forced suspension of work and from the inability, as a result of the injunction, to take steps to protect the result of labor performed from injury by the elements are recoverable.²³ Expenses incurred in connection with the property

¹⁸ Colby v. Meservey, 85 Iowa 555.

¹⁹ McKenzie v. Mathews, 59 Mo. 99. See Bullard v. Harkness, 83 Iowa 373; Colby v. Meservey, 85 Iowa 555.

²⁰ Muller v. Fern, 35 Iowa 420; Campbell v. Metcalf, 1 Mont. 378.

²¹ Brown v. Jones, 5 Nev. 374.

In Gear v. Shaw, 1 Pin. 608, an injunction was granted to restrain parties from mining on a certain lot; some time after its dissolution a new mineral discovery was made on the lot and a large quantity of ore was raised. In assessing damages on the injunction bond it was held that proof, for the purpose of enhancing damages, that the use of

the money for which the mineral might have been sold was worth more than the legal rate of interest should be rejected as ideal and speculative; and so, too, the proof of such subsequent discovery for the purpose of showing what the enjoined parties in the absence of the injunction might have realized.

But see Rees v. Sheridan, 135 La. 7, affirming an allowance for loss of credit.

²² Moorer v. Andrews, 39 S. C. 427. See also, Rees v. Sheridan, 135 La. 7, for an allowance for loss of profits in a similar case.

²³ White v. Brooke, 11 Wash. 99; Dougherty v. Dore, 63 Cal. 170;

affected by the injunction by order of the court are recoverable, and the sureties will not be heard to say that they are unnecessarily large if they or their principal took no steps to stop the work which caused the expenses.²⁴ In Tennessee an injunction plaintiff who is put in possession of property by virtue of a bond is regarded as holding it in the capacity of a receiver, and his sureties are not liable for its destruction, without his fault, pending the litigation.²⁵ Losses sustained by delays and laches on the part of the injunction defendant must be borne by him.²⁶

If an owner is deprived of his personal property, he is, *prima facie*, entitled to recover its value;²⁷ and this measure of redress has been allowed where the party obtaining the writ, during its pendency, took possession of the property, destroyed its identity and converted it to his own use.²⁸ It may admit of some doubt whether the loss of the property in such a case proceeds from the injunction. The writ stayed the defendant, but it vested no possession or right of control in the plaintiff.²⁹ His seizure of the property was an independent tort and not the natural and proximate consequence of the

Webb v. Laird, 62 Vt. 448, 22 Am. St. 121; St. Louis, etc. R. Co. v. Schneider, 30 Mo. App. 620; Quinn v. Baldwin Star C. Co., 19 Colo. App. 497; Virginia Beach D. Co. v. Commonwealth, 115 Va. 280.

²⁴ Lawlor v. Merritt, 81 Conn. 715; Tyler M. Co. v. Last Chance M. Co., 32 C. C. A. 498, 90 Fed. 15.

²⁵ Davenport v. Harbert, 2 Tenn. Cas. 287 (1877).

²⁶ Edmison v. Sioux Falls W. Co., 10 S. D. 440.

²⁷ Zell G. Co. v. Chrislip, 58 W. Va. 414.

²⁸ Barton v. Fisk, 30 N. Y. 166; White v. Brooke, 11 Wash. 99, quoting the text, and holding that where a prior mortgagee has been enjoined from foreclosing his chattel mortgage and selling under it

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the goods having been sold under the foreclosure of a junior mortgage, he may recover upon the bond the full amount of his claim, the goods being of the value thereof. He was not bound to pursue the party who converted them.

²⁹ In Patterson v. Kingsland, 8 Blatchf. 278, P., a mortgagee of real estate, sued K. to recover damages for the removal from the mortgaged premises of a building which K. had erected thereon under an agreement with the owner, and had removed therefrom after the execution of the mortgage. When K. had removed the building to some distance, P. obtained an injunction restraining its further removal. The building was subsequently blown down by the wind. It was held that P. did not, by obtaining such in-

injunction except as the restraint prevented the owner from protecting it.³⁰ But it must be confessed that the ground of liability on the bond is stated with force and plausibility by Denio, C. J.:³¹ "This seems to me a very plain case. The plaintiff claiming to be the owner of personal property lying on the defendants' land sued the defendants, who also claimed to own that personal property, to establish his title, and he procured a preliminary injunction forbidding the defendants from asserting their alleged ownership, by suit in court or in any other way, pending the principal suit; but he was finally beaten, the court determining that the property belonged to the defendants and not to the plaintiff. In the meantime, while the defendants' hands were tied, the plaintiff carried off the property, destroyed its identity, and disposed of and converted its proceeds to his own use; and the question is, what damages the defendants have suffered in consequence of this proceeding of the plaintiff. The object and the effect of the judgment manifestly was to allow the plaintiff to carry off and dispose of the property while the defendants, who were, as the event has shown, its owners, were precluded from doing anything whatever, in court or out of court, to protect themselves in its possession. *Prima facie*, the value of the property which the defendants have lost was the measure of the defendants' damages. If the property had remained specifically the same during the litigation, and at its conclusion had been within the defendants' reach, the damages probably would have been such as resulted from their being deprived of its use *pendente lite* and from any depreciation in value. But under the existing facts, it is the same thing as though it had

junction, take control of the building so that he could be charged with its value where it then stood, nor was the obligation imposed on him to assume possession and replace it on the land.

³⁰ See *Ashley v. Harrison*, 1 Esp. 48; *Vickers v. Wilcocks*, 8 East 1.

The results of the bad management of the receiver in whose hands

property is put are not attributable to the injunction; and so of an allowance for his services unless it is shown to be larger than the expense the injunction defendant would have incurred had there been no receivership. *Hotchkiss v. Platt*, 8 Hun 46.

³¹ *Barton v. Fisk*, 30 N. Y. 166. See *Moore v. Lachmund*, 59 Ore. 565.

been destroyed while the owners were prevented from extending their hands for its preservation. The plaintiff's argument is that the loss was not occasioned by the injunction but by the tortious act of the plaintiff and his assistant unconnected with that process. This is too narrow a view of the question. If it had been carried off and converted by a stranger while the owners were prohibited from doing anything to protect it, the person who restrained them ought to make recompense for the loss. *A fortiori*, he should make the compensation when he himself carried it off and converted it during the restraint which he had procured to be imposed. The efficient cause of the loss was the inability of the defendants, caused by the injunction, to take care of and preserve that which was their own." It was said in another case in New York, where a lessor had been enjoined from collecting rents, that if the plaintiff, pending the action, collected rent of the tenants, the amount so collected would form part of the damages.³² And damages were given in an Illinois case on the same principle.³³ A lessee of farming lands sued out an injunction against a prior lessee to prevent him from harvesting a crop of rye which he had sown while in possession under a lease requiring him to give one-third of the crop as rent; the plaintiff harvested the rye himself, and the court, at the hearing, having found that two-thirds of the rye belonged to the defendant dissolved the injunction and assessed as damages the value of the two-thirds after deducting the expense of harvesting the whole crop.³⁴ A later Illinois case is not harmonizable with the doctrine of the New York court. The contention was that there might be a recovery on the bond for the acts of the principal in taking the property in question and disposing of it for his own advantage. It was said: The service of the writ of injunction in no way authorized or caused the wrongful act of appellee in taking and converting the property. The dismissal of the bill and the dissolution of the injunction were conclusive that the injunction was wrongfully sued out. The only question on the

³² McDonald v. James, 47 How. Pr. 474.

³³ Collins v. Sinclair, 51 Ill. 328.
³⁴ Id.

assessment of damages was (assuming the appellee to have been all wrong in suing out the injunction), to what extent were appellants injured by being delayed some three weeks in taking and caring for the lumber and in procuring a dissolution of the injunction. Wrongs suffered during that time by unlawful acts of appellee, other than the improvident suing out of the injunction, constitute no part of the damages caused by the injunction.³⁵ The appointment of a receiver pending the disposition of the injunction suit, although it may have been contemplated when the writ was applied for, is not one of its incidents; the responsibility of the sureties continued only so long as the property involved was subject to the actual control of the injunction.³⁶ One deprived of the right to perform a contract for his services may, on showing that he failed to find other equally remunerative employment, recover the loss sustained.³⁷ Obtaining an injunction on allegations falsely and recklessly made, and known to be untrue when made, as an abuse of the process of the court for which punitive damages should be allowed.³⁸ The increased cost of finishing, after the dissolution of an injunction, a partially constructed improvement is an element of damage if the improvement remains in the possession of the defendant in the injunction suit;³⁹ but if he sells it he may not recover that difference unless it is shown that the purchaser would have given it or would have paid more for the property if the improvement had been finished as proposed.⁴⁰

§ 528. *Same subject.* Where the writ does not operate to change the possession and does not result in a loss of the chattels, but only suspends the owner's control, the amount properly recoverable on the bond is the loss in the value during the operation of the injunction, not exceeding the penalty, with interest from the institution of the suit.⁴¹ This damage

³⁵ *Cummings v. Mugge*, 94 Ill. 186.

³⁶ *Kerngood v. Gusdorf*, 5 Mackey 161.

³⁷ *Shepherd v. Gambill* (Ky.), 96 S. W. 1104.

³⁸ *South Penn. O. Co. v. Stone* (Tenn. Ch. App.), 57 S. W. 374.

³⁹ *Morgan v. Negley*, 53 Pa. 153; *Roberts v. White*, 73 N. Y. 375.

⁴⁰ *Morgan v. Negley*, *supra*.

⁴¹ *Citizens' T. & G. Co. v. Ohio*

is the difference between the value of the property at the time when the bond was given and its value at the time the injunction was dissolved, with interest.⁴² Profits which would have

Valley T. Co., 138 Ky. 421; Levy v. Taylor, 24 Md. 282; Meysenburg v. Schlieper, 48 Mo. 426; Lallande v. Trezevant, 39 La. Ann. 830 (bad treatment of animals).

If the owner is deprived of the use of property he may recover the rental value of it and the amount paid to an employee who was in charge of it under a subsisting contract, and for the expense of taking care of it while it was idle. Wood v. State, 66 Md. 61.

If the sale of real estate has been prevented the damages may be proved by showing the depreciation in its value; but a recovery cannot be had unless there is proof of a *bona fide* application to buy and that the injunction prevented the sale. Sturges v. Hart, 45 Ill. 103; Reece v. Northway, 58 Iowa 187.

The evidence showing a loss of property will not be weighed "in nice balances for the purpose of relieving parties who have become liable for the consequences of an illegal interference with the property of another." Hotchkiss v. Platt, 8 Hun 46.

A change in the value of gold coin as compared with legal tender currency, is not to be regarded. Riddlesbarger v. McDaniel, 38 Mo. 138. See § 210.

The damage done to timber by sap rot, worm holes, etc., during the pendency of an injunction may be recovered. Citizens T. & G. Co. v. Ohio Valley T. Co., 138 Ky. 421; Drews v. Williams, 50 La. Ann. 579.

⁴² Moore v. Lachmund, 59 Ore. 565; Brandamour v. Trant, 45 Ill.

372; Rubon v. Stephan, 25 Miss. 253; Levy v. Taylor, 24 Md. 282; Mansell v. British Linen Co. Bank, [1892] 3 Ch. 159.

In the last case an injunction was issued restraining the sale of shares of stock. Prior to the dissolution of the injunction the holder asked that the shares might be sold and the proceeds paid into court. The plaintiff successfully resisted that application. His liability was measured not by the difference between the value of the shares when the action was dismissed and the highest market price between that time and the issuance of the writ, but by the difference in their value between the time of the restraint and the denial of the motion for their sale.

In Slack v. Stephens, 19 Colo. App. 538, the owner of stocks recovered their value, they having become worthless during the time their sale was forbidden. It was competent to show that he had a purchaser who could and would have bought them if there had been no restraint. It was immaterial that they were owned by a minor, and judicial authority to sell them had not been obtained.

The language of the bond determines the period within which the obligors are liable for depreciation in the value of the property. If it is limited to such time as the court in which the suit is pending may act, effect will be given to it accordingly. Webber v. Wilcox, 45 Cal. 301; Lambert v. Haskell, 80 id. 611; Houghton v. Meyer, 203 U. S. 149, 52 L. ed. 432. In the

been made if an established business had not been interfered with may be recovered,⁴³ as where one is enjoined from work-

absence of such a limitation liability will extend to depreciation during the pendency of the suit on appeal. *Moore v. Lachmund, supra*; *Columbia A. Co. v. Pine Beach I. Co.*, 109 Va. 325.

Where a tenant was enjoined from removing a building on leased premises, the building not being capable of removal as such, his damages were the loss in value of the material in it between the time the writ issued and the time it was dissolved, with interest on the original value during that time. *Ridpath v. Merriam*, 22 Wash. 311.

⁴³ *Rees v. Sheridan*, 135 La. 7; *State v. Friedman*, 74 W. Va. 11; *Landis v. Wolf*, 206 Ill. 392, 109 Ill. App. 44; *Westervelt v. National Mfg. Co.*, 33 Ind. App. 18; *Quarnberg v. Chamberlain*, 29 S. D. 377 (loss of profits of a mill by reason of restraining completion of artesian well); *Lambert v. Haskell, supra*; *Hitchkiss v. Platt*, 8 Hun 46.

In *Lehman v. McQuown*, 31 Fed. 138 (Brewer, J.), personal property sold at a sheriff's sale was bought by the debtor's wife for less than its value. A creditor obtained the appointment of a receiver and an injunction to restrain interference on the ground that the sale was not *bona fide*. The contrary was established; the receiver settled his accounts and turned over the property unsold to the purchaser, who sought to recover damages upon the creditor's injunction bond for the interruption of her possession. The property in question was a stock of wall-paper, and possession of it was taken in April and held until July. The claim for damages embraced, among other items, these: deprecia-

tion in value of the stock; injury to credit; loss of custom; the sale by the receiver of portions of a single pattern of the paper so as to leave broken and fragmentary pieces. As to the decline in value of the stock the court said the claim must have been made "upon the assumption that the property, at the time it was taken possession of, could instantly be converted into money, and the illustration which was very forcibly put by counsel was of wheat. It is taken possession of to-day, when its market value is so much; it is held for four months; its market value goes down. Certainly that diminution in value is something of which the party has a right to complain. But it was admitted on the hearing last fall, in reference to the taxation of costs, that the receiver had acted prudently. He had a stock of goods which he had done the best he could to dispose of, and if he had not fully succeeded then it was because it was property which could not be thrown at once on the market and converted into money at anything like its value. As shown by the very result of the sheriff's sale, it was not property for which one could go out on the street and find a purchaser in the open market, and if the receiver has disposed of that property, or so much as he did, in the best manner he could, and in a manner which was commended by both parties, and for cash, it would not be fair to hold that, because he did not succeed in disposing of all the property, the complainant is to be charged with the difference between the value in April and in July of that undis-

ing a mine.⁴⁴ Losses sustained in consequence of the increased cost of conducting a business are recoverable.⁴⁵ The government may recover the difference between the legal rate of postage and that paid by the plaintiff on the dissolution of an injunction restraining it from collecting the legal rate.⁴⁶ The difference between the value of property sold and the price received for it is the measure of damages where the owner was at liberty to sell only to the purchaser.⁴⁷ Where a tenant was enjoined from plowing up a meadow on the demised premises the loss of profits for not being allowed to cultivate the land in corn, keeping a horse idle five months, and loss of sale of hogs, were considered too remote and speculative.⁴⁸ The owner of cows who is prevented from erecting a stable in which to shelter them may, under proper pleadings, show the effect of exposure to inclement weather upon them, as that they required

posed of." The testimony concerning the loss of profits was not clear enough to warrant an allowance therefor. The claim on account of the manner in which the receiver made his sales was rejected on the ground that his accounts had been approved and he discharged. A recovery was had of \$250 and costs for damages for the interruption of possession.

It is said in *Curtis v. Bachman*, 110 Cal. 433, 52 Am. St. 111, that loss of time and injury to business, (presumably resulting from the loss of time), are not elements of damage.

The profits which an existing contract for carrying freight would have yielded may be recovered for preventing the construction of a railroad to the point where the freight would have been delivered to it. *Waycross A.-L. R. Co. v. Offerman & W. R. Co.*, 119 Ga. 983.

The sale by the defendant of the business he was restrained from conducting prevents the recovery of

profits he might have made. *Lewis v. Collier*, 157 Ala. 533.

⁴⁴ *Silka v. Quinn*, 46 Colo. 596; *Findlay v. Carson*, 97 Iowa 537.

In *Coosaw M. Co. v. Carolina M. Co.*, 75 Fed. 860, mining operations in a locality were restrained, but were carried on in other regions, and compensation was sought for the loss of profits resulting because of the diminished quality of phosphate rock obtained. It was demonstrated that on the resumption of mining operations, after the injunction was dissolved, and because of the increased production the price of phosphate materially declined. The claim for such compensation was disallowed because of the uncertainty as to the amount of loss resulting.

⁴⁵ *Phoenix P. Co. v. American C. & P. Co.*, 111 Md. 549.

⁴⁶ *Houghton v. Meyer*, 208 U. S. 149, 52 L. ed. 432.

⁴⁷ *New England B. Co. v. Prettiss*, 76 N. H. 313.

⁴⁸ *Densch v. Scott*, 58 Ill. App. 33.

extra care and food and gave a decreased quantity of milk.⁴⁹ The profits which might have been obtained from a business that has not been established may not be recovered.⁵⁰ If sales of property are constantly made in violation of the writ there may not be a recovery on the ground that profits were lost; but the period during which a receiver was in possession of it is to be computed in ascertaining the profits which could have been realized, and it was not for the parties to the bond to object that he made sales without authority. "Even if the receiver had no authority, under his appointment, to make sales, if there had not been any injunction, if the corporation, its stockholders and creditors, saw fit to permit him to carry on the corporate business as theretofore conducted, or to make sales of its property, no one else should be allowed to question his right to do so, and the respondents should be held liable for preventing him from so doing by virtue of the writ. They had no right to question his authority, and were not concerned with the manner in which the business of the corporation was conducted."⁵¹ In estimating the value of goods upon which lost profits will be computed a deduction will be made to the extent of an attachment laid upon them by a third party subsequent to the issuance of the injunction, and the time of the computation will terminate with the appointment of a receiver pending the disposition of the injunction suit.⁵²

An injunction may prejudice a creditor by hindering and delaying the prosecution of a suit until the debtor becomes insolvent, and by the loss or depreciation of property on which his debt is secured by delaying the sale of it, and also by increasing costs and expenses. Such losses are covered by the bond.⁵³ In one case the principal defendant had filed his bill

⁴⁹ *Lange v. Wagner*, 52 Md. 310.

⁵⁰ *Chicago City R. Co. v. Howison*, 86 Ill. App. 215; § 60; *Whitehead v. Cape Henry Syndicate*, 111 Va. 193.

⁵¹ *Steel v. Gordon*, 14 Wash. 521. But see the next case, and § 527.

⁵² *Kerngood v. Gusdorf*, 5 Mackey 161.

⁵³ *Dodge v. Cohen*, 14 D. C. App. Cas. 582; *Bolling v. Tate*, 65 Ala. 417; *Stull v. Beddeo*, 78 Neb. 114, 119, 14 L.R.A. (N.S.) 507; *Allen v. Jones*, 79 Fed. 698.

A partner who has been enjoined from collecting firm assets may recover his share of those which were solvent at the time the injunction

in equity and obtained a temporary injunction to stay the plaintiff's action at law against him. He failed to maintain his bill and thereby became liable on his bond. The reasonable

issued and subsequently became insolvent or barred by the statute while the restraint continued. *Terrell v. Ingersoll*, 10 Lea 77.

If the enforcement of a decree is enjoined and the debt, the collection of which is thereby stayed is not the complainant's, damages are not to be measured by the amount named in the decree, but are limited to such as resulted from the delay in its execution. *Moore v. Hallum*, 1 Lea 511; *Staples v. White*, 88 Tenn. 30.

In *Aldrich v. Reynolds*, 1 Barb. Ch. 613, a mortgage foreclosure by advertisement was enjoined; and on a dissolution of the injunction there was a reference to ascertain the amount of damages sustained by the defendant by reason of the injunction. He held a bond and mortgage upon a farm in the possession of the complainant, and advertised a sale to take place on the 5th of June, 1845. It appeared on the reference that on the 5th of June the crops and grass upon the premises, and which were afterwards taken off by the complainant during the continuance of the injunction, were worth \$90.30, exclusive of the labor and expense of protecting, gathering and securing them. There was a deficiency of \$100 when the sale took place soon after the dissolution of the injunction. The master allowed as part of the damages \$90.30, the value of the crop and grass taken by the complainant during the time the sale was stayed. He also allowed the interest upon the amount due from the 5th of June until the injunction was dissolved, and the

extra expense of continuing the notice of sale during the time the sale was suspended by the injunction; and the taxable costs of the defendant in obtaining a dissolution of the injunction, and upon the reference as well as \$25 which had been paid by the defendant as an extra counsel fee in obtaining such dissolution. The chancellor held that the crops growing upon the premises would have gone to the purchaser if a sale had been made on the 5th of June, and therefore a sale at that time would have brought \$90.30 more than after they had been removed, and hence would have produced just about the amount of the mortgage, with the interest and costs of foreclosure. "The defendant, therefore, lost not only the difference between what the lot would have brought in June, and that for which it was actually sold after the injunction had enabled the mortgagor to strip it of its crops and grass, but also the interest on the amount which he would have been entitled to receive if the sale had taken place on the 5th of June." The report of the referee was confirmed.

Where a suit at law was enjoined and the matter in controversy was tried on its merits in a court of equity terminating in a judgment against the defendant at law, the obligor and his surety on the bond given on the granting of the injunction and conditioned for the payment of all "damages and costs," were held liable to the plaintiff at law for interest on the amount found due by the decree during the

damages which the party enjoined was entitled to recover were the legal taxable costs both in the suit at law and on the bill in equity during the time he was delayed by the injunction, provided he had not or could not realize the same on the original proceedings against such principal defendant; also, his reasonable counsel fees which he was liable to pay in both of the original cases for the same time. He could not recover as damages under his bond the interest accruing on the original note in the suit at law unless it appeared that the debtor had become insolvent since the injunction, or that the creditor had suffered damage equal to such interest without fault.⁵⁴ Ex-

time recovery was delayed by the injunction and his costs in the equity suit, and to the master in chancery and stenographer, intervening by petition, for their fees, but not for the payment of the principal amount awarded by the decree. *Woolfolk v. Jones*, 216 Fed. 807.

⁵⁴ *Derry Bank v. Heath*, 45 N. H. 524; *Redderburger v. McDaniel*, 38 Mo. 138; *Tryon v. Robinson*, 10 Rich. 160; *Willet v. Scovill*, 4 Abb. Pr. 405; *Edwards v. Pope*, 4 Ill. 465.

In *Jones v. Allen*, 29 C. C. A. 318, 85 Fed. 523, an injunction restrained the prosecution of an action at law. The equity suit was not disposed of for seven years, this delay being assumed to be by consent of the parties. The principals in the injunction bond became insolvent before the injunction was dissolved or soon afterward. It was determined by a majority of the court (Sanborn and Thayer, Philips dissenting) that it was immaterial whether the damages sued for were the result of insolvency occurring before the dissolution or so soon thereafter that the plaintiffs could not make their debt.

In *Kennedy v. Hammond*, 16 Mo. 341, A. conveyed to B. a mill and

leasehold to secure C. the payment of two notes. After the first and before the second note matured the property was advertised and sold pursuant to the deed of trust; D. became the purchaser. After the sale D. tendered to B. the amount of the note which had matured, and produced the receipt of the assignees of the grantor for the balance of his bid and demanded a deed. B. refused to deliver a deed, and when the second note became due again advertised the property for sale. D. applied for and obtained an injunction. When it was dissolved the lease had been declared forfeited and the mill had burned down, so that the mortgaged interest would not have sold for enough to defray the expenses of a sale. Held, upon the dissolution of the injunction, the damages were properly assessed at the whole amount of the notes with interest, etc., even though their makers were solvent.

A statute of Missouri required an injunction bond "to secure the amount, or other matter to be enjoined, and all damages that may be occasioned by such injunction, conditioned that the complainant shall abide the decision which shall be made thereon, and pay all sums

penses rendered useless by the issuance of the injunction may be allowed. Thus where the sale of property was restrained,

of money, damages and costs that shall be adjudged against him if the injunction shall be dissolved." Another provision was that "if money shall be enjoined, the damages thereon shall not exceed ten per cent. on the amount released by the dissolution, exclusive of legal interest and costs." The rule of ten per cent. held not to apply. Ryland, J., said: "Here the complainant did not seek to enjoin and restrain the defendants from the collection of a judgment or of a sum of money, but to prevent them from proceeding to sell property, the trust fund; and by that act, on the part of the complainant, serious injury may have been committed; no less than the destruction, in a greater or less degree, of the value of the entire fund; and can it be said that ten per cent. is to be the amount of damages to be awarded, on the dissolution of the injunction in such cases? Ten per cent. on what? The original debt, for the payment of which the trust was made? That will not do. Nor can the defendants be compelled to resort to the bond on which that injunction was originally allowed. The condition of the bond is, 'pay all sums of money, damages and costs that shall be adjudged against him, if the injunction shall be dissolved.' Now, before suing on this bond, after dissolution, the damages must be adjudged, and the nonpayment of the amount adjudged forms the breach of the bond so far as damages are concerned. * * * At the maturity of the second note steps were taken to sell the trust property; then the complainant steps in and by his bill prevents the sale by injunction.

Upon the dissolution of this injunction, the trust property being destroyed partly by fire, and the lease forfeited to the original lessor; the trust property, I may say, lost to the *cestui que trust*; the damages, in consequence, were assessed at the amount of the debt secured and interest, and I think very properly. Let us look at the facts in this case. Hall, Allen & Childs were the proprietors of the lease from Chambers of the steam saw-mill. They gave their deed of trust on the property to secure two notes. Afterwards Hall sold all his interest in the premises to Childs & Emerson, expressly subject to the debt mentioned in the trust deed. Then Allen sells his interest in the property to Childs & Emerson, in like manner subject to the payment of the debt. Then Childs transfers the property to Emerson subject to the payment of the debt. Lastly, Emerson transfers the property to John Maguire, in the same manner subject to the debt; so that Maguire becomes the owner of the property, and, in respect to the prior parties, is the principal debtor, and they merely his securities to the holder of the trust deed. Maguire procures Kennedy to bid off the property at the trustee's sale, and prosecutes the present suit for his own benefit, using Kennedy's name. Maguire has all along been in possession, receiving a large rent, \$2,000 per year, until the mill was burned down in 1849. The deed of trust contained a stipulation that the premises should be insured, and that the insurance should stand as security to the creditor. Maguire collects the insurance for his own benefit. This;

the expense incurred in advertising, which, of course, was a loss, in consequence of the issuance of the injunction may be

too, pending the injunction. So, too, pending the injunction, the landlord enters into the premises for a forfeiture, and Maguire suffers him to keep possession, and to make leases to other parties. Maguire, after making the trust debt his own, appropriates the security for the debt to his own use, and insists that the original Orris Hall shall look to the makers of the notes individually and not to the trust fund.

"The notes are still due; the trust property was sold; Maguire gets possession through Kennedy's purchase, pays no part of the debt for which the property was sold, rents out this very trust property for \$2,000 a year, and indemnifies Kennedy to prosecute this proceeding, in which the injunction was obtained. Had the second sale proceeded, the debt in all probability might have long ago been made out of the trust property. Pending this proceeding that property has become lost to the *cestui que trust*; and because the original makers of the notes are supposed to be worth \$3,000, Maguire contends that the *cestui que trust* has not been damaged, and that he must look to the notes."

Yates v. Joyce, 11 Johns. 136, was held in the foregoing case not to have any or but slight application to any principle involved in the case under consideration. That was a suit by a judgment creditor whose judgment was a lien on land against a party who pulled down erections which were thereon. The court sustained the action on the principle that, "where the fraudulent misconduct of a party occasions an injury

to the private rights of another, he shall be responsible in damages for the same."

In Lane v. Hitchcock, 14 Johns. 213, the court say: "The case is supposed to be within the principles of Yates v. Joyce, 11 Johns. 136. In the case now before us, proof was offered on the trial that the mortgagor was insolvent, and had no other property than the mortgaged premises out of which the debt of the plaintiff might be satisfied; but there was no averment in the declaration to warrant such proof. These were material and indispensable facts in order to give the plaintiff a right of action; and to allow this proof without the averment would take the defendant by surprise."

In St. Louis v. Alexander, 23 Mo. 484, an injunction was obtained by stockholders to restrain the sale under a trust deed of property, franchise, etc., belonging to the corporation. A statute provided that upon dissolution of an injunction in whole or in part, damages should be assessed by a jury, or, if neither party require a jury, by the court; but if money shall have been enjoined, the damages thereon shall not exceed ten per centum on the amount released by the dissolution, exclusive of legal interest and costs. The court say: "The injunction to stop the proceedings of a trustee to sell property under a deed of trust to pay a debt has not been considered such an injunction upon money as to authorize the assessment by the rule of per cent. laid down in that act alone. In the Case of Kennedy's Ex'r v. Hammond, 16 Mo: 341, the court held that the damages in such a case were not limited to ten per

charged.⁵⁵ In such a case the officer may recover such reasonable cost and expense as he incurred in consequence of the injunction, such as the cost of insuring the goods, rent for storage, clerk hire and custodian's fees.⁵⁶

Under a bond conditioned to secure the amount or matter to be enjoined and all damages and costs that may be oc-

cent. on the debt, but might extend to the full amount of the debt, if the loss to the creditor by the injunction extended so far. The meaning of the words, 'if money shall have been enjoined,' has been generally supposed to embrace injunctions upon the executions of judgments originated by the debtor therein against his creditor, and not such as restrain other acts whereby money may in consequence thereof be deferred in payment by the interposition of third parties. Upon an execution against a debtor's estate, the payment of which can be enforced out of all his property, and the justice of which has been settled by the law through the intervention of its officers and tribunals, if there be an interference by injunction and it turn out to be without proper cause, and is therefore removed, then damages not exceeding ten per cent. upon the amount released from the injunction may be a just penalty for improperly interfering, and a just recompense for the delay which such interference produced to the creditors. But such is not the case when a sale of trust property has been enjoined. Here the debt has been recognized by the parties only; the law has not adjudicated upon it. Then, when a sale is enjoined by a third party, and the court after a hearing dissolves the injunction, it becomes proper to ascertain the damages, not by the rule of per cent., but from the injury the cred-

itor has sustained from the improper act of the party stepping in between the creditor and the debtor, and hindering and delaying the execution of the means provided to enforce payment. Suppose, in this case, that the trust property was not worth half the debt intended to be secured; would the delay in the sale of it, caused by injunction, authorize the court to give ten per cent. damages for the detention and nonpayment of the whole debt? What injury has the creditor sustained by enjoining the sale of property not worth one-tenth of his debt? Again, suppose the injunction had caused the loss of the entire fund in trust; would ten per cent. on the debt be a proper amount of damages—the only amount which the law would recognize, although there be proof amply to show that the fund was in value equal to the debt? No. In all such cases the court or jury should determine the amount of injury by evidence before it or them as to the damages sustained; the probable amount that would have been realized; the value of money at the time, and other circumstances tending to show the damages sustained by the creditor in consequence of the injunction."

⁵⁵ *Edwards v. Pope*, 4 Ill. 465; *Alliance T. Co. v. Stewart*, 115 Mo. 236.

⁵⁶ *Fox v. Oriel C. Co.*, 70 Ill. App. 322.

casioned by the injunction, if the collection of a judgment is enjoined the amount of it, with the damages assessed upon the dissolution of the injunction, and costs, is the measure of the sureties' liability, notwithstanding their principal was solvent and able to pay.⁵⁷ But under a bond conditioned to pay the damages sustained if the injunction was improperly granted the sureties are not liable for the amount of the judgment, the collection of which was enjoined, unless it is shown that an opportunity to collect it was lost because of the injunction.⁵⁸ Under the Illinois statute the damages to be awarded when the collection of a judgment has been restrained are limited to ten per cent. of the amount of the judgment.⁵⁹ In Nebraska the damages caused by temporarily restraining the service of an execution on land are controlled by the accumulating costs and interest on the judgment, rather than on the rental value of the land.⁶⁰ If during the time an injunction restraining the enforcement of a judgment is in effect the property levied on depreciates in value from any cause the depreciation is an element of damage,⁶¹ and if the complainant does or permits the doing of injury to the fixtures or buildings on the land levied upon he must compensate the judgment plaintiff therefor.⁶² If interest is not recoverable on delinquent taxes it cannot be recovered on an injunction bond restraining proceedings for their collection, the obligation being to pay "all damages" resulting from the wrongful suing out of the injunction.⁶³ In-

⁵⁷ Hunt v. Burton, 18 Ark. 188.

⁵⁸ Neal v. Taylor, 56 Ark. 521; Dillard v. Stringfellow, 50 Tex. Civ. App. 410; Hefner v. Hesse, 29 La. Ann. 149; Grove v. Bush, 86 Iowa 94.

⁵⁹ Stirlin v. Neustadt, 50 Ill. App. 378.

⁶⁰ First Nat. Bank v. Hockett, 2 Neb. (Unof.) 512, 89 N. W. 412.

The costs incurred in obtaining the judgment restrained are recoverable. Moore v. Harton, 1 Port. 15; Fox v. Mountjoy, 6 Munf. 36; Roberts v. Fahs, 36 Ill. 268.

⁶¹ Dodge v. Cohen, 14 D. C. App. Cas. 582; Bartram v. Ohio, etc. R. Co., 141 Ky. 100.

⁶² Gibson v. Reed, 54 Neb. 309.

⁶³ Illinois Cent. R. Co. v. Adams, 78 Miss. 895.

The interest paid for borrowed money to meet obligations which would have been discharged by the taxes, the collection of which were enjoined may be recovered. School Directors v. Mathis, 168 Ill. App. 174.

terest may be allowed on the damages awarded although the first award was reversed because insufficient,⁶⁴ it is also recoverable on redemption money the payment of which is restrained.⁶⁵ Restraining the performance of a contract and postponing the time for payment is cause for charging the injunction plaintiff with interest.⁶⁶ If several creditors successively impound the same fund and give separate bonds they are not liable to a joint judgment for the damages.⁶⁷

§ 529. **What facts no defense.** Want of jurisdiction in the court over the subject-matter of the action does not deprive the defendant of the right to damages on the undertaking.⁶⁸ No matter can be heard on the assessment of damages which constitutes a defense to the action.⁶⁹ Nor will disobeying the writ defeat an action on the bond.⁷⁰ If a bond is conditioned to satisfy an execution, the collection of which is enjoined, it is immaterial to the liability of the sureties whether the property released was subject to execution or not, or whether the debt has been lost by reason of the injunction.⁷¹ The legal effect of an injunction bond is not lessened by a statute which continues a levy in force after an execution has been issued.⁷² The sureties on an undertaking in an action to set aside a bond and mortgage cannot include as a payment the sum bid by them for the property on its sale under a foreclosure.⁷³ A defense is not made by showing that after the writ was dissolved another injunction was obtained.⁷⁴ If the defendant is re-

⁶⁴ *Kohlsaat v. Crate*, 50 Ill. App. 552.

⁶⁵ *Wenham v. Schmitt*, 219 Ill. 195.

⁶⁶ *St. Louis, etc. R. Co. v. Schneider*, 30 Mo. App. 620.

⁶⁷ *Stringfield v. Hirsch*, 94 Tenn. 425, 45 Am. St. 733.

⁶⁸ *Alexander v. Gish*, 88 Ky. 13; *Cumberland C. Co. v. Hoffman C. Co.*, 15 Abb. Pr. 78; *Hanna v. McKenzie*, 5 B. Mon. 314, 43 Am. Dec. 122. But see § 475.

⁶⁹ *Nansemond T. Co. v. Roundtree*, 122 N. C. 45; *White v. Brooke*,

11 Wash. 99; *Terre Haute & I. R. Co. v. Peoria, etc. R. Co.*, 182 Ill. 501.

⁷⁰ *Van Hoover v. Van Hoover*, 18 Mo. App. 19; *Colcord v. Sylvester*, 66 Ill. 540. See *Steel v. Gordon*, 14 Wash. 521.

⁷¹ *Riggan v. Crain*, 86 Ky. 249.

⁷² *Pugh v. White*, 78 Ky. 260.

⁷³ *Holcomb v. Rice*, 119 N. Y. 598.

⁷⁴ *Swan v. Timmons*, 81 Ind. 243; *Colcord v. Sylvester*, 66 Ill. 540; *De Camp v. Burns*, 33 App. Div. (N. Y.) 517, 523.

strained from doing several acts and the bond is conditioned to pay such damages as he may sustain by reason of the injunction the sureties are liable, though the restraint is continued as to one act, for all damages except such as were caused by his inability to perform in that particular.⁷⁵ Granting an extra allowance to the defendant upon giving leave to discontinue a suit in which an injunction had been obtained does not bar a recovery of damages upon the bond unless the allowance was so conditioned by the court which gave it.⁷⁶

Where all damages covered by the bond or recoverable must be ascertained in the injunction suit,⁷⁷ and, *a fortiori*, if the bond is conditioned to pay such damages as shall be so ascertained, the sureties are bound by the action of the court in the ascertainment of the damages and can raise no question as to its correctness in an action on the bond.⁷⁸ If that instrument is in terms for the benefit of persons who are not, but who ought to have been, parties the sureties cannot deny their liability to them.⁷⁹ If several persons are interested in a suit and the only defendant employs an attorney, the obligors on the bond will not be heard to allege that the attorney did not represent all such parties.⁸⁰ The financial interest of attorneys in the subject-matter of the suit is immaterial to the recovery of compensation, and so if the services rendered would have been necessary on a hearing of the case on its merits.⁸¹ In England the undertaking extends to all the defendants although one or more of them only may be restrained; but not to those who did not ask the court to require it.⁸²

A substantial modification of a restraining order will release

⁷⁵ Pierson v. Ells, 46 Hun 336.

⁷⁶ Howell v. Miller, 12 Daly 277; Troxell v. Haynes, 5 id. 390, 16 Abb. Pr. (N. S.) 1.

⁷⁷ Roberts v. Fahs, 36 Ill. 268; Methodist Church v. Barker, 18 N. Y. 463; Blakeney v. Ferguson, 18 Ark. 347.

⁷⁸ Lothrop v. Southworth, 5 Mich. 436; Anderson v. Falconer, 30 Miss. 145; Lockwood v. Saffold, 1 Ga. 72.

⁷⁹ Alexander v. Gish, *supra*. See Hays v. Fidelity & D. Co., 112 Fed. 872, 50 C. C. A. 569.

⁸⁰ Nimocks v. Welles, 42 Kan. 39. See Fourth Nat. Bank v. Scott, 31 Hun 301.

⁸¹ Dempster v. Lansingh, 128 Ill. App. 388.

⁸² Tucker v. New Brunswick T. Co., 44 Ch. Div. 249.

the sureties from subsequent liability.⁸³ But in Illinois an injunction may be dissolved piecemeal, and if the liability of the sureties is not increased they are not discharged.⁸⁴ The same rule has been applied where the principal obligor and the execution creditor stipulated that the sheriff might retain the proceeds of the sale of property until the determination of a motion in the case for the appointment of a receiver.⁸⁵ The dismissal of a suit by agreement does not affect the surety.⁸⁶ It is immaterial to sureties that the property of the injunction defendant, for the depreciation in the value of which they are liable, was put in his name in fraud of the creditors of the owner.⁸⁷ Liability to the extent of the penalty of the bond, without credit for what has been paid on a judgment rendered in an action the prosecution of which was restrained, exists so long as the unpaid balance equals such penalty.⁸⁸

§ 530. What may be shown in defense. If an injunction rightfully awarded is properly dissolved no damages can be recovered upon matters done or arising afterwards.⁸⁹ An injunction by order is a provisional remedy, temporary in character. It assumes a pending litigation in which all questions are to be settled by a judgment, and operates only until the final judgment is rendered. If by that a permanent injunction is granted the temporary writ is ended; and this is so if a permanent one is denied.⁹⁰ As a general rule an undertaking cannot be required where a final decree is made, upon which event the functions of a preliminary injunction cease. Consequently the sureties are not liable for damages subsequently accruing although the final decree is reversed on ap-

⁸³ *Tyler M. Co. v. Last Chance M. Co.*, 32 C. C. A. 498, 90 Fed. 15.

⁸⁴ *Brackebush v. Dorsett*, 138 Ill. 167.

⁸⁵ *Keith v. Henkleman*, 173 Ill. 137.

⁸⁶ *Patterson v. Rinard*, 81 Ill. App. 80; *Boynton v. Phelps*, 52 Ill. 210.

⁸⁷ *Slack v. Stephens*, 19 Colo. App. 538.

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⁸⁸ *Allen v. Jones*, 79 Fed. 698.

⁸⁹ *Taylor v. Bush*, 5 B. Mon. 84; *Massie v. Sabastian*, 4 Bibb 433; *Anderson v. Wallace*, 6 T. B. Mon. 381; *Lampton v. Usher*, 7 B. Mon. 57, 66. Compare *Jones v. Allen*, 29 C. C. A. 318, 85 Fed. 523, stated in note to § 528.

⁹⁰ *Jackson v. Bunnell*, 113 N. Y. 216; *State v. Friedman*, 74 W. Va. 11.

peal.⁹¹ And if the injunction be dissolved before the merits are adjudicated the obligors may show the facts in mitigation that would entitle the plaintiff in the injunction suit to the writ.⁹² So where the injunction had been granted to stay a sale under execution, the subsequent reversal of the judgment on which the execution issued may be taken into consideration on the question of damages in an action on the injunction bond.⁹³

The damages and expenses incurred by the real party in interest in procuring a dissolution will be presumed to have been incurred by the defendant on the record and may be recovered in his name for the person beneficially interested.⁹⁴ The liability of the sureties does not extend to damages sustained by an assignee of the judgment;⁹⁵ nor to counsel fees paid or incurred by one of several defendants;⁹⁶ nor to damages resulting to the defendant from his misapprehension of the scope of the injunction.⁹⁷ A corporation suing on a bond

⁹¹ *Lambert v. Haskell*, 80 Cal. 611, 625; *Webster v. Wilcox*, 45 Cal. 302; *State v. Friedman*, 74 W. Va. 11.

⁹² *Stewart v. Miller*, 1 Mont. 301.

⁹³ *Fahs v. Roberts*, 54 Ill. 192.

In *Mahan v. Tydings*, 10 B. Mon. 351, it was held that in an injunction suit brought by executors in their representative character the bond given by such executors and their sureties only binds them to the extent of assets. See *Mills v. Forbes*, 12 How Pr. 466.

⁹⁴ *Andrews v. Grenville W. Co.*, 50 N. Y. 282; *Hovey v. Rubber T. P. Co.*, id. 335.

In *Peerce v. Athey*, 4 W. Va. 22, where an injunction bond was joint as to the obligees and joint and several as to the obligors, it was held that a joint action might be brought by the obligees and a joint judgment rendered for the whole of their demand although the claims due them respectively might be of

different amounts and bear interest from different dates. But in *Fowler v. Frisbee*, 37 Cal. 34, where various persons were severally in possession of and cultivating in separate parcels a tract of land and were sued jointly in ejectment to recover possession of the whole tract, and an injunction was obtained restraining them jointly from taking off the crops, such parties could not maintain a joint action for damages on the injunction bond where the damages were not joint. See *Lally v. Wise*, 28 Cal. 539; *Browner v. Davis*, 15 id. 9; *Summers v. Farish*, 10 id. 347.

⁹⁵ *Burgett v. Paxton*, 15 Ill. App. 379.

⁹⁶ *Hildrup v. Brentano*, 16 Ill. App. 443; *Ovington v. Smith*, 78 Ill. 250; *Safford v. Miller*, 59 id. 205; *Burns v. Follansbee*, 20 Ill. App. 41.

⁹⁷ *Lillie v. Lillie*, 55 Vt. 470.

running to it cannot recover damages which have incidentally fallen on its stockholders without showing that they have been compelled to respond for a breach of some valid contract into which they had antecedently entered and which they were prevented from performing by the injunction, or that they have rightfully liquidated the claims asserted against it.⁹⁸ It is a right possessed by the sureties to have the suit in which their bond was given disposed of according to the usual practice of the court; hence they are absolved from liability if, pursuant to a stipulation of the parties, it is determined at chambers after the close of the term.⁹⁹ In Indiana a restraining order made in vacation is not binding unless signed by the judge and no liability attaches to the sureties upon a bond given pursuant to it.¹ If the statutes prescribe the conditions of a bond the sureties are not liable beyond the statutory measure although the language of their obligation is broader and clear,² though the extra-statutory condition was required by the court.³ The presence of such a condition does not absolve the obligor from liability for the violation of such conditions as were authorized.⁴ It may be shown that the injunction defendant was not the owner of the property affected by the injunction when it was obtained.⁵

§ 530a. **Bonds to stay injunctions.** Damages recoverable on a bond given to stay an injunction, conditioned to pay all damages that might be subsequently awarded include those already suffered at the time of giving the bond.⁶

⁹⁸ *Eaton v. Larimer & W. R. Co.*, 3 Colo. App. 366.

⁹⁹ *Baker v. Frellson*, 32 La. Ann. 822.

¹ *Kiser v. Lovett*, 106 Ind. 325.

² *Horton v. Cope*, 6 Lea 155; *Hays v. Fidelity & D. Co.*, 112 Fed. 872, 50 C. C. A. 569.

³ *Moore v. Hallum*, 1 Lea 511.

⁴ *Slutter v. Kirkendall*, 100 Pa. 307; *Burrall v. Acker*, 23 Wend. 606; *Johnson v. Vaughan*, 9 B.

Mon. 217; *Barnes v. Brookman*, 107 Ill. 317; *State v. Purcell*, 31 W. Va. 44; *Rubelman H. Co. v. Greve*, 18 Mo. App. 6.

⁵ *Jenkins v. Parkhill*, 25 Ind. 473 (the statute provided that in actions for the recovery or possession of real property the plaintiff must recover on the strength of his own title).

⁶ *Costello v. Bridges*, 81 Wash. 192, L.R.A.1915A, 853.

SECTION 8.

APPEAL AND SUPERSEDEAS BONDS.

§ 531. **Their conditions; liability of sureties.** There is considerable diversity in the conditions of these bonds and undertakings by the legislation of the different states; but in certain particulars there is extensively a substantial agreement. Under the practice which preceded the code and in the federal courts bonds on appeals and writs of error which operate as a *supersedeas* contain generally the conditions to prosecute the appeal or writ of error to effect, and if the judgment be affirmed in whole or in part, or the plaintiff in error or appellant fail to make his plea good, he shall answer all damages and costs.⁷ A *supersedeas* bond with such a condition is strikingly analogous to the bond given by the plaintiff in replevin. In that action the plaintiff obtains possession of the property in question by giving a bond conditioned to prosecute the suit to effect; and when he fails in the performance of the condition he and his sureties are liable for the value of the property and interest thereon unless it is returned. So by executing a *supersedeas* bond a party against whom a money judgment or decree has

⁷ The agreement to prosecute with effect means to do so with success. *Legatee v. Marr*, 8 Blackf. 404; *Perreau v. Bevan*, 5 B. & C. 291; *Karthauss v. Owings*, 6 H. & J. 134; *Champomier v. Washington*, 2 La. Ann. 1013.

The condition is not satisfied if the appeal is dismissed for want of prosecution though the judgment is not changed. *Coon v. McCormack*, 69 Iowa 539; *Trent v. Rhomberg*, 66 Tex. 249. *Contra*, *Hobart v. Hiliard*, 11 Pick. 143. The performance of one condition is no defense to an action for the breach of another. *Trent v. Rhomberg*, *supra*.

The liability of the sureties on an appeal bond does not attach on

dismissal without prejudice by the appellate court. A final affirmance is essential. *National Surety Co. v. Schafer*, 57 Colo. 56.

A complaint in an action on an appeal bond alleging that the appeal was abandoned does not state a cause of action against the sureties. *Woodle v. Settlemyer*, 71 Ore. 25, L.R.A.1915A, 839.

In New York an action on an appeal bond pending an appeal to the court of appeals from a judgment rendered on an unsuccessful appeal to the appellate division, will be enjoined where the respondent is financially irresponsible. *Ig. Roth v. Rosenthal*, 160 App. Div. (N. Y.) 39.

been rendered and who appeals or takes a writ of error retains possession and enjoyment of the money in question subject to the same condition. On the breach of that condition there is a forfeiture of the bond, and the obligee is entitled to compensation, within the penalty, to the amount of the moneys so withheld and interest. In other words, the surety undertakes to pay the judgment if the condition of the bond is not fulfilled.⁸ That obligation attaches by virtue of the affirmance of the judgment. The judgment creditor is not bound to proceed against the judgment debtor,⁹ and the sureties have no right to have proceedings against them stayed until attached lands of their principal are sold.¹⁰ The obligee may elect which of the sureties he will proceed against or what security he will resort to for the satisfaction of his judgment.¹¹ It is not a defense to the sureties that the plaintiff holds securities belonging to the judgment debtor; they cannot avail themselves thereof as a

⁸ *Perry v. Tacoma M. Co.*, 152 Fed. 115, 81 C. C. A. 333; *Day v. McPhee*, *infra*; *Harris v. Kansas E. Co.*, 66 Kan. 372 (the condition was to abide the judgment if the same shall be affirmed and pay the costs); *Steinhauer v. Colmar*, 11 Colo. App. 494; *Healy v. Newton*, 96 Mich. 228; *Flannagan v. Cleveland*, 44 Neb. 58; *Woodlie v. Murry*, 2 Tenn. Cas. 625; *Tarr v. Rosenstein*, 3 C. C. A. 466, 53 Fed. 112; *Graham v. Swigert*, 12 B. Mon. 522; *Ives v. Merchants' Bank*, 12 How. 159, 13 L. ed. 936; *Sessions v. Pintard*, 18 id. 106, 15 L. ed. 298; *Talbot v. Morton*, 5 Litt. 326; *Many v. Sizer*, 6 Gray 141; *Stelle v. Lovejoy*, 125 Ill. 352.

A bond will be construed to be joint and several in all its clauses in accordance with the requirements of the statute. *Donovan v. Clark*, 76 Hun 339.

The liability of the sureties is not limited by a misdescription in

the bond of the amount for which the judgment was rendered; that instrument will be read in connection with the judgment (see numerous cases cited in the opinion) and with the statute governing appeals, and the rulings thereon. *Dye v. Dye*, 12 Colo. App. 206.

Liability for nominal damages exists though the execution of the judgment be permanently stayed. *Oberreich v. Foster*, 152 Ill. App. 302.

There is no liability for the debts of the obligor. *House v. Schnadig*, 235 Ill. 301.

⁹ *Day v. McPhee*, 41 Colo. 467; *Babbitt v. Finn*, 101 U. S. 7, 25 L. ed. 820; *Davis v. Patrick*, 6 C. C. A. 632, 57 Fed. 909; *Flannagan v. Cleveland*, *supra*.

¹⁰ *Davis v. Patrick*, *Flannagan v. Cleveland*, *supra*; *Ayers v. Duggan*, 57 Neb. 750; *Sterne v. Talbott*, 89 Hun 368.

¹¹ *Day v. McPhee*, *supra*.

counterclaim.¹² The same measure of liability results from the execution of a bond on an appeal from an order directing the issue of an execution under a decree for the payment of money.¹³ A *supersedeas* bond in the usual form will be valid as a common-law bond for the damages resulting from the stay of proceedings although no writ of error be sued out.¹⁴ On the receipt of the mandate affirming the judgment, with interest from its date and costs, on entering a summary judgment against the sureties it should be for the amount of the original judgment, with interest and costs; the interest should not be computed to date and judgment entered for the full amount.¹⁵

According to some courts the sureties on an appeal bond are not liable beyond the liability of their principal, and if he is an administrator and not liable on the bond because of the insolvency of the estate they are not liable.¹⁶ But this rule does not prevail everywhere.¹⁷ In Tennessee the bond by the administrator was conditioned to perform the judgment; on finding a plea of no assets in his favor the liability of the surety extended only to the costs and damages.¹⁸

§ 532. *Supersedeas bonds in federal supreme court.* By the twenty-second section of the judiciary act of 1789 the judge signing the citation is required to take good and sufficient security that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good.¹⁹ And since 1803, when provision for appeals in equity and admiralty cases was made, *supersedeas* bonds in such cases have been subject to the same conditions. And the

¹² *Sterne v. Talbott*, *supra*.

¹³ *Wood v. Brown*, 43 C. C. A. 474, 104 Fed. 203.

¹⁴ *Healy v. Newton*, 96 Mich. 228.

¹⁵ *Gordon v. Third Nat. Bank*, 6 C. C. A. 125, 56 Fed. 790.

¹⁶ *Lunsford v. Baskins*, 6 Ala. 512; *Evans v. Adams*, 4 Blackf. 54; *Fitzpatrick v. Todd*, 79 Ky. 524.

An action is not maintainable on the bond if the judgment is not enforceable against the principal. *Giles*

v. De Cow, 35 Colo. 135, approving *Cook v. King*, 7 Ill. App. 549.

¹⁷ *Yates v. Burch*, 87 N. Y. 409.

The discharge of the principal in bankruptcy after the execution of the bond, the adjudication of bankruptcy having preceded its execution, does not affect the liability of the sureties. *Oberreich v. Foster*, 152 Ill. App. 302.

¹⁸ *Banks v. McDowel*, 1 Cold. 84.

¹⁹ R. S., § 1000.

twenty-ninth rule of the supreme court of the United States, adopted in 1867, in accordance with the prior adjudications of the court, provided that *supersedeas* bonds in the circuit courts "must be taken with good and sufficient security that the plaintiff in error or appellant shall prosecute his appeal or writ to effect, and answer all damages and costs if he fail to make his plea good." And this rule declared that "such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including 'just damages for delay,' and costs and interest on the appeal." Under this rule the penalty of the bond would be ample for as large a recovery against the surety by action on the bond as the remedy by execution against the principal.²⁰

It is said in one case that "it is not required that the security shall be in any fixed proportion to the decree. What is necessary is that it be sufficient."²¹ In that case the decree below was for over \$300,000, and a bond had been required for double that amount. On a motion to reduce it the appellate court, after making the remark quoted, said: "We are satisfied that a bond in a much less amount will be entirely sufficient; and inasmuch as it appears that security in part for the amount they might be decreed to pay had been given by the present appellants, before the bond on appeal was required, by a deposit of bonds of the United States and other private bonds amounting in all to a sum not less than \$200,000, we will order that the appellants have leave to withdraw the appeal bond now on file on filing a bond in lieu thereof in the sum of \$225,000, with good and sufficient sureties." It will be observed that though the judgment was a money judgment and rendered against the defendants personally the court fixed the penalty at a less sum in consideration of there being other security. Hence there could not, for that reason, be a recovery against

²⁰ See *Catlett v. Brodie*, 9 Wheat. 553, 6 L. ed. 158; *Stafford v. Union Bank*, 16 How. 135, 14 L. ed. 876, 17 id. 275, 15 L. ed. 101; *Rubber Co. v. Goodyear*, 6 Wall. 153,

18 L. ed. 762; *French v. Shoemaker*, 12 id. 86, 20 L. ed. 270; *George v. Bischoff*, 68 Ill. 236; *Roberts v. Cooper*, 19 How. 373, 15 L. ed. 687.

²¹ *Rubber Co. v. Goodyear*, *supra*.

the sureties for the full sum of the judgment. It was not deemed necessary; but on affirmance of the judgment the bond would be available to the extent of the penalty unless the judgment had been so far otherwise satisfied that a sum less than that would completely discharge it. In an earlier case, not unlike it in the fact of a personal judgment and collateral security, the court say: "The condition of the bond was 'for the prosecution of said appeal to effect, and to answer all damages and costs if' there should be a failure to make the plea good in the supreme court. There was a failure to do this and the penalty of the bond was incurred. Whatever hardship there may be in this case is common to all sureties who incur responsibility and have money to pay. Beyond that of a faithful application of the proceeds of the land in payment of the decree the appellants have no equity. They cannot place themselves in the relation of two creditors having claims on a common fund, which may be distributed *pro rata* between them." The appellee "has a claim on both funds; first, on the proceeds of the land, and second, on the judgment entered on the appeal bond for the satisfaction of the original decree."²²

§ 533. Same subject; liability if judgment is in part for money or in rem. It is undoubtedly true that the *supersedeas* bond secures the amount of the judgment or decree rendered against the appellant or plaintiff in error personally to the extent of the penalty even though there be other security. This is apparent from the authorities cited in the preceding notes. The sureties may be resorted to in the first instance because an action accrues against them on the forfeiture of the bond, and the value of the other security is no more to be considered in reduction of the amount to be recovered than the responsibility of a solvent principal.²³ Rule 29 of the supreme court, which

²² Sessions v. Pintard, 18 How. 106, 15 L. ed. 298. The judgment was rendered on the bond for the full amount of the penalty before sale of the land which was security. The proceeds were applied to the original decree, and after such application there was less due than

the amount of the judgment on the bond. The latter was reduced accordingly by a receipt, and direction given to collect on the execution only the balance.

²³ Sessions v. Pintard, 18 How. 106, 15 L. ed. 298.

has been referred to, formulates the law as generally held in other cases: "In all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in the case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal."

In a case decided prior to the adoption of this rule a bond had been given in a penalty of \$25,000 upon appeal from a decree in admiralty rendered for \$22,224; the decree had been affirmed with six per cent. damages, as well as costs. On return of the mandate judgment had been entered for the original amount and also for \$6,078.20 damages arising by reason of the appeal, and for \$529.98 costs. An amount about equal to eighty per cent, of the total sum for which execution was issued had been realized by the sale of property attached when the proceeding was commenced, and on which a lien continued until sold. The deficiency exceeded the penalty of the *supersedeas* bond; and it was contended in behalf of the surety that the proceeds of the sale should be applied ratably to every part of the demand and thus reduce the damages and costs to about \$1,200. This view, however, was rejected. It was held that the surety was bound to pay such damages as might be awarded by the supreme court and costs, and he could have been sued and judgment had against him had no execution issued. He was positively bound to the amount of his bond and could not be heard to allege an extinguishment of it in part because of a payment made by his principals, leaving an amount due equal to the bond. Mr. Justice Catron said: "This is the plain equity of the case. If the appeal had not been taken and the property attached had been sold in due time after the first decree for \$25,000, no damages would have been sustained by the plaintiffs below; and as the surety was instrumental in delaying satisfaction it is

equitable that he should respond to such damage as his act occasioned and which enlarged the amount.”²⁴

The bond required by the rule on an appeal from a decree for the foreclosure of a mortgage is not intended as security for either the amount of the decree or the interest accruing on the debt pending the appeal, but only for such damages as may arise from the delay incident to obtaining the judgment of the appellate court.²⁵ There is an intimation that the damages may be affected by the use and detention of the mortgaged property; but, as is said in a subsequent case, that was not the point in judgment.²⁶ The bond sued upon in a recent case contained the statutory words, “that the appellant shall prosecute his appeal to effect, and if he fail to make his plea good shall answer all damages.” It also contained an extra-statutory condition: And shall “pay for the use and detention of the property covered by the mortgage in controversy during the pendency of the appeal.” It was not competent for the parties to add to their rights or liabilities by virtue of this condition, and it was rejected. The rulings in *Jerome v. McCarter* and *Supervisors v. Kennicott* were approved; and it was held that the bond did not cover the balance due after applying the proceeds of the sale of the mortgaged property, nor the rents and profits thereof, nor the value of its use and detention pending the appeal. The liability was limited to the costs of the appeal and the deterioration or waste of property. It might extend to burdens resting upon it as the result of the non-payment of taxes and loss by fire if it was not properly insured; but as to these last elements there was no occasion for their consideration. It is also suggested that there was doubt concerning liability for depreciation in the value of the property.²⁷ The supreme court of Massachusetts has ruled that an appeal bond in an equity suit in a federal court does not include damages

²⁴ *Id.*; *Ives v. Merchants' Bank*, 12 How. 159, 13 L. ed. 936.

²⁵ *Jerome v. McCarter*, 21 Wall. 17, 22 L. ed. 515; *Supervisors v. Kennicott*, 103 U. S. 554, 26 L. ed. 486.

²⁶ *Kountze v. Omaha H. Co.*, 107 U. S. 378, 27 L. ed. 609.

²⁷ *Kountze v. Omaha H. Co.*, *supra*.

for the rents and profits, or for the use and detention of land pending the appeal unless there is a recovery therefor in the suit.²⁸ Where a bond was given to supersede an order confirming a sale of real estate, which order directed the immediate execution of a deed and delivery of possession of the property to the purchaser, the latter was entitled, after the reversal of the order, to recover for the breach of the bond the value of the use and possession of the land during the time he was deprived of it. The case in hand was distinguished from one in which the appeal was from a decree ordering a sale.²⁹

The Utah court has held that a *supersedeas* bond in an action of ejectment given under section 1,000, Revised Statutes of the United States, covers liability for rents and profits pending the proceedings in error, but that the recovery must be limited to compensation for actual loss, the rule of compensation applicable being that which governs in actions upon contract.³⁰ The same conclusion had previously been announced by Mr. Justice Brewer. He said: The statute provides that the security shall answer all damages and costs where the writ is a *supersedeas*. That he shall answer *all* damages! Now, when the judgment is entered in the circuit court the right of the plaintiff to the possession of the property is established. He is entitled to the immediate possession and to the rents and profits that thereafter shall arise therefrom. If by proceedings in error and a *supersedeas* bond he is deprived of that possession, and so, pending the proceedings in error, loses those rents and profits, certainly he is damaged to that extent; and if the *supersedeas* bond is to answer all damages it should answer for those rents and profits. I do not see any logical escape from that reasoning. The intimation to the contrary in *Omaha Hotel Co. v. Kountze*³¹ was not regarded as binding.³² In agreement with these cases is a recent case in Pennsylvania, which also denies

²⁸ *Burgess v. Dable*, 149 Mass. 256.

²⁹ *Woodworth v. Northwestern Mut. L. Ins. Co.*, 185 U. S. 354, 46 L. ed. 945, distinguishing *Kountze v. Omaha H. Co.*, *supra*.

³⁰ *Tarpey v. Sharp*, 12 Utah 383.

³¹ 107 U. S. 378, 27 L. ed. 609.

³² *St. Louis S. & R. Co. v. Wyman*, 22 Fed. 184.

the right of abatement, as against the damages recoverable on the bond, for improvements consisting of a frame building erected on piles so that it could be removed and repairs made on an old house to render it habitable after the ejectment was begun.³³

§ 534. **Liability in state courts if judgment is in part for money or in rem.** The judgment in the appellate court for damages necessarily ascertains the sum that respondent is entitled to when he realizes the entire amount recovered. If by reason of the appeal the original judgment is wholly or partially lost that is an additional damage covered by the *supersedeas* bond if the penalty is large enough. The bond is not for the damages awarded by the appellate court simply, but "all damages;" and hence when a judgment or decree is for the recovery of money not otherwise secured the bond is required to be made an indemnity for the whole amount of the judgment, including just damages for the delay and costs and interest on the appeal.

Where an intruder, ousted by judgment in *quo warranto* from an office having a fixed salary and of personal confidence as distinguished from one merely ministerial, takes a writ of error and by a *supersedeas* bond keeps himself in the office and in the enjoyment of the salary pending the writ, which he fails to prosecute successfully, in an action on the bond by the party who has the judgment of ouster the measure of damages is the salary received by the intruder during the pendency of the writ of error and the consequent operation of the *supersedeas*.³⁴

In a Kentucky case action was brought on a *supersedeas* bond

³³ Gleeson's Est., 192 Pa. 279, 73 Am. St. 808, 8 Pa. Dist. 64.

³⁴ United States v. Addison, 6 Wall. 291, 18 L. ed. 919. It was also held in this case that the rule which measures damages upon breach of a contract for wages, or for freight, or for the loss of the rent of buildings, where the party aggrieved must seek other employment, or other articles for car-

riage, or other tenants, and where the damage he is entitled to recover is the difference between the amount stipulated and the amount actually received, has no application to public offices of personal trust and confidence, the duties of which are not purely ministerial or clerical. See Lawlor v. Alton, 8 Irish L. 160.

given to stay execution pending a writ of error from the supreme court of the United States under the twenty-fifth section of the judiciary act, the decree being otherwise secured. The condition of the bond was to prosecute the writ to effect or, on failure, to pay the amount of the original decree, with the damages and costs, and all damages, interest and costs that might be awarded in the appellate court. The condition, in terms, was broad enough to secure the payment of the amount of the decree, but the legal effect was discussed with reference to the condition which the law prescribed, and that was the same, substantially, as required by the laws of that state in case of appeals from judgments and decrees. Mr. Chief Justice Simpson said: "If it were substantially a decree against the defendants for money, then there can be no question that the law required them, in case they appealed or suspended its execution by the *supersedeas*, to secure to the plaintiff the payment of the amount, and the bond imposes a liability to that extent upon the obligors." The court found the decree to be such and the plaintiff entitled to full recovery against the sureties.³⁵

³⁵ *Graham v. Swigert*, 12 B. Mon. 522. Some further observations of the chief justice will not be without value. He said: "The condition of the bond required by the act of congress is substantially the same as is required by the laws of this state in the case of appeals from judgments and decrees. It is, therefore, contended that the decisions of the court upon the effect of such bonds must determine the extent of the obligation of the surety in this case; and that, according to the principles of these decisions, he is not liable for the amount of the decree. * * * The cases referred to for the purpose of sustaining this proposition are *Talbot v. Morton*, 5 Litt. 326, and *Sumrall v. Reid*, 2 Dana 65. In both of these cases an appeal

was taken from a decree to foreclose a mortgage on real property, and subject it to sale for the payment of judgments at law. In the first it was held that the bond was sufficient, although it did not secure the payment of the judgment at law, as the decree was rendered against the mortgaged estate, and there was no decree for money. And the court in that case said it cannot be contemplated by law that the bond should secure the real estate or its value, or that accidents of fire and destruction of the estate are to be provided for in the bond. In the case of *Sumrall v. Reid*, the appeal bond was conditioned to pay the amount recovered by the decree and costs; and it was decided that there was nothing recovered by the decree, and it only subjected the

Where the judgment discharged an attachment and ordered the proceeds of the sale of the goods levied on paid to the

real estate in the mortgage to the payment of a judgment at law; there was no liability on the surety for the debt. The principle attempted to be deduced from these cases is, that the law prescribes one uniform condition to such bonds, but discriminates between the liability imposed by a breach of the condition in the different classes of cases. In appeals from a judgment or decree *in personam* the liability extends so far as to secure the judgment or decree; but in appeals from a decree *in rem* the demand asserted in the suit, and to obtain the payment of which the proceeding is instituted, is not secured by the bond. These cases have not settled the doctrine in the manner and to the extent contended for. They only decide that in cases where there is a mere decree of foreclosure, made for the purpose of subjecting real estate to the payment of judgments at law, and an appeal is taken, the bond required by law does not secure the amount of the demand for the payment of which the land is decreed to be sold. This, according to the reasoning of the court in the first case, results in some measure from the nature of the property which is looked to for the security of the debt. It is permanent and not subject to loss, removal or destruction, and consequently, a stipulation in the bond for its security is unnecessary, and not contemplated by law. If, however, it be conceded that the same doctrine ought to apply to all decrees merely for the sale of mortgaged property, whether personal or real, it by no means follows that it ought to be extended to that class

of cases where personal property is attached by a proceeding in chancery instituted for the purpose of obtaining payment of the complainant's demand, where the debtor has a right to retain the property by executing a bond, especially when the appeal is taken by the debtor himself, having the property in his possession at the time. The effect of the appeal may be to diminish very materially, if not to destroy, the security of the complainant's demand by postponing the execution of the decree until the sureties in the bond executed by the debtor become insolvent, and the property itself be consumed or disposed of, and placed beyond the reach of the creditor.

"In the case of *Worth v. Smith*, 5 B. Mon. 504, it appeared that a number of creditors were proceeding at the same time to subject by attachments the steamer *John Mills* to the payment of their several debts; that the steamer had been sold, and the proceeds of the sale were under the control of the court. In that state of case a contest arose among the creditors about the disposition of the fund; and part of the creditors being dissatisfied with the decree of the chancellor upon the subject appealed to this court, and the decree was affirmed. A suit was then brought by the preferred creditors against the surety in the appeal bond, and it was held that he was only liable for the costs and damages awarded by this court, and not for the sums decreed to the creditors out of the fund for distribution. The ground of the decision was, that the appeal did not affect the security of the fund; that,

defendant, no personal judgment, even for costs, being rendered, the sureties were not liable for the money in the hands

notwithstanding the appeal, it remained under the control of the chancellor, who was not thereby restricted from taking any step which he might deem proper to secure it. This case does not, however, settle the principle that an appeal taken by the debtor from a decree to sell personal property which had been attached and remained in his possession would not impose any liability upon the obligors in the appeal bond for the amount of the decree. It seems rather to authorize an opposite inference, inasmuch as in the case last mentioned the appeal would have the effect to suspend the action of the chancellor altogether, and deprive him of all control over the property, and of all power to provide for its security. But let this question be disposed of as it may when it arises, the decree in this case, in our opinion, partakes of the nature of a personal decree, and was virtually, and in effect, a decree against the parties for whom the defendant became surety in the bond, and, consequently, is not within the operation of the principle applicable to the cases where the proceedings are exclusively *in rem*. The statutes under which the proceeding was instituted in the chancery court made the defendants liable to the action of the party aggrieved, either at law or in chancery (1 Statute Law 260), so that the chancellor had the power to render a personal decree against them for the sum adjudged to the complainant. The boat or vessel in which the slaves were removed out of the limits of the commonwealth is also made liable, and may be condemned and sold to pay and

satisfy the damage sustained by the complainant and the costs of suit. But the proceeding against the boat is merely ancillary to the main object of the suit, and intended to aid in its accomplishment, by furnishing means to be applied to the satisfaction of the decree. The proceeding was not exclusively *in rem*, but was both *in rem* and *in personam*.

"The damages sustained by the complainant had been ascertained, and a decree rendered for the amount. The defendants had been required to produce the attached property, and had failed to comply with the requisition. The chancellor could have ordered an execution to issue against them immediately for the sum decreed and costs of the suit, or could have enforced the payment of the amount by proceeding against the parties in the bond executed for the forthcoming of the property. In this attitude of the case the parties agreed that the decree pronounced should be treated as a final decree, and the defendants obtained an appeal. The effect of the appeal was to suspend the execution of the decree and prevent the chancellor from ordering an execution to issue against the defendants, or to enforce the bond. The decree, as it was rendered, would not have authorized an execution to issue against the defendants without an additional order; but still the decree was personal, and imposed upon the defendants the duty to pay the money to which the complainant was entitled, and the enforcement of this duty was prevented by the appeal. There is a clear distinction between this case and the

of the officer.³⁶ While it was the law of Kentucky that a party could not appeal from a judgment which was an entirety because he was entitled to more relief than was awarded him and at the same time enforce so much of the judgment as was in his favor, a plaintiff took an appeal from a decree ordering the sale of his land, to pay his creditor, subject to a prior lien, the existence of which lien the plaintiff contested; the defendant prosecuted a cross-appeal and gave a *supersedeas* bond, on which appeal the judgment was affirmed. There was no liability on the bond because the act of the defendant in appealing, not the bond, stopped the plaintiff from enforcing his judgment.³⁷ If the entire judgment in an action to enforce a lien for the recovery of the debt, as well as for the sale of the property, is superseded the plaintiff may recover on the bond so much of the judgment as is *in personam* although the judg-

cases that have been referred to. In those cases the defendants were not personally liable and the chancellor had no power to order an execution to issue upon the decree. In the case of *Worth v. Smith* the appeal was not taken by the debtor, but by part of the creditors whose claims had been postponed, and who, of course, were in no manner responsible for the fund in contest, and against whom no decree had been rendered for the payment of money. And in that case the court said that as the surety might have executed the bond alone without his principal, if he were to be made liable for the fund in contest, which had been decreed to the preferred creditors, his liability would exceed that of his principal, against whom no decree for the payment of the fund or any part of it had been rendered. That reasoning, however, does not apply to this case. Here a decree had been pronounced against the principals of the surety. They were personally liable for

the sums decreed. The appeal was evidently taken to prevent the enforcement of that liability. The nature of the proceeding had undergone a radical change. It had become, by the failure to deliver the property attached, exclusively personal. It was no longer *in rem*, for there was no property for the chancellor to act upon. He could have proceeded against the surety in the bond, but his liability was personal. The remedy, however, was not confined to the liability of the surety, but extended to the defendants, who were personally liable for the amount of the decree by the express provisions of the statute, which authorizes the party aggrieved in such a case to sue in chancery." See *Nichols v. MacLean*, 101 N. Y. 526; *People v. Nolan*, id. 539.

³⁶ *Neilson v. Jarvis*, 17 Ky. L. Rep. 694.

³⁷ *Lyon v. Lancaster*, 16 Ky. L. Rep. 92 (Ky. Super. Ct.).

ment for the sale of the property be reversed.³⁸ If in an action by a subcontractor a personal judgment is rendered against the original contractor and the claim is also adjudged to be a mechanic's lien, and one of the landowners appeals and gives a *supersedeas* bond in the usual form on affirmance of the judgment the sureties are not liable for the payment of the personal judgment. It seems that while the appeal brought up such judgment for review as against the original contractor it did not vacate that judgment nor suspend the issue of execution thereon.³⁹ Where a personal judgment was obtained against M., and, under an attachment, a judgment setting aside a deed from M. to B. on the ground that it was fraudulent, and ordering a sale of the land to pay, first, a debt due to another party and then the appellant's debt, on an appeal by B., superseding only the sale of the land, and after an affirmance of the judgment there could not be a recovery on the bond for the depreciation in the value of the land from whatever cause it proceeded, nor for attorneys' fees, the bond not being conditioned to pay all damages, but being a copy of the form appended to the code.⁴⁰ Where there was a sale of land to satisfy two judgments in favor of the same party, the liens on the land being on an equality, and an appeal was taken from one of the judgments and affirmed it was erroneous, in order to protect the surety in the bond, to apply the proceeds realized from the sale to the satisfaction of the appealed judgment; there should have been a *pro rata* division between the judgments, leaving the surety liable for the balance of that which was superseded.⁴¹

In Maryland where the appeal has not been prosecuted to effect the rule of damages and the extent of recovery will de-

³⁸ *Leopold v. Furber*, 8 Ky. L. Rep. 198, 84 Ky. 214.

Under the Kentucky act the court must award damages upon affirming or dismissing an appeal from a superseded money judgment, regardless of the number of appeals previously taken in the cause. *United States F. & G. Co. v. Citizens' Nat. Bank*, 147 Ky. 810.

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³⁹ *Sosman v. Conklin*, 65 Mo. App. 319.

⁴⁰ *Buckner v. Terrell*, 8 Ky. L. Rep. 701 (Ky. Super. Ct.).

⁴¹ *Laughlin v. Coakley*, 19 Ky. L. Rep. 407, distinguishing *Ives v. Merchants' Bank*, 12 How. 159, 13 L. ed. 936, and *Sessions v. Pintard*, 18 id. 106.

pend on the loss and injury sustained by reason of the stay of execution on the judgment appealed from.⁴² In an action on the appeal bond the measure of damages is the actual injury suffered by the appellee from the delay in whatever manner it arises.⁴³ If the fund pledged was unequal to the payment of the debt at the time of the decree the intermediate accruing interest is a clear loss to the plaintiff, occasioned by the delay, and should be made the standard in the absence of other injury.⁴⁴ By such a bond in a foreclosure case, which is *in rem*, the obligors are not bound on affirmance of the decree to pay the mortgage debt, nor to make good to that extent any deficiency in the proceeds of the sale of the land,⁴⁵ nor did they stipulate that the land should sell for enough to pay even the principal of this debt; but if the deficiency was increased by the intermediate depreciation of the mortgaged property such deficiency would be an item of damage covered by the bond.⁴⁶ The waste of property pending the hearing of a will contest by reason of neglect and decay is an element of damages; it is otherwise as to depreciation in value from other than physical causes. Interest on the damages recovered for waste is not to be allowed.⁴⁷ In Kentucky liability for depreciation in the value of land, the sale of which has been stayed, whether it arose from general causes or by particular accidents, is not a ground of damage, at least prior to its sale because it may bring enough to pay all the creditors.⁴⁸

§ 535. **Same subject.** Where the operation of an injunction was suspended by an appeal—and such was the effect of an appeal from an order allowing it—on the affirmance of the

⁴² Keen v. Whittington, 40 Md. 489.

⁴³ Woods v. Fulton, 2 Har. & Gill 71. See Marshall v. Dobler, 97 Md. 555.

⁴⁴ Id.; Jenkins v. Hay, 28 Md. 547.

⁴⁵ Kennedy v. Nims, 52 Mich. 153; Woods v. Fulton, *supra*.

⁴⁶ Hinkle v. Holmes, 85 Ind. 405; Jenkins v. Hay, 28 Md. 547; Cook v. Marsh, 44 Ill. 178; Utica Bank

v. Finch, 3 Barb. Ch. 293, 49 Am. Dec. 175.

There is an intimation that depreciation in the market value of property is not an element of damage. See Kountze v. Omaha H. Co., 107 U. S. 378, 27 L. ed. 609, and § 533.

⁴⁷ Hughan v. Grimes, 62 Kan. 258.

⁴⁸ Buckner v. Bogard (Ky. Super. Ct.), 8 Ky. L. Rep. 701.

order, if the thing on which it was intended to operate should exist in specie in the defendant's possession, then the injunction is restored to its original vigor; but if the thing is consumed or disposed of the complainant must proceed on the bond which was given to indemnify him from all loss and injury which he may sustain by reason of the appeal. And the measure of damages is the value of the property or thing so disposed of and lost to him.⁴⁹

Where a judgment in replevin for the return of the goods is affirmed their value (if they have not been restored) and the costs of suit would seem to be the true standard by which the damages of the appellee should be measured on a suit brought on the appeal bond.⁵⁰ But if no damages are awarded and the claim is withdrawn the recovery can only be for the costs.⁵¹ In Vermont, where the conditions of the bond are that the appellant will prosecute his appeal to effect or pay all intervening damages occasioned thereby, in estimating such damages the property which the appellant had at the time of the appeal and all that he acquired during its pendency is to be taken into account. The plaintiff is entitled to recover the value of his chance of collecting his debt during the time of the suspension of his execution.⁵² A lessee in possession of premises subject to a right of dower is not liable to heirs not in possession for rents and profits pending an appeal from an order appointing commissioners to make partition.⁵³ Nor is one who appeals from the allowance of a will liable on such a bond, in case of affirmance, for extra expenses of the executors in prosecuting the suit subsequent to the appeal, beyond the taxable costs; but where such appeal necessitates the appointment of a special administrator the extra expenses of special administration, beyond the amount that would have been necessary if the state had been settled by the executors without the intervention of the appeal, constitutes intervening dam-

⁴⁹ *Blondheim v. Moore*, 11 Md. 365; *Everett v. State*, 28 Md. 190.

⁵⁰ *Karthauss v. Owings*, 6 H. & J. 134.

⁵¹ *Bryan v. Simpson*, 92 Ga. 307.

⁵² *McGregor v. Balch*, 17 Vt. 562.

⁵³ *Stockwell v. Sargent*, 37 Vt.

ages recoverable on the bond.⁵⁴ Attorney's fees paid by an executor in the successful resistance of an appeal in a will contest are not recoverable under a bond conditioned to pay all damages he may sustain and all costs.⁵⁵ The legislature intended only to provide for the security and recovery of intervening damages whenever the appellee should have judgment therefor, and not to create any new liability. The appellant is to give security for such damages, provided the other party should be found entitled to recover any.⁵⁶ And where interest is recoverable as intervening damages it should be moved for and allowed on the hearing of the appeal.⁵⁷ If the appellee is entitled only to costs a bond to pay all intervening costs and damages will secure no more than costs.⁵⁸ So in a bond given on appeal, the condition of which was to pay all such costs as the obligee might recover, the costs which accrued before the bond was made, as well as afterwards, are included.⁵⁹ One who becomes surety on a *supersedeas* bond substituted for a prior similar bond is liable for all the damages accruing during the pendency of the appeal, and not for those only which accrued after it was filed.⁶⁰

⁵⁴ *Sargeant v. Sargeant*, 20 Vt. 297.

By statute enacted in Illinois in 1865 it was provided that appeals shall be allowed to the supreme court from all decrees, judgments and orders of inferior courts from which writs of error might be lawfully prosecuted; and in granting appeals inferior courts shall direct the condition of appeal bonds, with reference to the character of the decree, judgment or order appealed from. A bond was given on appeal from a decree dissolving an injunction which restrained the use of land, conditioned to prosecute the appeal and pay the amount of the judgment, costs, interest and damages rendered and to be rendered in case the decree should be affirmed. No judgment was ren-

dered in either court that the appellee recover the rental value of the real estate; it was therefore held that the obligors were not bound for it. *McWilliams v. Morgan*, 70 Ill. 62.

⁵⁵ *Williams v. Fidelity & D. Co.*, 42 Colo. 118.

⁵⁶ *Stearns v. Brown*, 1 Pick. 530.

⁵⁷ *Stearns v. Brown*, 1 Pick. 530.

⁵⁸ *Swan v. Picquet*, 4 Pick. 465.

⁵⁹ *Manufacturing Co. v. Barney*, 45 N. H. 40.

⁶⁰ *Wilson v. King*, 59 Ark. 32, 23 L.R.A. 802; *Hargis v. Mayes*, 20 Ky. L. Rep. 1965.

There is disagreement on this point. In Kentucky if a second bond is not limited to the time of its execution it will relate back and cover the period between the execution of a prior insufficient bond

Under a bond given in a *habeas corpus* proceeding to procure the discharge of a minor, claimed by the petitioner as his apprentice, and conditioned to pay all the costs and damages that may accrue on and by reason of the appeal there may be a recovery of a reasonable attorney's fee for services rendered in procuring the affirmance of the order, but not for the loss of the services of the apprentice pending the appeal, nor for the fee paid the sheriff to procure the surrender and delivery of the apprentice after the termination of the appeal.⁶¹

A statute of Massachusetts regulating appeals in actions by landlords against tenants provided that if the complainant appeal he shall recognize to pay all intervening damages and costs and to prosecute his appeal with effect; that if the defendant appeal he shall recognize to pay all rent due and in arrears and all intervening rent, damages and costs; and that the court shall, whenever any appellant thereto fails to prosecute his appeal, affirm the former judgment upon the appellee's complaint and award such additional damages and costs as have arisen in consequence of the appeal. Under these provisions it was contended it was competent for that court to render judgment in favor of the landlord, when appellee, after defaulting the appellant, for the intervening rent and damages; that "additional damages" include such rent because he is damaged by being kept out of possession, and include likewise damages for the timber and wood removed and any injury to the buildings. The court suggest that the case might be likened to that of interest accruing subsequently to the commencement of the action; but reply, that interest is merely incidental and therefore is brought up to the time of the judgment; that, with the exception of interest, no damages could be recovered except what had accrued before the action was commenced; that the phrase "intervening damages" seems to have been used without any definite meaning; it is the usual language in regard to ap-

and the date of the return of the property covered by it. *Dowling v. Walker*, 120 Ky. 528. In Kansas a second undertaking given in lieu of an insufficient one will not ope-

rate retroactively unless it is so expressed. *Henrie v. Buck*, 39 Kan. 381.

⁶¹ Shows v. Pendry, 93 Ala. 248.

peals and is employed in respect to appeals by the plaintiff where there can be no intervening damages. The court say: "If the tenant keeps out the owner wrongfully, and there were no other remedy, the statute might perhaps be so construed as to give this remedy, though it would be an awkward construction. There can, however, be no doubt that an action of debt will lie on the recognizance, and a previous judgment of the common pleas for intervening damages is not necessary to sustain the action. This view is confirmed by the clause in the recognizance to pay rent in arrears. That is not intervening rent, and a remedy for it would necessarily be upon the recognizance."⁶² Under a bond conditioned to pay all "rent due or to become due" there may be a recovery of rent under a new as well as under the original lease.⁶³

§ 536. *Instances of liability on more specific conditions.* The obligations required by later legislation to stay execution pending appeal are generally more precise, specifying the liability with greater particularity. They are usually required, in terms, to secure the payment of money judgments and decrees with the damages and costs which may be awarded on the appeal; and in other cases, likewise, such peculiar damages as result from the appeal according to the nature of the case. What damages and costs may be awarded on appeal will be considered in subsequent sections. The obligation as to the judgment or decree appealed from, as well as to the damages and costs on the appeal, is simply to pay them, or that appellant shall do so, or such part of the judgment or decree below

⁶² *Braman v. Perry*, 12 Pick. 118.

In *Davis v. Alden*, 2 Gray 309, it is held that a lessee, who, on appealing from the judgment of a justice of the peace or police court in an action on R. S., ch. 104, recognizes to pay all intervening rent and all damages and loss which the lessor may sustain by reason of the withholding of the possession of the demanded premises, and by reason of any injury done to the

premises during such withholding, is liable, *prima facie*, and in ordinary cases, to payment at the rate reserved in the lease until the recovery of possession by the lessor, although the buildings on the premises be meanwhile destroyed by fire; and is responsible for all waste, actual and permissive, and for all losses, including the destruction of the building, if not proved to have been caused by inevitable accident.

⁶³ *Pray v. Wasdell*, 146 Mass. 324.

as shall be affirmed. If the bond is general in terms as to the affirmance of the judgment it will hold the sureties liable for the costs, expenses and losses resulting from an affirmance by the court of last resort,⁶⁴ with interest as an incident thereto from the date of demand upon the surety.⁶⁵ The rate of interest will be the same as that borne by the judgment, notwithstanding a subsequently-enacted statute reduced the rate on judgments; the contract rate was not affected thereby.⁶⁶ The liability for interest on a judgment rendered by a federal court is not affected by a default judgment rendered against the sureties as trustees in a suit against the plaintiff, such judgment being subsequent to the service of notice on them that the plaintiff looked to them for the payment of his judgment. The sureties' liability did not extend to interest on a sum deposited in court by a receiver and retained there, no provision concerning it being made in the decree.⁶⁷ If the execution of a personal judgment is stayed by a bond and the judgment debtor becomes insolvent between the time of its execution and the final termination of the action, the surety cannot avoid liability for the amount of the judgment by showing that a rule might have been obtained against the debtor to bring the money into court.⁶⁸ The rule might be different if there was a fund in court resulting from the sale of the property attached, the money awaiting distribution.⁶⁹ The obligee may recover costs though they have not been paid.⁷⁰

Liability for costs, expenses and losses has been enforced

⁶⁴ *The Joseph B. Thomas*, 158 Fed. 559; *Mackellar v. Farrell*, 57 N. Y. Super. Ct. 398; *Robinson v. Plimpton*, 25 N. Y. 484; *Bennett v. Brown*, 20 id. 99; *Gardner v. Barney*, 24 How. Pr. 467; *Smith v. Crouse*, 24 Barb. 433; *Rodman v. Moody*, 14 Ky. L. Rep. 202 (Ky. Super. Ct.); *Keaton v. Boughton*, 83 Mo. App. 158; *Roberts v. Lovitt*, 13 Ind. App. 281; *Waycross A.-L. R. Co. v. Offerman & W. R. Co.*, 114 Ga. 727; *People v. Wilson*, 169 Ill. App. 452.

⁶⁵ *Murray v. Aiken, etc. M. Co.*, 39 S. C. 457.

⁶⁶ *Missouri, etc. R. Co. v. Lacy*, 13 Tex. Civ. App. 391.

⁶⁷ *Tarr v. Rosenstein*, 3 C. C. A. 466, 53 Fed. 112.

⁶⁸ *Mahlman v. Williams*, 89 Ky. 282.

⁶⁹ *See Worth v. Smith*, 5 B. Mon. 505.

⁷⁰ *Hamilton v. Baltimore & O. R. Co.*, 11 Ohio N. P. (N.S.) 437.

where a new court of final appeal was provided for after the bond was executed.⁷¹ But it has been held that when the condition is to pay on the affirmance of the judgment by a designated court there is no liability for the costs of an appeal from its judgment of affirmance.⁷² If, when the appeal bond was given, the supreme court of a state had appellate jurisdiction only on appeal from an intermediate court and the bond conformed to the law as it then was, and the law was subsequently changed so that the appeal went directly to the supreme court, there being no judgment of the intermediate court, the sureties are not liable on the bond.⁷³ An appeal bond to perform the judgment of a designated circuit court does not include liability, so far as the surety is concerned, to perform the judgment of any other circuit court.⁷⁴ And such a bond given to perform the judgment of the supreme court is not binding to secure the performance of the judgment of an intermediate court, although the case in which such bond was given was, by an amendment of the constitution and laws enacted in pursuance thereof, transferred from the former to the latter.⁷⁵ These cases are based on the rule that the contracts of sureties are not to be extended beyond their terms. The supreme court of Texas recognizes this principle, but says that such contracts are to be construed in connection with the laws in force when they are entered into, and in view of the fact that every person must know that the power to change the jurisdiction of the courts may be exercised at any time and cannot be controlled by contracts made or obligations assumed by individuals, it ought not to be held that the parties to an appeal bond contemplated, in the event of such change pending appeal, that their obligation should become inoperative, for the substance and spirit of such

⁷¹ *Bierce v. Waterhouse*, 219 U. S. 320, 55 L. ed. 237; *Horner v. Lyman*, 2 Abb. App. Dec. 399, 4 Keyes 237.

⁷² *Winston v. Rives*, 4 Stew. & Port. 269; *Morgan Co. v. Selman*, 6 Ga. 440; *Nofsinger v. Hartnett*, 84 Mo. 549; *Hinckley v. Kreitz*, 58 N. Y. 583.

⁷³ *Brookshier v. McIlwrath*, 112 Mo. App. 687, disapproving *Mexican Nat. R. Co. v. Mussette*, *infra*; *Schuster v. Weiss*, 114 Mo. 158, 19 L.R.A. 182.

⁷⁴ *Rotham D. Co. v. Kermis*, 79 Mo. App. 111.

⁷⁵ *Cranor v. Reardon*, 39 Mo. App. 306.

an undertaking is that the obligors will discharge the obligation fixed by their bond whenever the duty to do so is declared by a court having jurisdiction over the cause on appeal, whether that jurisdiction existed when the bond was given or was afterwards conferred. Referring to the Missouri cases cited, it was observed that some of them seem to hold that such obligations as sureties on appeal bonds assume are contracts within the constitutional safeguards which deny to legislatures power to pass laws whereby the obligation of contracts will be impaired, but it seems to us such is not the character of these obligations, for they are not based on consent of adverse litigants, but are assumed by the makers of such bonds, which are permitted, and thereby the right to appeal secured under the provisions of positive law. The conclusion arrived at was that bonds given to secure the payment of any judgment that might be rendered by the supreme court were binding on all the parties to them although that court was deprived of jurisdiction to hear the causes on which such bonds were given, such jurisdiction being transferred to the courts of civil appeals.⁷⁶ Under a bond conditioned to pay upon the affirmance of the judgment by a designated court there is no liability, after the reversal of the judgment, if another and different judgment is entered by consent of the parties, the sureties not consenting thereto.⁷⁷ Where the appeal in the first instance was to an intermediate court which reversed the judgment, and on appeal to the court of last resort the judgment of reversal was reversed and the original judgment affirmed the sureties were liable for the costs of the final appeal, the mandate to the intermediate court directing the entry of judgment in accordance with its terms. But it would have been otherwise if such mandate had been sent directly to the court of original jurisdiction.⁷⁸ If a second ap-

⁷⁶ Mexican Nat. R. Co. v. Mussette, 86 Tex. 708, 24 L.R.A. 642.

⁷⁷ Miller v. Ryan, 13 Ohio C. C. 278, following Myres v. Parker, 6 Ohio St. 501; or by the election of the plaintiff in accordance with the judgment of the appellate court.

Lehman v. Amsterdam C. Co., 151 Wis. 207.

⁷⁸ Nofsinger v. Hartnett, 84 Mo. 459; Robinson v. Plimpton, 25 N. Y. 484; Richardson v. Kropf, 47 How. Pr. 286, 60 N. Y. 634; Gardner v. Barney, 24 How. Pr. 467.

peal removing the case to a higher court, with another set of sureties, results in a second affirmance the liability of the first sureties is not thereby increased; they are not liable for the costs and damages on the second appeal, nor are the two sets of sureties co-sureties.⁷⁹ But as to this the authorities are not agreed if the second appeal was taken pursuant to authority existing at the time the first undertaking was executed. The sureties, it has been said, must be held to have anticipated that such an appeal might be taken when they signed the first undertaking. Having knowingly and voluntarily placed themselves in this position, they must bear the consequences.⁸⁰

Bail upon discharge from an order of arrest are sureties within the rule that as between different sets of sureties who undertake to secure the same debt, in different stages of legal proceedings, the primary liability rests upon the last set.⁸¹ The original sureties are not released by the execution of another bond, with other sureties, for a further appeal; the bonds are cumulative securities.⁸² In a New York case the undertaking

⁷⁹ *Moore v. Lassiter*, 16 Lea 630; *Hinckley v. Kreitz*, 58 N. Y. 583. See *Post v. Doremus*, 60 id. 371; *Burdett v. Lowe*, 85 id. 241; *Shankland v. Hamilton*, 1 Thomp. & C. 239; *Smith v. Crouse*, 24 Barb. 433; *Helbner v. Townsend*, 8 Abb. Pr. 234.

A defendant in a federal circuit court gave bond with a surety conditioned to keep and perform the final decree in the cause and pay all sums which might therein and thereby be decreed to be paid by him. The circuit court rendered a final decree against him for damages and costs, from which he appealed to the supreme court of the United States, and gave bond, with a different surety, to pay all such costs as the court should decree to be paid to the plaintiff upon affirmance of the decree of the circuit court. The supreme court affirmed that decree, with costs and interest;

and, pursuant to its mandate the circuit court decreed that its own former decree be affirmed, with costs and interest, and that execution issue for the sum found due by that decree, with interest from its date, and for the further amount of costs decreed by the supreme court, and the costs taxed in the circuit court upon the return of the mandate. Held, that this was the final decree in the cause within the meaning of the first bond. *Jordan v. Agawam W. Co.*, 106 Mass. 571.

⁸⁰ *Shannon v. Dodge*, 18 Colo. 164, citing *Robinson v. Plimpton*, 25 N. Y. 484; *Evers v. Sager*, 28 Mich. 47; *Ashby v. Sharp*, 1 Litt. 156; *Marquette County v. Ward*, 50 Mich. 174, 45 Am. Rep. 30; *State v. Bradshaw*, 10 Ired. L. 229.

⁸¹ *Culliford v. Walser*, 158 N. Y. 65.

⁸² *Becker v. People*, 164 Ill. 267; *Chester v. Broderick*, 131 N. Y. 549.

was for the payment of any deficiency which should remain after a sale of the mortgaged premises. On appeal to the general term of the supreme court the judgment was affirmed. An appeal was then taken to the court of appeals, and proceedings were stayed upon an undertaking. It was held that the sureties on the first undertaking had no such right to have the real estate sold under the judgment of foreclosure and their precise liability determined immediately after the affirmance of the judgment as to be released from their obligation by the second undertaking. The order providing for the latter and for the stay of proceedings was not such a novation and substitution of the new undertaking in the place of the original as to release the sureties on the latter from liability for a larger deficiency than would have existed but for the second appeal.⁸³ In another case, the facts being similar, after affirmance of the foreclosure decree by the court of appeals the premises were sold, the deficiency being over \$11,000, of which amount \$9,000 was collected on the second appeal bond, being the penalty thereof. It was determined in an action on the second bond that the sureties therein were liable for the deficiency, that the doctrine of subrogation did not apply and the sureties on the first bond were not discharged by the proceedings against the sureties on it.⁸⁴ The recovery for which the sureties are liable must be in the indential case in which the bond was given. The opposite party cannot make a judgment in his favor, obtained in another court, or in another suit, though on the same debt or demand, the measure of their liability.⁸⁵ In an action against a surety on a bond given on taking an appeal from an order dismissing a petition to have a debtor adjudicated a bankrupt damages suffered as the result of the appeal only can be recovered and not those resulting from the retention of the property by a receiver, his appointment having been a matter separate and distinct from the proceedings to adjudicate.⁸⁶

⁸³ *Mackellar v. Farrell*, 57 N. Y. Super. Ct. 398. *Sager*, 28 Mich. 47; *Lauer v. Grif* fith, 92 Ill. App. 388.

⁸⁴ *Chester v. Broderick*, 131 N. Y. 549. ⁸⁶ *T. E. Hill Co. v. United States*

⁸⁵ *Planters' & Miners' Bank v. Fidelity & Guaranty Co.*, 184 Ill. Hudgins, 84 Ga. 108; *Evers v.* App. 528.

There are numerous cases in which the doctrine is asserted that the sureties on an appeal bond are only liable, like other sureties, by virtue of the express terms of their undertakings.⁸⁷ There are, however, some cogent reasons for not adhering too closely to the rule that requires a strict construction of contracts in favor of sureties so far as obligations of the character under consideration are concerned. As has been observed: The very wide range and varying character of actions, suits, judgments and decrees necessitated broad generalizations in the stipulated conditions of a form of bond intended to operate in all. The very nature and uses of such bonds and their general recitals, in necessary conformity to the terms of statutes or rules of court, render it unreasonable and unjust to give the liability of sureties therein the strictness of interpretation that sometimes applies in the case of guarantors or special sureties in voluntary contracts between two parties. The interpretation, on the contrary, should rather be liberal, for the necessary protection of those who have nothing to do with the form or approval of the obligation and are compelled, against their wills, to forego their legal claims and incur risk of loss by reason thereof. This view, we think, is sound in principle and supported by authority in analogous cases.⁸⁸ The rule of strict construction in favor of sureties is not to be carried so far as to vitiate a bond which would, but for a misdescription of the

⁸⁷ *Schuster v. Weiss*, 114 Mo. 158, 19 L.R.A. 182; *Sears v. Seattle Con. St. R. Co.*, 7 Wash. 286; *Ogden v. Davis*, 116 Cal. 32; *Markoe v. American S. Co.*, 44 App. Div. (N. Y.) 285, affirmed without opinion, 167 N. Y. 602; *Smith v. Huesman*, 30 Ohio St. 662; *Lang v. Pike*, 27 id. 498; *Hall v. Williamson*, 9 id. 23; *Myres v. Parker*, 6 id. 501; *Hamilton v. Jefferson*, 12 Ohio 421; *Fullerton v. Miller*, 22 Md. 1; *Rice v. Rice*, 13 Ind. 562; *Foster v. Epps*, 27 Ill. App. 235; *Henrie v. Buck*, 39 Kan. 381; *Nofsinger v. Hartnett*, 84 Mo. 549; *Mix v. Singleton*, 86 Ill. 194.

This principle has greater force

where the bond in question was executed by a private person than where it was executed by a surety company. The obligations of the latter are subject to the same rules of construction as those of insurance companies. See §§ 724, 725.

⁸⁸ Per Justice Shepard in *Fulton v. Fletcher*, 12 D. C. App. Cas. 1, 17, citing *McElroy v. Mumford*, 128 N. Y. 307; *Barton v. Fisk*, 30 N. Y. 166, 172; *Ives v. Merchants' Bank*, 12 How. 159, 13 L. ed. 936; *Sessions v. Pintard*, 18 id. 106, 15 L. ed. 298; *People v. Wilson*, 169 Ill. App. 452. See *Desio v. Hutchinson*, 36 App. D. C. 68.

amount for which judgment had been rendered, be a contract to pay the whole judgment; in such a case the sureties' liability is not limited to the sum mentioned in the bond. The rule in such a case is that whenever, in the bond, there is enough to identify the judgment a misrecital will not affect, limit or vary the liability of the sureties if from the instrument itself the intention to be bound to answer for the judgment may be gathered.⁸⁹ In some cases it is said that the surety cannot escape liability unless there is a substantial reason for it. The judgment creditor has been prejudiced by the surety's act, and the latter has obtained for his principal the benefit of an appeal, and he is therefore estopped to deny his liability when the bond has subserved the purpose for which it was given and the appellant has had the benefit of it.⁹⁰

If the bond is for the benefit of those entitled to costs, as well as for the benefit of the defendant in error, the surety does not discharge his obligation by paying the amount of the penalty of the bond to the defendant in error without the assent of those entitled to the costs; having paid in his own wrong he is liable, also, for their *pro rata* share.⁹¹ If a *supersedeas* may be issued to stay proceedings on part of a judgment a bond reciting that the appellant desired to supersede the judgment in so far as the same adjudges the lien of the appellee superior to that of the appellant, and which binds the makers to satisfy and perform the judgment above stated, will not cover the amount of a personal judgment of one of the creditors of the common debtor, that part of the judgment not being superseded.⁹² Where the undertaking is to pay the amount of the judgment and all dam-

⁸⁹ Dye v. Dye, 12 Colo. App. 206, citing McElroy v. Mumford, *supra*; Landa v. Heermann, 85 Tex. 1; Warren v. Marberry, 85 Tex. 193; Ryan v. Webb, 39 Hun 435; Phelps v. Daniel, 86 Ga. 363; Mathews v. Morrison, 13 R. I. 309; Adler v. Potter, 57 Ala. 571; Hartlep v. Cole, 120 Ind. 247; Miller v. Vaughan, 78 Ala. 323; Miner v. Rodgers, 65 Mich. 225.

⁹⁰ Irwin v. Crook, 17 Colo. 16; Abbott v. Williams, 15 Colo. 512; Shannon v. Dodge, 18 Colo. 164; Creswell v. Herr, 9 Colo. App. 185. This subject is considered in another aspect in § 537.

⁹¹ Curry v. Homer, 62 Ohio St. 233.

⁹² Gilbert v. Bamberger, 19 Ky. L. Rep. 1833.

ages which shall be awarded on the appeal if the judgment be affirmed, and the order of affirmance is interlocutory and conditional, providing for a new trial in a certain event, the undertaking does not extend to the judgment on such new trial. The final judgment thus obtained is not an affirmance of the first judgment. The sureties were only bound for the first judgment when affirmed.⁹³ If the bond is defective or insufficient, although it performs the office for which it was given, the rule that the recovery cannot extend beyond what is expressed in it applies.⁹⁴ The sureties upon an appeal bond given by the defendant in an ejectment action are liable only for a specific judgment, and are released when the defendant pays the costs, has the order for judgment vacated and the cause sent back for a new trial under the statute.⁹⁵ A statute imposing liability for any judgment which may be entered upon the appeal for costs means only such costs as are incurred after the appeal is taken.⁹⁶ A bond conditioned to prosecute the appeal with effect or to pay, satisfy and abide by the judgment that may be rendered does not impose liability for costs of the trial court.⁹⁷ The bond given on an appeal from an order denying a new trial does not cover the judgment subsequently rendered on the verdict unless the benefit of it was lost in consequence of the appeal.⁹⁸ An obligation to pay all such costs as the defendant shall recover of the plaintiff in the action does not include costs that the latter agreed to pay in consideration of a compromise of the action.⁹⁹ Under a bond covenanting to pay all rents accruing or to accrue, not exceeding a fixed sum, liability is limited to the period during which the appeal has kept the lessors out of possession; it does not cover rent due before it was executed.¹ In Ohio a surety in an undertaking for costs before

⁹³ *Poppenhusen v. Seeley*, 3 Keyes 150; *Wilson v. Churchman*, 6 La. Ann. 468; *Smith v. Huesman*, 30 Ohio St. 662.

⁹⁴ *Weigley v. Moses*, 78 Ill. App. 471.

⁹⁵ *Clason v. Kehoe*, 87 Hun 368.

⁹⁶ *Robinson v. Masterson*, 136 Mass. 560.

⁹⁷ *Denton v. Wood*, 11 Lea 505; *Dawson v. Holt*, 12 id. 27.

⁹⁸ *Reitan v. Goebel*, 35 Minn. 384.

⁹⁹ *Smith v. Arthur*, 116 N. C. 871.

¹ *Rosenquest v. Noble*, 21 App. Div. (N. Y.) 583.

a justice of the peace is liable for the costs made there, although the judgment is recovered in the court of common pleas; but the liability does not extend to the costs made in the latter court.² In Kentucky damages will not be allowed on a superseded money judgment if the only relief granted on appeal is an award of costs.³

The code has adapted the security on appeal for consequential damages, where a stay of execution is desired, to the special exigence of particular cases. An appeal of itself does not operate to stay proceedings. In an action for specific performance brought by a vendor against the vendee a judgment was recovered establishing the amount due on the contract, adjudging that the defendant should be barred and foreclosed of all right, claim, etc., to the land, and directing a sale thereof by the sheriff and payment out of the proceeds of the amount adjudged to be due, and in which there was no provision for the payment of any deficiency. The defendant appealed and gave an undertaking according to section 335 of the New York code instead of section 338; it recited that a judgment had been recovered against the defendants. The judgment was affirmed, but no damages were awarded upon the appeal, and the costs were paid. An action was brought on the undertaking, and it was held that though it was not in the proper form, yet as it secured the end for which it was given and stayed all proceedings on the judgment, it was valid as against the defendants who subscribed it; that as no amount was directed to be paid by the judgment the defendants were only liable for the difference between the amount bid for the land at the time of the sale and the amount which would have been bid at the time at which the judgment directed it to be sold, with interest on such amount to the time of the actual sale; but as no difference was proved none could be presumed, and the plaintiff was only entitled to nominal damages.⁴

²Hull v. Burson, 61 Ohio St. 283.

⁴Chamberlain v. Applegate, 2 Hun 510.

³Oberdorfer v. White, 118 Ky. 291.

It may be doubted that the damages held to be recoverable, if they had been proven, were within the contract.⁵ But there being a recital of a judgment against the appellant, were not the sureties estopped from denying it? The case is briefly reported and does not disclose whether the recital stated the amount. In a case in Illinois the action was brought on an appeal bond conditioned to prosecute the appeal to effect and pay the amount of the judgment, costs, interest and damages rendered and to be rendered against the appellant in case the decree should be affirmed. Scott, C. J., remarking upon a similar point, observed: "It is urged by the defendants that the decree was *in rem*, and was not to be performed by Bischoff; and as the master in chancery has executed the decree by selling the property as directed he and his surety are discharged from all liability created by the condition of the appeal bond. This is not, in our opinion, the true construction. The bond as set out in the declaration distinctly states a decree had been rendered against Bischoff, from which he had prayed an appeal. The object he had in view was to have the execution of the decree suspended until the cause could be reviewed in the supreme court, and the bond is expressly conditioned for the payment of the judgment in the event the decree should be affirmed. The defendants are estopped by the recitals in the bond to deny what they solemnly admitted to be true, viz.: the existence of a decree against Bischoff; and the legal effect of the engagement is to pay it in case it shall be affirmed on appeal or be liable for the penalty of the bond."⁶

§ 537. **Same subject.** A statute of Indiana provides that "when any appeal is taken to the supreme court from a judg-

⁵ See *McWilliams v. Morgan*, 70 Ill. 62.

⁶ *George v. Bischoff*, 68 Ill. 236; *Meserve v. Clark*, 115 id. 580; *Gudtner v. Kilpatrick*, 14 Neb. 347; *Love v. Rockwell*, 1 Wis. 382; *Adams v. Thompson*, 18 Neb. 541; *Ogden v. Davis*, 116 Cal. 32.

If no judgment was rendered in the trial court the bond is a nul-

lity. *Brounty v. Daniels*, 23 Neb. 162. See *First Nat. Bank v. Rogers*, 13 Minn. 407, 97 Am. Dec. 239.

If the order granting an appeal is void there is no liability on the bond because it was void as a statutory bond. *American Acc. Co. v. Reigart*, 92 Ky. 142; *Schmidt v. Mitchell*, 95 Ky. 342.

ment in waste, or for the recovery of land, or the possession thereof the condition of the appeal bond, in addition to the matters hereinbefore prescribed, shall further provide that the appellant shall also pay and satisfy all damages which may be sustained by the appellee for the *mesne* profits of the premises recovered or for any waste committed thereon as well before as during the pendency of such appeal.”⁷ It was first held that a bond which did not contain a provision in substance like the statute, although it was conditioned for the prosecution of the appeal and there had been a breach of that condition, did not render the sureties liable for the rents and profits.⁸ But the late cases hold that such liability exists by virtue of the statute although the bond is silent.⁹ A bond executed in behalf of an ejectment defendant conditioned for the payment of the value of the use and occupation of the real estate pending an appeal covers liability for the use and occupation of the land without the improvements, there not having been an assessment or payment of the value of the improvements and the defendant not being responsible for their not being made.¹⁰ In an action for unlawful detainer a judgment was rendered for the plaintiff below and the bond on appeal was conditioned “to pay all costs of such appeal, and abide by the order the court may make therein, and pay all rent and other damages justly accruing to the plaintiff during the pendency of the appeal.” The plaintiffs sought to recover on the bond treble damages for which the defendant was liable, but it was held that the responsibility was limited by the terms of the bond and the treble damages claimed were not covered by the phrase “other damages justly accruing,” but only actual damages¹¹ which are the value of the use and occupation or the reasonable rental value of the premi-

⁷ R. S. 1843, p. 633.

⁸ *Malone v. McClain*, 3 Ind. 532.

⁹ *Opp v. Ten Eyck*, 99 Ind. 345;
Hays v. Wilstach, 101 id. 100.

¹⁰ *Hentig v. Collins*, 1 Kan. App. 173.

¹¹ *Chase v. Dearborn*, 23 Wis. 143.

Post v. Doremus, 1 Hun 521, has some curious features, and is an

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example of liberal construction of the contract of the sureties to effectuate their obvious intention. It was substantially modified on appeal. *Post v. Doremus*, 60 N. Y. 371. See *Reed v. Lander*, 5 Bush 598; *Whitehead v. Boorum*, 7 id. 399; *Wade v. First Nat. Bank*, 11 id. 697.

ses.¹² Later cases favor a measure of damages based on the rental value of the premises for the use for which they would command the highest price,¹³ and there may also be a recovery equal to the damages done the premises during the time possession was withheld.¹⁴ In Kentucky the value put upon the premises by the parties in a lease thereof will be taken as representing their worth.¹⁵ The rental value of the premises during the pendency of a writ of error in an action of ejectment, the money judgment being merely nominal, cannot be recovered upon a bond conditioned for the prosecution of the writ to effect and the payment of the debt, damages and costs adjudged or accrued upon such judgment, and all other damages or costs that may be awarded.¹⁶ The sureties upon an appeal and *supersedeas* bond from a decree enforcing judgment liens on land are not responsible, after the affirmance of the decree, for any portion of the rents and profits of the land while the cause was pending on appeal or for any loss sustained by the appellees on account of the debtor's receipt thereof.¹⁷ If a premature appeal causes the loss of rents of the land involved they may be recovered.¹⁸

In Alabama, Kentucky and New York an appeal bond which stays the execution of a judgment for the recovery of land or its possession, if conditioned for the payment of "all costs and such damages as the plaintiff may sustain by reason of this appeal," covers the loss of the possession and the value of the use.¹⁹ In Texas if the plaintiff in an action of trespass to try title recovers judgment for the land and the defendant recovers

¹² Shunick v. Thompson, 25 Ill. App. 619; Rehm v. Halverson, 94 id. 627, 197 Ill. 378.

Only the fair rental value may be recovered where a tenant holds over after notice that he will be required to pay increased rent, he refusing to assent thereto. McGrath v. Snell, 162 Ill. App. 635.

¹³ Cooke v. Burke, 148 Ill. App. 155.

¹⁴ Upton v. Swedish A. Hospital, 157 Ill. App. 126.

¹⁵ Dowling v. Walker, 120 Ky. 528.

¹⁶ Johnson v. Hessel, 134 Pa. 315.

¹⁷ Hutton v. Lockridge, 27 W. Va. 428; Nourse v. Weitz, 120 Iowa 708.

¹⁸ Perkins v. Watson, 92 Miss. 452.

¹⁹ Simmons v. Sharpe, 2 Ala. App. 385; Maret v. Sanders, 141 Ky. 366; Cahall v. Citizens' Mut. B. Ass'n, 74 Ala. 539; Clason v. Kehoe, 87 Hun 368.

for the value of his improvements and appeals, giving a bond conditioned to pay the plaintiff the rental value of the land pending the appeal if the judgment be affirmed, liability for such value exists notwithstanding the land would have had no rental value but for the improvements, and that the possession of the land was surrendered when the judgment for the value of the improvements was paid to the defendant. The latter was not entitled to set off against the rents that accrued pending the appeal improvements made on the land after his appeal was taken. Liability for rental value continued from the time the appeal was taken until the filing of the mandate of the appellate court in the trial court, and the sale of the land did not affect such liability, the purchaser having an assignment of the rents.²⁰ Upon the affirmance of a judgment for the sale of land to pay a debt interest on the value of the land may be recovered on the bond from the date first fixed for its sale.²¹ In Alabama if an appeal is taken from a decree distributing a fund in court, proceedings being stayed, interest may be recovered on so much of it as was detained therein, and also a reasonable attorney's fee for services in the appellate court.²² Liability for attorney's fees is denied in Kentucky and Kansas.²³ Depreciation in the value of the property because of the failure to take such care of it as a prudent person would, whether that results from theft or otherwise, is an element of damages.²⁴

Under a bond conditioned, *inter alia*, to pay all damages which, during the pendency of the appeal, may accrue by reason of the appeal, there may be a recovery for the depreciation in the value of stocks the sale of which the bond superseded. It was observed by the court: True, it is alleged that the direct cause of the deterioration of the value of the stock was caused by the directors of the company, but it is evident that this dam-

²⁰ Norton v. Davis, 13 Tex. Civ. App. 90.

²¹ Hargis v. Mayes, 20 Ky. L. Rep. 1965.

²² Drake v. Webb, 63 Ala. 596; Simmons v. Sharpe, *supra*, as to attorney's fees.

²³ Dowling v. Walker, 120 Ky. 528; Welch v. Welch, 20 Ky. L. Rep. 1990; Buckner v. Bogard, 8 Ky. L. Rep. (Ky. Super. Ct.), 701; Hughan v. Grimes, 62 Kan. 258.

²⁴ Dowling v. Walker, Maret v. Sanders, *supra*.

age or loss in the value of the stock would not have affected the appellants but for the delay caused by the *supersedeas* and appeal. If the stock had been sold under the judgment superseded the mismanagement of the company would not have affected the appellants. The fund would have been in court subject to distribution or subject to the judgment of this court on the appeal. If appellee could control the stock and prevent its loss in value she should have done so. If its value depended on the action of others over whom she had no control it seems that by the execution of the bond and the consequent suspension of proceedings under the judgment she elected to make the action of those who could control the value her action and she should abide the result.²⁵ If an appeal works delay in the appointment of a receiver of the property in controversy and during the delay the property depreciates in value such depreciation, if the natural and proximate result of the appeal, is an element in the liability of the sureties, which liability continues for such time after the return of the mandate of the appellate court as may be reasonably occupied in a diligent attempt to secure the appointment of a receiver and seizure of the property.²⁶ If it is shown that the very damages which are sought to be recovered were in the actual contemplation of the parties when the contract was entered into they may be recovered though they were to some extent contingent and remote—as the loss of the earnings of a railroad where the company has been enjoined from building across the line of another railroad.²⁷ The obligors on a bond given in a proceeding brought to reverse a judgment vacating a will are liable for the loss sustained by the successful parties by reason of being kept out of possession and prevented from exercising acts of ownership over the real property they were found to be entitled to, including waste of the property by reason of neglect and decay while the stay was in force. But shrinkage in the value of such property from

²⁵ Welch v. Welch, *supra*, also in 22 Ky. L. Rep. 1259; Bemiss v. Commonwealth, 113 Va. 189.

²⁶ Fulton v. Fletcher, 12 D. C. App. Cas. 1.

²⁷ Waycross A.-L. R. Co. v. Of-ferman & W. R. Co., 114 Ga. 727.

other than physical causes was not an element of damages, neither were the fees of counsel for services rendered in securing an affirmance of the judgment in the supreme court, nor interest on the damages for waste, the amount being unliquidated.²⁸

The condition of a bond was to prosecute the appeal with effect and satisfy and pay, in case of affirmance, the damages, charges and costs decreed below, and also all costs and damages that should be awarded by the appellate court. The appeal was from an order dissolving an injunction, thereby continuing it in force, restraining the collection or negotiation of certain drafts. In an action on this bond, after affirmance of the order, the plaintiff sought to recover the value of those drafts which were lost by reason of the delay caused by the appeal, notwithstanding such damages were not decreed in the case in which the appeal was taken. But the court held that the liability of a surety could not be extended by implication beyond the terms of his contract and that the damages proposed to be recovered were not within the bond.²⁹ The bond does not impose liability upon the sureties for the act or neglect of any person who is not restrained by it.³⁰ A bond to secure costs is limited to the plaintiff's costs,³¹ and to taxable costs.³² These rules are not every where accepted because of a different view of the rule of construction applicable to such bonds. Occasion has existed to call attention to this difference of opinion on two phases of the general subject.³³ It remains to notice some cases which apply a different view to bonds given to secure the payment of costs. A bond given to secure all costs for which the plaintiff may be liable on this suit covers costs accrued before it

²⁸ *Haughan v. Grimes*, 62 Kan. 258.

²⁹ *Fullerton v. Miller*, 22 Md. 1; *McFarlane v. Howell*, 91 Tex. 218; *Lewis v. Maulden*, 93 Ga. 758; *Drake v. Smythe*, 44 Iowa 410; *Donovan v. Clark*, 76 Hun 339; *Lutt v. Sterrett*, 26 Kan. 561.

³⁰ *Roberts v. Jenkins*, 80 Ky. 666;

Bridgford v. Fogg, 12 Ky. L. Rep. 570.

³¹ *Hielt v. Davis*, 88 Ind. 372.

³² *First Nat. Bank v. Fidelity & D. Co.*, 106 Ill. App. 367. See *American S. Co. v. Koen*, 49 Tex. Civ. App. 98.

³³ § 536.

was executed,³⁴ costs on appeal,³⁵ and costs incurred after the death of the surety, the bond expressing that "I hereby acknowledge myself security for costs."³⁶ The estate of such surety was not released by the giving of an additional bond after his death.³⁷ The surety is liable to judgment without resort to the property of the principal.³⁸ Cases of this class are to be distinguished from those against sureties generally. As was said by Chief Justice Dixon: To one consulting the decisions in this class of cases it may possibly, at first sight, seem somewhat surprising that no reference is made in them to the familiar doctrine that the obligation of a surety is *strictissimi juris*, and that nothing is to be taken against him by inference or intendment. A consideration of this doctrine might be supposed to have led to a strict construction of the statute in favor of the surety, and to a different conclusion respecting his liability. This point is explained, no doubt, by reason of the presence and operation of another rule or principle, which countervails that just alluded to, and which is that statutes of the kind, requiring security to be given for costs, being remedial in their nature, are to be liberally construed to effectuate that object.³⁹ The same principle of just and liberal construction extends to all agreements and undertakings authorized or required in the course of legal controversies before the courts.⁴⁰

Where the appeal bond is for costs and damages only the sureties are not liable for the debt.⁴¹ Damages, within the

³⁴ *Sawyer v. Williams*, 72 Fed. 296; *McClaskey v. Barr*, 79 id. 408; *Wilson v. Hudspeth*, 3 Dev. 57.

³⁵ *McClaskey v. Barr*, *supra*; *Dunn v. Sutliff*, 1 Mich. 24; *Robinson v. Plimpton*, 25 N. Y. 484; *Smith v. Lockwood*, 34 Wis. 72; *Martin v. Kelly*, 59 Miss. 664; *Hendricks v. Carson*, 97 Ind. 245.

³⁶ *McClaskey v. Barr*, *supra*.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Smith v. Lockwood*, 34 Wis. 72; *Cox v. Hunt*, 1 Blackf. 146.

See *Sutherland on Stat. Const.*, ch. 15.

⁴⁰ *Smith v. Lockwood*, *supra*.

⁴¹ *Smith v. Erwin*, 5 Yerg. 296; *Banks v. Brown*, 4 id. 198; *Gholson v. Brown*, id. 496; *Onderdonk v. Emmons*, 9 Abb. Pr. 187.

Stille v. Beauchamp, 13 La. Ann. 474: Where the bond recites the judgment and sets forth the fact that the appellant has taken a suspensive appeal from such judgment, and a blank is left for the amount to be filled up it will be presumed

prescribed terms of an appeal bond or undertaking, may be disallowed when they exceed the rights of the party claiming and the legal liability imposed on the other; as where a general

it was left in order to ascertain by calculation the amount fixed by law for the appeal, and the party signing the bond will be bound for that amount.

Ward v. Bell, 18 Ind. 104, 81 Am. Dec. 349: If the instrument given specifies no amount or contains no penalty the law will hold the obligors in it liable to the extent required by the statute, upon an appeal and *supersedeas* in such cases, on the ground of the intention of the parties executing the instrument to become liable to that extent. But sureties may expressly limit the amount of their liability by the terms of the obligation, and if they do and the officer is satisfied with it and accepts it they will not be bound beyond the amount named, but if the bond proves insufficient the officer may be liable for the deficiency.

Reeves v. Andrews, 7 Ind. 207: A sued B. before a justice; B. pleaded a set-off and recovered a judgment. A. appealed and executed a bond after the statute, but in the court above dismissed the action. B. thereupon sued him and his surety upon the bond. Held, that he had a right to dismiss; the dismissal operated to avoid the proceedings before the justice; the obligors were estopped at this stage to deny that the appeal had been taken, and that the dismissal was a breach of condition of the bond, but that the obligor was entitled to only nominal damages unless special damages were alleged and proved.

Raney v. Baron, 1 Fla. 327: A bond was conditioned that A. should

pay said damages so recovered by said B. against him and costs, in case the judgment of the said court should be confirmed. Held, that the surety in the bond was not liable for the ten per cent. damages awarded by the appellate court against the appellant, but only for the judgment and costs in the court below.

A bond which operates as a *supersedeas* and is conditioned "to pay all costs in case the decree or order of the circuit court in chancery shall be affirmed," covers as well the costs decreed and taxed to the appellee in the court below as to those in the appellate court. Daly v. Litchfield, 11 Mich. 497; Prosser v. Whitney, 46 id. 407.

By the Tennessee code, sec. 3162, in actions founded on liquidated accounts signed by the party to be charged therewith, bonds, bills single, etc., upon an appeal in the nature of a writ of error, the bond shall be taken and the securities bound for the payment of the whole debt, damages and costs, and for the satisfaction of the judgment of the superior court where the cause may be finally tried. Patrick v. Nelson, 2 Head 507.

Under a statute which provides that if any appeal shall be dismissed the surety shall be liable for the whole amount of the debt, costs and damages recovered against the appellant, the debt and damages are such as were recovered in the trial court, no judgment therefor being rendered in the appellate court. Fitzgerald v. Wellington, 37 Kan. 460.

form of undertaking is required for a class of cases usually similar, but distinguishable by individual differences, and the liability contended for does not exist in the particular case. Thus, in an action upon an undertaking executed by the defendant in a foreclosure case upon appeal, pursuant to the California practice act,⁴² it was considered that the legislature could not have intended by that section to increase the liability of the principal debtor. It was therefore held that the provision in regard to use and occupation should be understood as referring to those cases in which the creditor is entitled to the value of the use, and that an undertaking to pay what the creditor has no legal right to is not binding on the sureties; that, as this section includes orders as well as judgments, the provision in question applies more particularly to judgments and orders directing a delivery of possession.⁴³ If all of several plaintiffs or defendants appeal and execute a joint bond, as they ought, each is answerable for the entire amount. If one alone execute he is bound for the whole.⁴⁴ If a bond is given

If the bond is for the payment of the judgment and interest it is a mere security for the payment of the former and whatever discharges the judgment releases the obligors. Hence, if the appeal is dismissed without an assessment of damages and the costs thereof paid and the judgment reversed in another proceeding there is no liability for anything beyond nominal damages, although an action on the bond was begun before such reversal. *Cook v. King*, 7 Ill. App. 549.

⁴² The section referred to corresponds with sec. 338 of the New York code: "If the judgment appealed from directs the sale or delivery of possession of real property the execution of the same shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sure-

ties, to the effect that during the possession of such property by the appellant he will not commit, nor suffer to be committed, any waste thereon; and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof pursuant to the judgment, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency."

⁴³ *Whitney v. Allen*, 21 Cal. 233.

⁴⁴ *Young v. Young*, 2 J. J. Marsh. 72; *Brown v. Hancock*, 13 Tex. 21.

on an appeal from a joint judgment against all the appellants and on behalf of all of them the sureties are liable on its reversal as to all but one of their principals, it being affirmed as to him.⁴⁵ A judgment is affirmed within the meaning of an appeal bond though a finding be eliminated from the record.⁴⁶ But under some statutes the affirmance must be *in toto* to make the sureties liable.⁴⁷ The affirmance on appeal of a part of the judgment appealed from and the entry of a *remittitur* for the balance does not release the parties to the bond, their obligation being conditional on the affirmance of the judgment.⁴⁸ The condition to prosecute the appeal with effect is to be read in connection with the statute governing the particular case. Thus, if it is provided that if, in proceedings for forcible detainer, it shall appear that the plaintiff is entitled to the possession of only a part of the premises claimed the judgment shall be for that part only, a judgment for the entire building is affirmed if it awards the first floor of it and one-half the

⁴⁵ *Gilpin v. Hord*, 85 Ky. 213; *Ives v. Hulce*, 17 Ill. App. 35; *Alber v. Froelich*, 39 Ohio St. 245, overruling *Lang v. Pike*, 27 id. 498; *Lutt v. Sterrett*, 26 Kan. 561.

⁴⁶ *Foster v. Epps*, 27 Ill. App. 235.

"Affirmed" means in effect an affirmance, as where, on appeal from a justice's court, there is a trial *de novo*, and the appellee may elect whether to have judgment for the amount of the recovery appealed from or have the appeal dismissed; whichever is done the judgment is in effect affirmed. *Best B. Co. v. Klassen*, 85 Ill. App. 464.

If the assessment made by the assessor of a taxpayer's property is largely increased by the supervisors and, on his appeal, is considerably reduced though left materially larger than it was fixed by the assessor, the matter has been decided against him and he

is liable for the statutory damages. *Atkinson & B. Co. v. Pike County*, 73 Miss. 348.

In a creditor's suit to annul fraudulent deeds after an appeal from an interlocutory order a receiver was appointed and sold so much of the property in controversy as could be found; a reference was had to the auditor; whose report distributing the proceeds of the sale, was ratified by a decree. This decree had the effect of vacating and annulling such deeds and was final to such an extent as authorized a suit upon the appeal bond although no formal decree was entered vacating and annulling the deeds. *Fulton v. Fletcher*, 12 D. C. App. Cas. 1, 15.

⁴⁷ *Howie v. Bonds*, 87 Miss. 698; *Heinlen v. Beans*, 71 Cal. 295. See *Chase v. Ries*, 10 Cal. 517.

⁴⁸ *Harding v. Kuessner*, 172 Ill. 125.

basement to the plaintiff; the bond was conditioned against such a judgment.⁴⁹ If the principal issue on appeal is between co-defendants and it is decided against the respondent, although his liability is fixed at less than the sum claimed, he is the losing party.⁵⁰ The failure to perfect an appeal operates as an affirmance of the judgment rendered.⁵¹

The designated amount is the limit of the liability of the sureties,⁵² except where interest is allowed as damages for delay in paying,⁵³ and where costs may be imposed regardless of the sum named in the bond.⁵⁴ Although it be true that an appellant debtor was insolvent when an appeal bond was executed it cannot be assumed that if execution had then issued and been levied that an assignment for the benefit of creditors would have been made and the levy thereby defeated. Such a defense is too speculative to mitigate the liability of the sureties.⁵⁵ In an action upon a *supersedeas* bond against the principal and sureties a legal claim due from the plaintiff to the principal may be set off.⁵⁶

§ 538. Interest and damages awarded on appeal. By section 23 of the judiciary act it is provided that where the supreme court shall affirm the judgment or decree they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs, at their discretion. There are similar statutes in the states, but there is generally a limitation to a certain per cent. In the federal courts the rate and limit were fixed by rule in 1803 and 1807 at ten per cent. per annum on the amount of the judgment to the date of affirmance where the suit was for mere delay, and six per cent. where there was a real controversy. In both cases the interest was computed as part of the damages and had to be specially

⁴⁹ *Rehm v. Halverson*, 94 Ill. App. 627, 197 Ill. 378.

⁵⁰ *Flannagan v. Cleveland*, 44 Neb. 58; *Healy v. Newton*, 96 Mich. 228.

⁵¹ *Murray v. Aiken M., etc. Co.*, 39 S. C. 457.

⁵² *Graeter v. De Wolf*, 112 Ind. 1;

Zeigler v. Henry, 77 Mich. 480.

⁵³ *Crane v. Andrews*, 10 Colo. 265; §§ 477, 478.

⁵⁴ See § 525.

⁵⁵ *Vent v. Duluth T. Co.*, 77 Minn. 523.

⁵⁶ *Van Etten v. Kosters*, 48 Neb. 152.

allowed. If upon the affirmance no allowance of interest or damages was made it was equivalent to a denial thereof, and the circuit court in carrying into effect the decree of affirmance could not enlarge the amount thereby decreed, but was limited to the mere execution of the decree in the terms in which it was expressed.⁵⁷ There was no liability for interest or damages after the date of affirmance, unless so allowed, until 1842, when it was provided by act of congress "that on all judgments in civil cases hereafter recovered in the circuit or district courts of the United States interest shall be allowed and may be levied by the marshal, under process of execution issued thereon, in all cases where by the law of the state in which such circuit or district court shall be held interest may be levied under process of execution on judgments recovered in the courts of such state, to be calculated from the date of the judgment and at such rate per annum as is allowed by law on judgments recovered in the courts of such state." ⁵⁸

In 1852 the supreme court, by rule 62, still further extended the provision for interest, and both interest and damages are now regulated by rule 23, which declares: 1. The interest is to be calculated and levied from the date of the judgment below until the same is paid, at the same rate as interest on judgments in the state courts. 2. That where a writ of error delays the proceedings on a judgment, and appears to be sued out for delay, ten per cent. in addition to the interest is to be allowed upon the amount of the judgment. The same rule is to be applied to the decrees for the payment of money in cases in chancery unless otherwise ordered by the court. This third clause is intended doubtless to adopt for chancery cases the "same rule" as to interest only. The second clause can only be applied by an affirmative finding that the proceeding has been taken for delay, and hence is not a rule which could take effect unless otherwise ordered. The court, however, under section 23 of the judiciary act, has authority to award

⁵⁷ *Boyce v. Grundy*, 9 Pet. 275, 9 L. ed. 127; *Perkins v. Fourniquet*, 14 How. 313, 14 L. ed. 435.

⁵⁸ 5 Stats. at Large, 508; sec. 966, R. S. of U. S.

just damages and single or double costs at its discretion as well in equity as in law cases. In admiralty a different rule as to interest or damages prevails. In such cases there is a discretionary power to add to the damages allowed in the court below further damages by way of interest. But this allowance of interest is not an incident of affirmance affixed to it by law or by rule of court. If given by the court it must be in the exercise of its discretionary power and, *pro tanto*, is a new judgment.⁵⁹

If the money of a party is tied up by an appeal interest may be allowed on it as damages covered by the appeal bond.⁶⁰ If a superseded money judgment does not bear interest it cannot be recovered on the bond as damages.⁶¹ No damages will be allowed on appeals and writs of error except on money judgments or decrees.⁶² Damages are allowed for delaying the plaintiff, where delay is the object and there is no ground or expectation of reversal in whole or in part.⁶³ Statutes author-

⁵⁹ *Hemmenway v. Fisher*, 20 How. 255, 15 L. ed. 799; *Phillips' Prac.* 191. See § 518, vol. 2, *Foster's Fed. Prac.* (3d ed.).

⁶⁰ *National Bank of Illinois v. Baker*, 58 Ill. App. 343; *Bostrom v. Gibson*, 111 id. 457 ("interest and damages").

Interest may not be recovered on money held in escrow under a bond conditioned to pay costs, interest and damages. *Schaefer v. American B. & T. Co.*, 137 Ill. App. 168.

⁶¹ *Louisville & N. R. Co. v. Sharp*, 91 Ky. 411.

⁶² *Arrowsmith v. Rappelge*, 19 La. Ann. 327; *Long v. Robinson*, 13 id. 465; *Hodges v. Holeman*, 5 Dana 136.

⁶³ *Lew v. Katz*, 187 Ill. App. 460; *First Nat. Bank of Princeton v. Ficklin*, 185 Ill. App. 381; *First Nat. Bank of Champaign, Ill. v. John A. Bryant Piano Co.*, 185 Ill. App. 119; *Wittenberg v. Fisher*,

183 Mo. App. 347; *Joseph T. Ryerson & Son v. Crawford Locomotive & Car Co.*, 187 Ill. App. 640 (allowing \$400 for prosecuting an appeal for delay); *Chicago T. T. R. Co. v. Bomberger*, 130 Fed. 884, 65 C. C. A. 64; *Goff v. Healey*, 2 Cal. App. 95; *Florence O. & R. Co. v. McRae*, 40 Colo. 303; *McMurria v. Powell*, 120 Ga. 766; *Light v. Reed*, 234 Ill. 626; *Chicago & A. R. Co. v. Moore*, 117 Ill. App. 147; *Bater v. Bater*, 2 Ga. App. 62; *Watzlavzick v. Oppenheimer*, 38 Tex. Civ. App. 306; *Cotton v. Wallace*, 3 Dall. 302, 1 L. ed. 612; *Barrow v. Hill*, 13 How. 54, 14 L. ed. 48; *Lathrop v. Judson*, 19 id. 66, 15 L. ed. 553; *Kilbourne v. State Institution*, 22 id. 503, 16 L. ed. 370; *Sutton v. Bancroft*, 23 How. 320, 16 L. ed. 454; *Jenkins v. Banning* id. 455, 16 L. ed. 580; *Prentice v. Pickersgill*, 6 Wall. 511, 18 L. ed. 790; *Campbell v. Wilcox*, 10 id. 421, 19 L. ed. 973; *Warner v. Lessler*, 33

izing the imposition of damages when appeals from judgments, orders or decrees for the recovery of money are dismissed for want of prosecution or other enumerated causes are penal in their character and cannot be extended by construction beyond the clear legal meaning of their terms. A decree of foreclosure and the dismissal of a cross-bill is not a decree for the recovery of money; such a statute contemplates only cases in which the judgment, etc., appealed from is for the recovery of money from the appellant.⁶⁴ Under a statute authorizing the imposition of ten per cent. damages on the affirmance or dismissal of an appeal from a judgment for the payment of money the computation is to be made on the amount of the judgment at the time it was superseded although the *supersedeas* prevented the collection of interest.⁶⁵

§ 539. **Same subject.** The court will not award damages unless the proceeding is in this sense taken in bad faith,⁶⁶ or, as it is sometimes expressed, unless the appeal or writ of error was clearly frivolous and taken in bad faith.⁶⁷ They have been

N. Y. 296; *Maier v. Carman*, 38 id. 25; *Winfield v. Potter*, id. 67; *Murray v. Mumford*, 2 Cow. 400; *Lehane v. Keyes*, 2 Nev. 361; *Ramsay v. Davis*, 20 Wis. 31; *Russell v. Williams*, 2 Cal. 158; *Magruder v. Melvin*, 12 Cal. 559; *Cady v. Scaniker*, 1 Idaho 198; *Whittlesey v. Sullivan*, 33 Mo. 405; *Owings v. McBride*, 32 id. 221; *Robinson v. Starley*, 29 Ind. 298; *Hutchinson v. Ryan*, 11 Cal. 142; *Wright v. Sanders*, 3 Keyes 323; *Amory v. Amory*, 91 U. S. 356, 23 L. ed. 436; *Dzialniski v. Bank*, 23 Fla. 346; *Perkins v. Jacobs*, 99 Wis. 409.

A judgment dissolving an injunction restraining the collection of an execution is not for the recovery of money although it states in an advisory way the sum that may be collected. *Mulholland v. Troutman*, 10 Ky. L. Rep. 263 (Ky. Super. Ct.).

It must clearly appear that the appeal was taken for delay only. *Everett v. Ingram*, 142 Ga. 145, or that there was no just cause for taking it. *W. A. Leyhe Piano Co. v. American Multigraph Sales Co.*, — Tex. Civ. App. —, 171 S. W. 494.

⁶⁴ *Hamburger Co. v. Glover*, 157 Ill. 521.

An order to pay money to a receiver is a judgment for the payment of money. *Robinson v. Corsicana C. Factory*, 124 Ky. 435, 8 L.R.A. (N.S.) 474.

⁶⁵ *Popp v. L. & N. R. Co.*, 101 Ky. 157.

⁶⁶ *Story v. Bird*, 8 Mich. 316; *Hartridge v. McDaniel*, 20 Ga. 398; *Northwestern L. Ins. Co. v. Starkweather*, 38 Wis. 361; *Morse v. Buffalo Ins. Co.*, 30 Wis. 534, 11 Am. Rep. 587; *Tobin v. Missouri Pac. R. Co.* (Mo.), 18 S. W. 906.

⁶⁷ *Ossouski v. Wiesner*, 101 Wis.

allowed for the reason that all the questions raised have been previously settled by the court of last resort or are decided by reference to plain elementary principles;⁶⁸ and also where there is no bill of exceptions or statement of facts, and no error is suggested or apparent in the record;⁶⁹ and in some states for default in filing a transcript;⁷⁰ in not taking other necessary steps;⁷¹ and where the only error was a trivial one in the computation of interest and would have been corrected if the attention of the trial court had been called to it;⁷² or on abandonment of the appeal;⁷³ or where the appellate court

238; *Atlanta, etc. R. Co. v. Minchew*, 7 Ga. App. 566; *Chicago v. Saldman*, 129 Ill. App. 282; *Brockway v. McClun*, 148 Ill. App. 465; *Hirsch v. Chicago Con. T. Co.*, 146 id. 501; *Hackley State Bank v. Magee*, 128 La. 1008; *Zahm v. Royal F. Union*, 154 Mo. App. 70; *Ferrandini v. Bankers' L. Ass'n*, 51 Wash. 442; *Willis v. Ivy*, 16 Ariz. 120; *Langworthy v. Hulette*, 187 Ill. App. 162; *Merchant's Loan & Trust Co. v. Hulette*, 187 Ill. App. 161; *Bradley v. Federal L. Ins. Co.*, 178 Ill. App. 524; *Pedersen v. Sorensen*, 162; *Merchants' Loan & Trust Co. United States F. & G. Co.*, 131 La. 933; *Missouri, etc. R. Co. v. Pitkin* (Tex. Civ. App.), 158 S. W. 1035.

That the payee of notes should allege that it is the holder and owner thereof is not so frivolous a ground of appeal that they will conclude therefrom that the appeal was taken for delay only. *Bryan v. Wharton Bank & Trust Co.*, — Tex. Civ. App. —, 174 S. W. 827.

⁶⁸ *Florence O. & R. Co. v. First Nat. Bank*, 38 Colo. 119; *Sheridan v. Peoria R. Co.*, 241 Ill. 469; *Chicago v. Blaine*, 126 Ill. App. 102; *United States Ben. Soc. v. Watson*, 41 Ind. App. 452; *Connellee v.*

Latham (Tex. Civ. App.), 140 S. W. 368; *Galveston, etc. R. Co. v. Nations M. & S. Co.* (Tex. Civ. App.), 136 S. W. 833; *Pinkham v. Wemple*, 12 Cal. 449; *Kraft v. Auw*, 192 Ill. 574; *Potter v. Leviton*, 199 Ill. 93, 15 Am. Neg. Rep. 689; *In re McKenna's Estate*, 168 Cal. 339; *Weinstock-Nichols Co. v. Courtney*, 26 Cal. App. 445; *Morrow T. Co. v. Heard*, 11 Ga. App. 187; *Denning v. Carlisle P. Co.*, 226 U. S. 102, 57 L. ed. 140; *Maggill v. Young* (Tex. Civ. App.), 153 S. W. 184; *Wallace v. Prudential Ins. Co.*, 174 Mo. App. 110.

⁶⁹ *Santa Rosa Bank v. Paxton*, 149 Cal. 195; *Chambers v. Hodges*, 3 Tex. 517; *Whittlesey v. Sullivan*, 33 Mo. 405; *Owings v. McBride*, 32 Mo. 221.

⁷⁰ *Chicago Federation v. American Musicians' Union*, 234 Ill. 504; *Anonymous*, 11 Ill. 87; *Simmang v. Smith* (Tex. Civ. App.), 150 S. W. 494.

⁷¹ *Stafford v. Anders*, 10 Fla. 211; *Hall v. Kennedy*, Sneed 124; *Dodson v. Bolard* (Tex. Civ. App.), 150 S. W. 317.

⁷² *Rountree v. I. X. L. L. Co.*, 106 Cal. 62.

⁷³ *Hohl v. Meyer*, 7 La. Ann. 18.

had no jurisdiction of the appeal.⁷⁴ In some states the mere fact that the appellant did not submit evidence to support his defense or failed to prosecute his appeal does not show that it was frivolous so as to subject him to damages.⁷⁵ For the mere failure to file a transcript, no actual damages being shown and it not appearing that the appeal was taken for delay, the allowance cannot exceed interest on the judgment and costs.⁷⁶ In the absence of the record it cannot be determined that an appeal was taken merely for delay.⁷⁷ Although an appeal was taken for that purpose if the judgment bears interest and the respondent will be reimbursed for costs and attorney's fees incurred respecting the motion to dismiss no further liability will be imposed on the appellant unless special damages are shown to have been sustained.⁷⁸ If there is error in the judgment the court will not award damages, even though the error is so small that they refuse to disturb the judgment,⁷⁹ nor where, although reversible error appears, the proceedings below were irregular.⁸⁰ Nor will they allow damages where the appeal proves unsuccessful by a change in the law, as by the emancipation of slaves.⁸¹ Where the court below erroneously excluded evidence necessary for the recovery of double damages and the verdict and judgment were given for single damages,⁸² where the appellants are not themselves indebted to the appellees and no decree for money has been rendered against them;⁸³ where the decision involves questions of fact and the evidence is conflicting,⁸⁴ or where there is palpable error in the proceedings, although it cannot be relieved against because of

⁷⁴ *Nelson County v. Bardstown*, 123 Ky. 836.

⁷⁵ *Hallidie Mach. Co. v. Hayden-C. A. I. Co.*, 56 Wash. 11; *Pearse v. Goddard*, 1 Tyler 373; *Gilmore v. Wright*, 20 Ga. 198; *Hull v. Tommy*, 30 Ga. 762. See *Madison, etc. R. Co. v. Briscoe*, 18 B. Mon. 570.

Advice of counsel will not relieve appellant from damages if there is no semblance of merit in the appeal. *Cauthen v. Barnesville Bank*, 68 Ga. 287.

⁷⁶ *Seattle & M. R. Co. v. Joergenson*, 3 Wash. 622.

⁷⁷ *Walter v. Maresch*, 3 Wash. 624.

⁷⁸ *Wheeler v. Commercial I. Co.*, 22 Wash. 546.

⁷⁹ *Simons v. Burrows*, 6 La. Ann. 358.

⁸⁰ *McGuire v. Gilbert*, 180 Ill. 96.

⁸¹ *Henderson v. Montgomery*, 18 La. Ann. 211.

⁸² *Waddell v. Chicago, etc. R. Co.*, 20 Iowa 9.

⁸³ *Rowan v. Pope*, 14 B. Mon. 102. See *Northwestern L. Ins. Co. v. Irish*, 38 Wis. 361.

⁸⁴ *Barbee v. Findlay*, 221 Ill. 251

delay in objecting,⁸⁵ damages for a frivolous appeal will not be allowed. Nor will they be awarded to a respondent upon affirmance of a judgment fully paid and satisfied before the taking of the appeal. This rule was applied to a case where the plaintiff in a foreclosure decree purchased the property at the sale for the full amount of the debt, including costs and interest, and the sale had been confirmed before the appeal. It was considered that the statute providing for damages on affirmance did not reach such a case, or, at least, was quite inoperative, for there could be no delay of payment to complain of arising from the appeal.⁸⁶ Part payment of the judgment below will relieve from damages *pro tanto*.⁸⁷ So where a *supersedeas* bond is executed, but a *supersedeas*, though necessary to stay proceedings, is not actually issued, no damages will be allowed.⁸⁸ In Oregon damages are not allowed except where there has been an abandonment of the appeal.⁸⁹ They will not be allowed in such a case where the appellant, before expiration of the time for appealing, offered to pay the judgment and the transcript was filed by the respondent.⁹⁰ Nor will they be allowed if a principal defendant who has not appealed would be liable therefor.⁹¹ Attorney's fees expended in resisting an unsuccessful appeal cannot be recovered in an action on an appeal bond.⁹²

SECTION 9.

MISCELLANEOUS BONDS.

§ 539a. Receiver's bonds. The sureties on the bond of a wrongfully appointed receiver who sells property are liable for

(and no application was made in the appellate court); Austin v. Moore, 16 La. Ann. 218.

⁸⁵ Kinsella v. Cahn, 185 Ill. 208.

⁸⁶ Northwestern L. Ins. Co. v. Irish, 38 Wis. 361.

⁸⁷ Brady v. Holderman, 19 Ohio 26.

⁸⁸ Reed v. Lander, 5 Bush 598; Whitehead v. Boorum, 7 id. 399; Wade v. First Nat. Bank, 11 id. 697.

⁸⁹ Nelson v. Oregon R. & N. Co., 13 Ore. 141.

⁹⁰ Lester v. Elwert, 25 Ore. 102.

They are not allowed against a *quasi* corporation which is trustee for public funds. Chiles v. School Dist. 111 Mo. App. 52.

⁹¹ Stepina v. Conklin L. Co., 134 Ill. App. 173.

⁹² Higgins v. J. I. Case Threshing Mach. Co., 95 Neb. 3.

the loss sustained by the suspension of the business in which the property was used.⁹³ If it is restored to the owner there is liability for its rental value during the time it was withheld; that liability is not lessened by the costs of the receivership or by money paid by the receiver for repairs on it otherwise than upon necessity. There also may be a recovery for the services of counsel in procuring the dissolution of the order appointing the receiver.⁹⁴ Sureties on a receiver's bond are liable for loss of property resulting from the receivership though no fault on the part of the receiver be shown.⁹⁵ While an averment by a defendant in receivership proceedings that the property is not worth over a specified amount will not estop him, in an action for damages on the receiver's bond from showing it to have a greater value such averment is an admission which the jury may take into consideration in fixing the amount of his damages.⁹⁶

§ 539b. **Bail bonds in civil actions.** The distinction between bail bonds in civil actions and penal bonds and the statutes governing them is pointed out in an Arkansas case which also lays down the procedure which should be followed in actions on bail bonds. The limited number of actions brought on these bonds does not warrant an extended review of the procedure, which varies somewhat in the several states. In the case referred to the damages were measured on failure to surrender the principal or satisfy the judgment against him by the recovery in the original suit, with interest thereon, not to exceed the penalty of the bond.⁹⁷ That measure of recovery is not improper because the declaration was amended, as a matter of right at the trial by increasing the demand of damages to a sum in excess of that specified in the bond. The sureties were not thereby released because they became such with knowledge that the right might be exercised; and the extent of their liability was not thereby affected.⁹⁸ The rule of damages is the same

⁹³ *Haverly v. Elliott*, 39 Neb. 201.

⁹⁴ *Joslin v. Williams*, 76 Neb. 594,
602.

⁹⁵ *Lyon v. United States Fidelity
& Guaranty Co.*, 48 Mont. 591.

⁹⁶ *Lyon v. United States Fidelity
& Guaranty Co.*, 48 Mont. 591.

⁹⁷ *Leech v. Pirain*, 5 Ark. 118.

⁹⁸ *New Haven Bank v. Miles*, 5
Conn. 587.

where the judgment is against husband and wife jointly though she has no separate estate and both are without property—the original judgment, interest thereon from the time of the return of *non est* on the execution, with the cost of the writ and the fees of the officer.⁹⁹ The amount due on an execution, with interest thereon, is the sum to be recovered in an action for the breach of a bond to procure the release of a defendant from arrest upon *mesne* process.¹ To vary that rule in case judgment has been recovered he must make it appear that he was not possessed of attachable property at the time of the breach of the condition of the bond.² Where a debtor, surrendered to the custody of an officer, gives a bond as security and escapes the officer may mitigate his *prima facie* liability for the whole sum due from the debtor to a nominal amount by showing that the plaintiff consented to an *exoneretur*.³ The sureties on a forfeited recognizance to appear before a justice of the peace to answer a charge of bastardy cannot avoid liability for the judgment subsequently rendered in the circuit court by showing that their principal was insolvent, or that the record of the justice showing a forfeiture of the recognizance was fraudulently made up.⁴ But in Upper Canada in an action by the assignees of the sheriff on a bond for the jail limits the damages may be reduced to a nominal sum by showing the insolvency of the debtor from the time of his arrest until his death.⁵ The court of common pleas of the same jurisdiction reached a contrary conclusion, notwithstanding the decision above noted, in a case begun before it was announced; the damages were measured by the sum for which the debtor was in custody, with interest thereon though he was insolvent from the time of his arrest until the breach of the bond sued upon.⁶ The actual damages sustained by the breach of a poor debtor's bond measures the recovery where he makes a disclosure and takes the required oath before *de facto* officers, though they are

⁹⁹ Hall v. White, 27 Conn. 488.

¹ Richards v. Morse, 36 Me. 240;
Call v. Foster, 52 id. 257.

² Sargent v. Pomroy, 33 Me. 388.

³ Kellogg v. Manro, 9 Johns. 300.

⁴ Rooksby v. State, 92 Ind. 71.

⁵ Brown v. Paxton, 19 Up. Can.
O. B. 426.

⁶ Kerr v. Fullarton, 10 Up. Can.
C. P. 250.

not those before whom he should have appeared.⁷ In Maryland where an applicant for a discharge under the insolvent debtors acts fails to appear in accordance with the conditions of his bond the amount of the creditor's claim measures the damages regardless of the insolvency of the debtor.⁸ There cannot be added to the debt and costs, in which may be included the costs of assessing the damages, a further assessment made by the jury;⁹ and costs are the damages less than the debt, and interest because the debtor, after his escape, offers to return as a prisoner; the officer might, but was not bound, to receive him.¹⁰ Where the bond for prison bounds is not a mere indemnity to the sheriff and he may assign it to the prisoner's creditor the latter may, on the breach, elect to pursue and retake the debtor or to abandon his execution as abortive or resort to an action on the bond, and recover the amount of the debt, with interest and costs.¹¹ The voluntary return of a debtor to the jail limits does not bar an action on the undertaking if he was served with process when outside the limits; and his insolvency does not mitigate the liability of his sureties.¹² In addition to the penalty of the bond, interest may be recovered from the time the defendant was in default, the date when the execution against his body was returned unsatisfied.¹³

§ 539c. **Arbitration bonds.** On the confirmation by the court of an award made under a statutory arbitration (but not otherwise) an action will lie on the bond executed to secure performance thereof; the damages are measurable by the amount of the judgment confirming the award, with interest and costs, not to exceed the penalty of the bond.¹⁴ In New York, though no award is made, the revocation of a submission by a party who has deposited a pledge to secure the payment of an award

⁷ Houghton v. Lyford, 39 Me. 267.

⁸ Kiersted v. State, 1 G. & J. 231.

⁹ Smith v. Jansen, 8 Johns. 111.

¹⁰ Seymour v. Harvey, 8 Conn. 63; Spader v. Frost, 4 Blackf. 190.

¹¹ McGuire v. Pierce, 9 Gratt. 167; Hubbard v. Harrison, 1 Bibb. 550.

¹² Flynn v. Union S. & G. Co., 61

App. Div. (N. Y.) 170.

¹³ Steinbock v. Evans, 122 N. Y. 551.

¹⁴ Shroyer v. Bash, 57 Ind. 349, 26 Am. Rep. 57.

authorizes the foreclosure of the pledge to meet the costs, expenses and damages incurred in preparing for and conducting the arbitration. It is not competent for the parties to an arbitration by any agreement they make concerning the costs thereof, if an award should be made, to avoid the rule of liability imposed by the statute for revoking the submission. But for the statute the liability would have been for all damages caused by the breach, including the amount for which an award should have been made.¹⁵ Where the sum awarded is payable in instalments, the last two of which were to be secured upon real estate and paid at a future time, the failure to pay the instalment due or to give the security was cause for assessing all the damages sustained by the successful party though the time for the payment of the last instalments had not arrived. Under the facts the amount of plaintiff's claim was not unreasonable as a measure of damages.¹⁶ The penal sum mentioned in a bond in the usual form is to be considered a penalty, and not as liquidated damages.¹⁷ The plaintiff may not recover the expenses incurred in defending a suit in equity to set aside the award; having recovered his costs in that suit, he has been, as matter of law, fully indemnified therefor.¹⁸

¹⁵ Union Ins. Co. v. Central T. Co., 157 N. Y. 633, 44 L.R.A. 227.

¹⁶ Bond v. Bond, 16 Up. Can. C. P. 327.

¹⁷ Stewart v. Grier, 7 Howst. 378; Henry v. Davis, 123 Mass. 345.

¹⁸ Henry v. Davis, *supra*.

CHAPTER XII.

NOTES AND BILLS.

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§ 540. **Promissory notes and bills of exchange.** The liability of parties to these instruments varies according to their relations to them. There is an essential difference in their contracts, and these are subject to different laws. Each party must pay such damages as result naturally and proximately from a breach of his particular contract as interpreted by law. The *maker of a note* enters into an express agreement absolutely to pay a sum certain, either presently or at a specified time in the future, to a person named, or to his order or the bearer. When notes are drawn according to the usual forms their requirements are plain to the common understanding. These forms are, however, sometimes departed from and not being precise in language the short and indeterminate expressions used require interpretation. The liability of an *acceptor of a bill of exchange* is similar to that of the maker of a note. His agreement is to comply with the request contained in the bill. An absolute acceptance is an engagement to pay according to the tenor of the bill, and a conditional or partial one obliges

him to pay according to the tenor of the acceptance.¹ He is primarily and originally liable to pay the bill, but this liability originates in the acceptance, and he is under such obligation only as attaches thereby.²

The measure of damages for non-performance of an agreement to accept for the drawer's accommodation a draft which is still in his hands is the loss and inconvenience thereby occasioned to him, and not the amount of the draft.³ One who draws without authority cannot recover as damages the sum he is compelled to pay in consequence of the draft being returned protested.⁴ A contract results from an acceptance as absolute and certain as from making a note. The amount payable at maturity by the acceptor or maker is ascertained from the face of the paper by similar rules.⁵ After default the sum recoverable by the holder is also determinable against both by like rules; but the acceptor stands in a peculiar relation to the drawer, and the drawer to indorsers, as do also the indorsers of a bill to each other in respect to re-exchange or damages in lieu thereof. These peculiarities will receive attention in the proper connection. The sum recoverable from the several parties includes principal and interest, together with the notarial fees where a protest is necessary or authorized to fix the liability of secondary parties,⁶ and sometimes exchange and re-exchange.

¹ *Huston v. Newgass*, 234 Ill. 285; *Thomas v. Thomas*, 7 Wis. 476; *Chitty on Bills*, 303; *Story on Bills*, § 238; 1 *Par. on Cont.* 281.

² *Chitty on Bills*, 304; *Anderson v. Anderson*, 4 *Dana* 352.

³ *Ilsey v. Jones*, 12 *Gray* 260.

⁴ *Rouvert v. Patton*, 12 *S. & R.* 253.

⁵ *Story on Prom. Notes*, § 114.

⁶ *Doughty v. Hildt*, 1 *McLean* 334; *City Bank v. Cutter*, 3 *Pick.* 414; *Noyes v. White*, 9 *Kan.* 640; *Knowles v. Armstrong*, 15 *Kan.* 371; *Ticknor v. Branch Bank*, 3 *Ala.* 135; *Curtis v. Buckley*, 14

Kan. 449; *Woolley v. Van Volkenburgh*, 16 *Kan.* 20; *Loud v. Merrill*, 47 *Me.* 351; *Weldon v. Buck*, 4 *Johns.* 144; *Bowen v. Stoddard*, 10 *Metc. (Mass.)* 375; *Cook v. Clark*, 4 *E. D. Smith* 213; *Merritt v. Benton*, 10 *Wend.* 116.

If it is necessary or more convenient for the indorsee to send notice to the indorser by special messenger he may do so and recover the expense. *Pearson v. Crallan*, 2 *Smith* 404 (1805).

Neither fees for protest nor statutory damages are recoverable except where the protest is necessary to fix

§ 541. **Principal sum.** A note or bill is by definition made for a *sum certain* payable in money.⁷ Hence, if it is valid and subject to be enforced according to its terms that precise sum as principal is to be recovered.⁸ Where the party sued is liable for the full amount the person having the legal title may recover it though some other person is entitled to the proceeds, if the suit be brought with his consent and for his benefit, as where the plaintiff is an agent for collection, although the beneficial interest of such plaintiff extends only to a part of the amount due. The surplus would, in such case, be held by him as trustee for any other party entitled to receive it. Thus, if a bill be drawn in the regular course of business, as for money really due from the drawee to the drawer, in order to avoid several actions an indorsee, though he has not given the full value of it, may recover the whole sum payable and will hold the overplus as trustee for the indorser.⁹ And if

the liability of some party to the note or bill. *Cramer v. Eagle Mfg. Co.*, 23 Kan. 399.

Protest fees may not be recoverable of the maker of a note which has never passed out of the hands of the original holder. *Modern Laundry v. Dilley*, 111 Ark. 350.

⁷ *Smith v. Myers*, 207 Ill. 126. See *Loring v. Anderson*, 95 Minn. 101; *Cogwill v. Robberson*, 75 Mo. App. 412. See § 559.

A stipulation in a note given for a policy of insurance to the effect that in case of loss the debt evidenced by it should become at once due and be deducted from the loss is available against one who purchased it. *Van Arsdale-O. B. Co. v. Martin*, 81 Kan. 499, differing from *Van Arsdale v. Edwards*, 24 Okla. 41.

⁸ *Columbian Conservatory v. Dickenson*, 158 N. C. 207.

⁹ *Loeb v. Weil*, 126 C. C. A. 430, 209 Fed. 608; *Stanley v. Penny*, 75 Kan. 179; *Greene v. McAuley*, 70

Kan. 601, 68 L.R.A. 308; *Manlet v. Park*, 68 Kan. 400, 66 L.R.A. 967; *Lowell v. Bickford*, 201 Mass. 543; *Walfboro L. & B. Co. v. Rollins*, 195 Mass. 323; *Benton v. Sikyta*, 84 Neb. 808, 24 L.R.A. (N.S.) 1057; *Eagle M. & I Co. v. Lund*, 14 N. M. 417; *Dickinson v. Bull*, 72 Ill. App. 75; *Abell Note B. & B. Co. v. Hurd*, 85 Iowa 559; *Lehman v. Press*, 106 Iowa 389; *Meadowcraft v. Walsh*, 15 Mont. 544; *Roberts v. Parrish*, 17 Ore. 583; *Roberts v. Snow*, 27 Neb. 425; *Wintermute v. Torrent*, 85 Mich. 555; *Wilson v. Tolson*, 79 Ga. 137; *Seybold v. Grand Forks Nat. Bank*, 5 N. D. 460; *Anderson v. Reardon*, 46 Minn. 185; *Giselman v. Starr*, 106 Cal. 651; *Wetmore v. Hegeman*, 88 N. Y. 72. This doctrine is so thoroughly established that it has been embodied in the "negotiable instruments law" of several states. *Crawford's Anno. Neg. Inst. Law*, § 90.

The interest of the acceptor is

the holder receive part payment of the first indorser he may, nevertheless, recover the whole against the drawer and acceptor;

not liable to be affected by the state of accounts or equities between the other parties connected with the bill; and the only questions in which he has any interest are whether the party seeking to enforce payment by him is the legal owner of the bill and whether recovery and payment to such party will be a satisfaction and absolute discharge of his liability. *Greene v. McAuley*, 70 Kan. 601, 68 L.R.A. 308; *Jones v. Broadhurst*, 9 M., G. & S. 173, 67 Eng. C. L. 173, per Cresswell. But *Wilde, C. J.*, said: "I suppose the drawer of an accommodation bill pays the amount to the holder: what is the reasonable intendment of the payment? If he does not make the payment in satisfaction and discharge of the holder's claim against every party on the bill, what good does he get by changing the plaintiff against him? The drawer of an accommodation bill is, in truth, the only party ultimately liable upon the bill. A person standing in that position, when he pays the bill, must be understood to make the payment in satisfaction of all claims against any one upon the bill."

This case was very thoroughly argued and carefully considered upon principle and authority. And it was held that a bill accepted for value may be collected by the holder in an action against the acceptor, notwithstanding it has been paid to such holder by the drawer, it not appearing that such payment was made in behalf of the acceptor. It affirms the right of the holder to recover for the use of the party paying him, citing *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*,

1 M. & P. 11, 14 Eng. C. L. 241, 4 Bing. 390, 3 C. & P. 134; *Reid v. Furnival*, 1 Cr. & M. 533; *Ex parte De Tastet*, 1 Rose 10. But if the acceptor has a defense which would be good against the bill in the hands of the party who has paid it to the plaintiff, he may use that as an equitable defense to the extent that the action is prosecuted for the use of that party. *Thornton v. Maynard*, L. R. 10 C. P. 695. To a declaration by the holder against the acceptor of several bills of exchange the defendant pleaded by way of equitable defense that the drawers became bankrupt, and that the plaintiff received 425*l.* as a dividend from their estate on account of the bills, and as to that sum was suing only as trustee for the drawers; and the plea claimed to set off a debt due to the defendant from the drawers. Held, a good equitable defense *pro tanto*. *Agra v. Leighton*, L. R. 2 Ex. 56; *Cochrane v. Greene*, 9 C. B. (N. S.) 448; *Elkin v. Baker*, 11 id. 526; *Clark v. Cort*, Cr. & Ph. 154. Lord Coleridge, C. J., said: "These cases * * * appear to establish the soundness of these two propositions: 1. That the holder, having been paid a part of the bill by the drawer's trustees, sues as regards that sum as trustee for the benefit of the drawer's trustee; and 2. That where the plaintiff is suing merely as trustee, and the defendant has a claim against the *cestui que trust*, which but for the intervention of the trust could have been a set-off at law, such claim can be set off in equity. If, then, these two propositions are sound—and we think they are,—it follows that the plea is

though if the latter pay a part then only the residue can be recovered against the former.¹⁰

The rule permitting the holder of a bill or note to recover more than is due to himself is limited to cases where there is some other person entitled to receive from the defendant the overplus of what is due the plaintiff; and if there be no such person the plaintiff will be permitted only to recover what is due himself.¹¹ "As between the pledgor and pledgee, when the securities pledged are the obligations of the pledgor, the pledgee can only recover his principal debt. For it would be worse than idle that a plaintiff should recover an amount which he would be obliged instantly to restore to the defendant. So where the collateral is in the hands of a *bona fide* holder, without notice of a good defense against his assignor, the general and better rule appears to be that the pledgee can recover the amount of his principal debt only."¹² But in case of bankruptcy, though the holder may prove the whole amount under a commission against a remote party and receive a dividend until his debt is satisfied, he cannot prove for more than the sum actually due on the balance of account against his immediate indorser.¹³

In cases where there is a defense to a note or bill, in whole

good unless the bankruptcy makes a difference. We think it does not." *Belohradsky v. Kuhn*, 69 Ill. 547; *Wiffen v. Roberts*, 1 Esp. 261; *Jones v. Hibbert*, 2 Stark. 304.

¹⁰ *Chitty on Bills*, *677; *Walwyn v. St. Quintin*, 1 B. & P. 658; *Johnson v. Kennion*, 2 Wils. 262; *Ex parte De Tastet*, 1 Rose 10.

¹¹ *Chitty on Bills*, *677; *Pierson v. Dunlop*, 2 Cowp. 571; *Steel v. Bradfield*, 4 Taunt. 227; *Jones v. Hibbert*, 2 Stark. 304.

A note for a definite sum, given as security for advances, can only be enforced as between the original parties to the extent of the advances made. *Vogan v. Caminetti*,

65 Cal. 438; *Rogers v. Smith*, 47 N. Y. 324.

¹² *Benton v. Sikyta*, 84 Neb. 808, 24 L.R.A.(N.S.) 1057; *Union Nat. Bank v. Roberts*, 45 Wis. 373, 379, citing *Chicopee Bank v. Chapin*, 8 Metc. (Mass.) 40; *Stoddard v. Kimball*, 6 Cush. 469; *Bond v. Fitzpatrick*, 4 Gray 89; *Fisher v. Fisher*, 98 Mass. 303; *Williams v. Smith*, 2 Hill 301; *Duncan v. Gilbert*, 29 N. J. L. 521. To the same effect is *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95. See *Gold Glen M., M. & T. Co. v. Dennis*, 21 Colo. App. 284; *Reed v. First Nat. Bank*, 23 Colo. 380.

¹³ *Ex parte Bloxham*, 6 Ves. 448, 600; *Ex parte Leers*, id. 644; *Chitty on Bills*, *678.

or in part, it is unavailable and the sum payable according to its face is recoverable if the paper has passed into or through the hands of a *bona fide* holder by successive transfers. The title of an indorsee is the title of all the prior parties.¹⁴ As soon as it comes into the hands of a holder as to whom it is not subject to defenses and equities good between antecedent parties its character as a negotiable security is established and he can transfer it with that immunity.¹⁵ But if the holder has paid less than full value for the paper his privilege as *bona fide* holder to exclude defenses attaches, according to some authorities, only in respect to the amount he has paid. As to the remainder there is no privilege; it is open to defenses.¹⁶ The theory upon which these authorities proceed

¹⁴ Naef v. Potter, 226 Ill. 628, 11 L.R.A.(N.S.) 1034; Gemkow v. Link, 225 Ill. 21; Scott v. Bankers' Union, 73 Kan. 575; Beattyville Bank v. Roberts, 117 Ky. 689; First Nat. Bank v. Busch, 102 Minn. 365; Edwards v. Jones, 2 M. & W. 414; Hunter v. Wilson, 4 Ex. 489; Thiedemann v. Goldschmidt, 1 De Gex, F. & J. 10; Robinson v. Reynolds, 2 Q. B. 202, 210; Hoffman v. Bank, 12 Wall. 181, 20 L. ed. 366; United States v. Bank, 15 Pet. 393, 10 L. ed. 780.

¹⁵ Hascall v. Whitmore, 19 Me. 102, 36 Am. Dec. 738; Thomas v. Newton, 2 C. & P. 606; Smith v. Hiscock, 14 Me. 449; Solomon v. Bank of England, 13 East 135; note b; Haley v. Lane, 2 Atk. 182; Woodman v. Churchill, 52 Me. 58; Woodworth v. Huntoon, 40 Ill. 131, 89 Am. Dec. 340; Bassett v. Avery, 15 Ohio St. 299; Watson v. Flanagan, 14 Tex. 354; Masters v. Ibberson, 8 C. B. 100; Prentice v. Zane, 2 Gratt. 262; Hereth v. Merchants' Nat. Bank, 34 Ind. 380; Simonds v. Merritt, 33 Iowa 537; Peabody v. Rees, 18 id. 571; Mornyer v. Cooper, 35 id. 257; Boyd v. McCann, 10 Md.

118; Cook v. Larkin, 19 La. Ann. 507. See Kost v. Bender, 25 Mich. 515.

¹⁶ Perry v. Council Bluffs City W. W. Co., 67 Hun 456, 467, affirmed without opinion, 143 N. Y. 637; Campbell v. Brown, 100 Tenn. 245; Oppenheimer v. Bank, 97 Tenn. 19, 33, 56 Am. St. 778, 33 L.R.A. 767; Huff v. Wagner, 63 Barb. 215; Hargee v. Wilson, id. 237; Faulkner v. White, 33 Neb. 199.

In Huff v. Wagner, Talcott, J., discusses this point: "The special term granted a new trial upon the exception to the ruling as to the admission of the evidence, and upon the principle that a *bona fide* holder of commercial paper, to which, as between maker and payee, there is a good defense, is entitled to be protected only to the extent of the value he has paid. This, I think, is correct. The protection of the holder in such cases, as in other cases where the law protects *bona fide* purchasers against latent claims, is founded upon the idea of protecting such *bona fide* purchaser for value against any possible loss. And this is the precise reason why

is that the protection extended to *bona fide* purchasers is preserved in the case of purchasers for less than value by treating

a *bona fide* holder of such paper, which has been transferred to him to secure an antecedent debt, cannot recover against the party who has been defrauded; namely, that he has lost nothing by his reliance upon the face of the paper. These principles are discussed and laid down in a very elaborate opinion of the late chancellor, delivered in the court of errors in the leading case of *Stalker v. McDonald*, 6 Hill 93, in which he expressly holds that if the holder of such paper has paid but a part of the consideration or value of the property, he is only entitled to be considered as a *bona fide* purchaser *pro tanto*; and refers with approbation to the case of *Edwards v. Jones*, 7 C. & P. 633, in which, in an action on a note for £100, the consideration of which was impeached by a plea, the plaintiff replied that it was indorsed to him for the consideration of £49. And he was only permitted to recover the £49 advance. The proposition sought to be maintained by the counsel for the appellant in this case, namely, that whatever may have been the consideration of the transfer of a negotiable note, if it was a valuable one, the holder, without notice of the invalidity of the note, may recover the entire face thereof, reference to the amount paid by him for it, would produce most unjust and startling results. It would enable the holder of a stolen note for \$1,000 to recover the entire amount thereof from the maker, from whom it had been stolen, although the holder had purchased the same without notice for only \$100—a result revolting to common sense, and going far beyond afford-

ing that protection which public policy requires should be extended to the parties who purchase negotiable paper for value. I see no reason for any distinction between the case of a purchaser for money, and one where the note is exchanged for property. If such a distinction could be made the maker of the note would have no protection. Such notes would then be used in the purchase of property, as in this case, instead of sold for money. The purchaser is fully protected against loss by being enabled to recover the full value of the property parted with on the purchase.

“The doctrine laid down in *Stalker v. McDonald* was also expressly held in *Williams v. Smith*, 2 Hill 301, and in *Youngs v. Lee*, 18 Barb. 187, in which Mr. Justice Welles, delivering the opinion of the court, said: ‘It follows that the plaintiffs are *bona fide* purchasers and holders of the note upon which the action is brought, and entitled to recover from the indorsers the amount they paid for it *and no more*.’ The case of *Youngs v. Lee* was affirmed on appeal. 12 N. Y. 551. The same principle was asserted in *Cardwell v. Hicks*, 37 Barb. 458. The truth is, that in such cases the holder, except so far as he has parted with value, has no equity superior to that of the party defrauded. There is a remarkable silence on this precise point in most of the elementary works I have examined. It is, however, explicitly laid down in *Story on Bills*, § 188, that where a bill has been obtained by fraud a *bona fide* holder can only recover the amount he has advanced. The English cases, where a question of this

them as *bona fide* purchasers *pro tanto*, thus protecting them against loss. Mr. Daniel says that "where some legal consider-

character appears to have been presented, appear, generally, to have been between the *bona fide* holder and the accommodation maker or indorser; and in such cases it has always been ruled that the holder only recovers the amount of his advances. See Chitty on Bills, 81; Nash v. Brown, id. 81, note 1; Wiffen v. Roberts, 1 Esp. 261; Jones v. Hibbert, 2 Stark. 304; Simpson v. Clarke, 2 Cr., M. & R. 343. I do not perceive any reason why a *bona fide* holder for value may not recover the full face of the note without regard to the amount he has advanced, as well where he sues a mere accommodation maker as where he sues one from whom the note was obtained by fraud. In either case the amount of the recovery is limited to the amount advanced by the holder, because there was no sufficient valid and valuable consideration for the making of the note; and the right to recover at all grows out of the advance which has been made by the holder, which gives it validity in his hands to that extent. I think the discussions and opinions in the English cases show that this point has not been considered debatable where the note was obtained by false and fraudulent representations. Indeed, I think that until quite recently it has been assumed at *nisi prius* in this state that a holder of such paper for value and without notice was entitled to be protected to the extent of his advances, and no more. The point has been expressly decided in Holman v. Hobson, 8 Humph. 127, and in Bethune v. McCreary, 8 Ga. 114.

"It is claimed by the counsel for

the respondent that the case of The Essex County Bank v. Russell, 29 N. Y. 673, countenances the doctrine maintained by him. There a bank had discounted or purchased a note which was diverted, and gave as the proceeds of the discount a part in cash and the balance in a note held by it, made by one Brewster, and indorsed by other parties, which was past due and under protest. The bank was allowed to recover the whole amount of the diverted note, on the ground that it was a *bona fide* holder for value, and upon the express ground that the Brewster note which constituted a part of the consideration on the purchase, although under protest, was worth its nominal amount, and was good and collectible. And the principle laid down in Stalker v. McDonald, on this point, seems to have been expressly recognized as law. Mr. Justice Hogeboom says, speaking of the plaintiffs (the bank): "They were, therefore, on discounting this note, *bona fide* holders of it for value, at least to the extent of the sum advanced in cash, on the discount; and to that extent, at all events, they would be entitled to recover in this action. * * * It becomes necessary to determine whether the plaintiffs are *bona fide* holders of the note in suit, in such a sense as to exclude the defense of its misapplication, so far as respects the part of the discount which was appropriated to the purchase of the Brewster paper. *There was no want of consideration on the part of the plaintiff to the full amount of the note in suit in the transaction in question. The Brewster note was, though overdue, good and collectible*

ation exists in the inception of the paper it seems that in New York the *bona fide* holder may recover the full amount, no

paper. It was worth its nominal amount, and was collectible for two years afterwards. It was a chose in action which the plaintiff had a right to sell and transfer to Comstock. To the full extent of its value it was a valuable consideration.' The case of *Park Bank v. Watson*, 42 N. Y. 490, 1 Am. Rep. 573, is claimed by the counsel for the appellant to have overruled the former cases on the subject and to have established the doctrine for which he contends. In that case the Park Bank had surrendered notes held as collateral security for a debt due it, on receiving the notes in suit, which proved to have been diverted. One of the notes surrendered was the note of Thomas Parks, shown on the trial to be irresponsible. The defendant's counsel had requested the court to charge 'that the plaintiff cannot recover for any amount beyond that which remained after deducting the Parks note.' The request being refused, an exception was taken. The only opinion in the case is that of Judge Lott, who says: 'The surrender of those notes, under the decision in *Brown v. Leavitt*, 31 N. Y. 113, and the cases there cited, made the bank a holder for value, and entitled it to recover the full amount claimed in those actions, without deducting the amount of the note of Parks.'

'The question in *Brown v. Leavitt* was simply whether the surrender and delivery up to the debtor of an existing note, and receiving another in payment of it, constituted a valuable consideration within the meaning of the rule which

protects a *bona fide* purchaser for value against defenses existing between prior parties; and neither in that case, nor in any one of the cases there cited, was any question presented like that in the case at bar; unless it be in the cases of *Stalker v. McDonald* and *Youngs v. Lee*, in which cases the doctrine laid down was, as we have seen, directly contrary to the position of the appellant here. I have looked into the original points and case on the argument in the court of appeals of *The Park Bank v. Watson*, and find that it was claimed there by the plaintiff that, notwithstanding the evidence touching the irresponsibility of Parks, the maker of one of the notes surrendered, his note was nevertheless of value, and would probably have been paid. It cannot be affirmed that a particular note of a party, shown to be of the character and in the position such as that of Parks, is wholly valueless. Now the request of the counsel for the defendant in that case was that the judge charge that the entire amount of the Parks note must be deducted from any recovery. Upon well settled practice this request was too broad, as the note of Parks had some value, and an exception to the refusal to charge as requested was therefore unavailable; and the remark of Justice Lott, which has been quoted so far as it is supposed to countenance the idea that the holder of negotiable paper, in good faith, for value, to which there is a defense as against the party from whom the holder received it, may recover the full face of the paper without regard to the amount he has paid for it, if not

matter what amount he may give for it.¹⁷ This seems to us the true distinction in such cases. If the paper is issued in fraud without consideration, the *bona fide* purchaser should be limited in recovery to the amount paid with interest.¹⁸ But if there is an original valid consideration, or the paper was issued fairly and intentionally without consideration, then he is entitled to recover the whole amount regardless of the amount he pays.”¹⁹ The doctrine of the text is not sustained by some courts. Thus it is said in Iowa: “The defense that a note has been obtained fraudulently or without consideration does not avail against a *bona fide* holder. If, however, the recovery of such holder may be limited to the amount paid it is apparent that the defense does avail, for without such defense he would recover the amount evidenced by the note.”²⁰ And in Michigan that “the maker of a note has no concern with the amount paid for it by a *bona fide* purchaser.”²¹ This is the doctrine of the federal supreme court where the purchaser of a negotiable security is not individually chargeable with fraud,²² and of the courts of Connecticut, Texas, Massachusetts, Pennsyl-

inadvertent, was at least unnecessary to the decision, and wholly unsupported by the authorities on which it was supposed to have been placed.” *Gilbert v. Duncan*, 29 N. J. L. 133; *Holcomb v. Wyckoff*, 35 id. 35, 10 Am. Rep. 219; *Moore v. Ryder*, 65 N. Y. 438; *Todd v. Shelbourne*, 8 Hun 510; *Ingalls v. Lee*, 9 Barb. 647; *Allaire v. Hartshorne*, 21 N. J. L. 665, 47 Am. Dec. 175; *Robbins v. Maidstone*, 4 Q. B. 811; *Williams v. Smith*, 2 Hill 301; *Valette v. Mason, Smith (Ind.)* 89; *Cook v. Cockrill*, 1 Stew. 475, 18 Am. Dec. 67. See *Grand Rapids, etc. R. Co. v. Sanders*, 17 Hun 552.

¹⁷ 1 Neg. Inst. (5th ed.) § 758, referring to *Howe v. Potter*, 61 Barb. 357. “In this case nothing is said as to the amount reserved by the holder, but it appears to

have been a full recovery upon the draft.”

¹⁸ *Holcomb v. Wyckoff*, 35 N. J. L. 38, 10 Am. Rep. 219.

¹⁹ See *Daniels v. Wilson*, 21 Minn. 530.

²⁰ *Lay v. Wissman*, 36 Iowa 305; *Bank of Michigan v. Green*, 33 Iowa 140.

The rule of the statute that a *bona fide* holder for value of a note procured by fraud may recover only what he paid does not apply to others than the maker. *Voss v. Chamberlain*, 139 Iowa 569, 130 Am. St. 331, 19 L.R.A. (N.S.) 106.

²¹ *Vinton v. Peck*, 14 Mich. 287, 296.

²² *Cromwell v. County of Sac*, 96 U. S. 60, 24 L. ed. 687; *Railroad Cos. v. Schutte*, 103 id. 118, 26 L. ed. 327; *Wade v. Chicago, etc. R. Co.*, 149 id. 327, 37 L. ed. 757.

vania, Wisconsin, Ohio, Oregon and Indiana.²³ It does not conflict with the rule which limits the recovery on a note taken and held as a protection against a specified liability to the amount of the liability,²⁴ nor the rule which holds that where the purchaser pays a largely disproportionate sum for a note as compared with its value as known to him he will not be regarded as a *bona fide* holder.²⁵ If the maker of a non-negotiable note is not responsible for the value of it as it is expressed on its face an assignee cannot collect such value from his assignor if the latter shows that the price paid him for it was less than its face. *Prima facie* that is its value; but it is not conclusively so. The assignor's liability is the amount received, with interest.²⁶ In Minnesota a holder who pays the face value of a note with knowledge that money paid on it has been misapplied can recover only the sum due on it.²⁷

§ 542. **Want or failure of consideration.** It is essential to the validity of every contract that it be based on a sufficient consideration. Notes and bills are not exceptions; some consideration there must be;²⁸ but they import a consideration; that is, in the absence of any express admission a consideration is presumed by law to exist, not only between the original parties, as maker and payee of the note, or drawer and acceptor of a bill, but also between other and subsequent parties. In suing upon these contracts no special averment or proof of consideration is necessary;²⁹ the averment and proof of a contract of such nature includes this essential element. But the

²³ Lock v. Citizens' Nat. Bank, — Tex. Civ. App. —, 165 S. W. 536; Lassas v. McCarty, 47 Ore. 474 (by statute); Bissell v. Dickerson, 64 Conn. 61, 73; Petri v. First Nat. Bank, 83 Tex. 424, 29 Am. St. 657; Petri v. Fond du Lac Nat. Bank, 84 Tex. 212; Fowler v. Strickland, 107 Mass. 552; Moore v. Baird, 30 Pa. 138; Bange v. Flint, 25 Wis. 544; Bailly v. Smith, 14 Ohio St. 396; Farber v. National F. & I. Co., 140 Ind. 54.

²⁴ Grant v. Kidwell, 30 Mo. 458.

²⁵ De Witt v. Perkins, 22 Wis. 445.

²⁶ Thomas v. Linn, 40 W. Va. 122; Goff v. Miller, 41 W. Va. 683, 56 Am. St. 886; Mackie v. Davis, 2 Wash. (Va.) 219, 1 Am. Dec. 482; Drane v. Scholfield, 6 Leigh 397; Foust v. Gregg, 68 Ind. 399; Schmied v. Frank, 86 Ind. 250.

²⁷ Buse v. First State Bank, 105 Minn. 323.

²⁸ Fowler v. Shearer, 7 Mass. 14, 22; Jennison v. Stone, 33 Mich. 99.

²⁹ Deeter v. Burk, — Ind. App.

presumption of consideration is not conclusive between the immediate parties, nor, indeed, between remote parties except in favor of a *bona fide* holder for value.³⁰ Under a statute pro-

—, 107 N. E. 304; Paul Gerli & Co. v. Doorly, (Misc.) 151 N. Y. Supp. 574; Ruth v. Krone, 10 Cal. App. 770; Zimbleman v. Finnegan, 141 Iowa 358; Reid v. Windsor, 111 Va. 825; Sprague v. Sprague, 80 Hun 285; Carnwright v. Gray, 127 N. Y. 92, 24 Am. St. 424, 12 L.R.A. 845.

In *Bourne v. Ward*, 51 Me. 191, it was held that negotiable notes, when they have passed into the hands of indorsees in the usual course of trade, enjoy the privilege of having a consideration presumed. But notes not negotiable, and negotiable notes while in the hands of the payee, enjoy no such privilege. *Bristol v. Warner*, 19 Conn. 7; *Delano v. Bartlett*, 6 Cush. 364; *Burnham v. Allen*, 1 Gray 496. If they contain the words "value received" they are *prima facie* evidence of consideration. See *Holliday v. Atkinson*, 5 B. & C. 501; *Bristol v. Warner*, 19 Conn. 7.

In *Richardson v. Comstock*, 21 Ark. 69, it is held that a note in the hands of the payee is *prima facie* evidence of consideration, the words "value received" being in it. The opinion says "the note upon its face furnishing *prima facie* evidence of consideration, as held by a series of adjudications of this court." *Gage v. Melton*, 1 Ark. 228; *Rankin v. Badgett*, 5 id. 346; *Greer v. George*, 8 id. 133; *Cheney v. Higginbotham*, 10 id. 273; *Dickson v. Burks*, 11 id. 307. The cases in 8 and 10 Ark. were upon promissory notes—but the notes were not set out—and whether the words "value received" are in them or not does not appear. The decisions seem to

proceed on the ground that, as promissory notes, they import a consideration. Story on Prom. Notes, § 181; Chitty on Bills, pp. 78, 85.

Where one consideration of a note has been negatived by a breach of warranty there can be no presumption, in the absence of evidence, that there was any other. In such a case the maker is not obliged to prove that there was no other consideration. *Aldrich v. Stockwell*, 9 Allen 45.

The introduction of testimony to show an actual consideration does not prevent the party offering it from availing himself of the legal presumption. *Durland v. Durland*, 153 N. Y. 67.

³⁰ *Muir v. Hamilton*, 152 Cal. 634; *Baum v. Palmer*, 165 Ind. 513; *Midland S. Co. v. Citizens' Nat. Bank*, 34 Ind. App. 107; *City Nat. Bank v. Jordan*, 139 Iowa 499; *Freittenberg v. Rubel*, 123 Iowa 154; *Dewey v. Bobbitt*, 79 Kan. 505; *Lynds v. Van Valkenburgh*, 77 Kan. 24; *Deming I. Co. v. Wallace*, 73 Kan. 291; *Clark v. Holway*, 101 Me. 391; *Brown v. Smedley*, 136 Mich. 65; *National Citizens' Bank v. Bowen*, 109 Minn. 473; *Conrad v. Clarke*, 106 Minn. 430; *Davis v. Stearns*, 85 Neb. 121; *Citizens' Bank v. Fredrickson*, 83 Neb. 755; *Morgan v. Thompson*, 72 N. J. L. 244; *Masterson v. Heitmann*, 38 Tex. Civ. App. 476; *Preas v. Vollentine*, 53 Wash. 137; *Hoffman v. Bank*, 12 Wall. 181, 20 L. ed. 366; *Lenheim v. Fay*, 27 Mich. 70; *Crossly v. Ham*, 13 East 498; *Goodman v. Harvey*, 4 A. & E. 870; *Hannover*

viding that on the failure of the consideration of a note the holder cannot recover more than he paid for it a *bona fide* holder for value can recover only a nominal sum unless he shows he paid more.³¹ If there is evidence of a defense, in whole or in part, to a note by way of recoupment of the damages suffered because of the partial want or partial failure of consideration the burden is upon the indorsee-plaintiff to show that he is a *bona fide* holder of the note and that it was taken by him before maturity for value.³² But a distinction has been made between cases where a note was originally obtained by fraud, or was fraudulently put into circulation by the payee, or was given upon an illegal consideration, and cases where there has been only a want or failure of consideration as between the maker and payee. In the former class of cases the production of the note by the indorsee and the proof or admission of the genuineness of the signatures are not enough to make out a case for the plaintiff if the fraud or illegal consideration is proved, but the burden still remains on him to produce some additional evidence that he took the note in good faith for value before maturity; while in the latter class of cases the production of the note by the indorsee and the proof or admission of

v. Doane, 12 Wall. 342, 20 L. ed. 439; Andrews v. Pond, 13 Pet. 65, 10 L. ed. 61; Security T. & S. D. Co. v. Duross, (Del.) 86 Atl. 209; Skilding v. Warren, 15 Johns. 270; Fisher v. Leland, 4 Cush. 456, 50 Am. Dec. 805; Ryland v. Brown, 2 Head 270; Norvell v. Hudgins, 4 Munf. 496; Harrisburg Bank v. Meyer, 6 S. & R. 537; Thrall v. Horton, 44 Vt. 386; Lawrence v. Stonington Bank, 6 Conn. 521; Taylor v. Mather, 3 T. R. 83, note; Brown v. Davies, id. 80; Ayers v. Hutchins, 4 Mass. 370; Thompson v. Hale, 6 Pick. 259; Boggs v. Lancaster Bank, 7 W. & S. 331; Tucker v. Smith, 4 Me. 415; Brown v. Turner, 7 T. R. 630; Conger v. Armstrong, 3 Johns. Cas. 5, 2 Am. Dec. 126; Conroy v. Warner, 3 Johns.

Cas. 259; Amory v. Merryweather, 2 B. & C. 573; Evans v. Kymer, 1 B. & Ad. 528; Kasson v. Smith, 9 Wend. 437; Steers v. Lashley, 6 T. R. 61; Walker v. Hagerty, 30 Neb. 120; Bank v. Adams, 96 Ga. 529; Benson v. Dublin W. Co., 99 Ga. 303; Montgomery v. Hunt, 99 Ga. 499; Mahon v. Gaither, 70 Ill. App. 434; Kent v. Barnes, 72 id. 617; First Nat. Bank v. Oliver, 16 Tex. Civ. App. 428.

³¹ Wray v. Warner, 111 Iowa 64.

³² Iowa Nat. Bank v. Carter, 144 Iowa 715; Ocean Bank v. Carll, 55 N. Y. 441; Smith v. Livingstone, 111 Mass. 342; National Revere Bank v. Morse, 163 Mass. 383; Abmeyer v. First Nat. Bank, 76 Kan. 877.

the genuineness of the signatures make out a *prima facie* case in his favor, which is not met merely by proof of a want or failure of consideration, but the burden of also introducing evidence that the indorsee did not take the note in good faith for value before maturity is on the defendant.³³ In Iowa failure of the consideration for a note fraudulently put in circulation must be shown by the maker.³⁴

It is not within the object of the writer to discuss in detail the law which defines a *bona fide* holder for value; but rather what deductions are authorized where the paper is open to defenses. If there is a total *want* or a total *failure* of consideration there can be no recovery; the essential basis of a binding contract is then shown to be wanting.³⁵ Fraud vitiates a contract; and, at the election of the defrauded party, it may be

³³ *Holden v. Phoenix Rattan Co.*, 168 Mass. 570; *Elgin City B. Co. v. Hall*, 119 Tenn. 548; *Rochford v. Barrett*, 22 S. D. 83; *Le Tourneux v. Gilliss*, 1 Cal. App. 546; *City D. Bank v. Green*, 130 Iowa 384; *Ireland v. Scharpenberg*, 54 Wash. 558. See *Voss v. Chamberlain*, 139 Iowa 569, 18 L.R.A.(N.S.) 106; *Cox v. Cline*, 139 Iowa 128; *McNight v. Parsons*, 136 Iowa 390, 22 L.R.A.(N.S.) 718, 125 Am. St. 265; *Myers v. Petty*, 153 N. C. 462; *Matlock v. Scheurman*, 51 Ore. 49, 17 L.R.A.(N.S.) 747; *State Bank v. Cook*, 125 Iowa 111; *Arnd v. Heckbert*, 108 Md. 300; *Scott v. Geiser Mfg. Co.*, 70 Kan. 498; *Kennedy v. Gibson*, 68 Kan. 612; *Regester v. Reed*, 185 Mass. 226; *Stouffer v. Fletcher*, 146 Mich. 341; *Askegaard v. Dalen*, 93 Minn. 354; *First State Bank v. Hammond*, 124 Mo. App. 177; *Lahrman v. Bauman*, 76 Neb. 846; *Hallock v. Young*, 72 N. H. 416.

³⁴ *Freittenberg v. Rubel*, 123 Iowa 154.

³⁵ *Richardson v. Lowe*, 149 Fed. 625, 79 C. C. A. 317; *Kennedy v. Welch*, 196 Mass. 592; *Andrews v. Fidelity L. & T. Co.*, 103 Va. 196; *Cawthorpe v. Clark*, 173 Mich. 267; *Warner v. Crouch*, 14 Allen 163; *Starr v. Torrey*, 22 N. J. L. 190; *Buckles v. Cunningham*, 6 Sm. & M. 358; *Clough v. Patrick*, 37 Vt. 421; *Grant v. Townsend*, 2 Hill 554; *Sawyer v. Chambers*, 44 Barb. 42; *Cragin v. Fowler*, 34 Vt. 326, 80 Am. Dec. 680; *Payne v. Cutler*, 13 Wend. 605; *French v. Gordon*, 10 Kan. 370; *O'Neal v. Bacon*, 1 Houst. 215; *Morrill v. Aden*, 19 Vt. 505; *Case v. Gerrish*, 15 Pick. 49; *Rice v. Goddard*, 14 id. 293; *Dickinson v. Hall*, id. 217; *Joliffe v. Collins*, 21 Mo. 338; *Smith v. Brooks*, 18 Ga. 440; *Washburn v. Picot*, 3 Dev. 390; *Aldrich v. Stockwell*, 9 Allen 45; *Tillotson v. Grapes*, 4 N. H. 444; *Dunbar v. Marden*, 13 id. 311; *Aurora Nat. Bank v. Dils*, 18 Ind. App. 319; *Jackson v. Warwick*, 7 T. R. 121. See *Diefendorff v. Gage*, 7 Barb. 18; *Fitch v. Redding*, 4 Sandf. 130.

avoided; but if not avoided by him it is only available as ground for a cross-action or recoupment, which is of the same nature; or as a defense where the fraud has directly caused a want or failure of consideration.³⁶ The fraud or covin necessary to defeat recovery on a note by a *bona fide* indorser before maturity must relate to the execution of the note, and not to the consideration on which it is based, and must consist of some trick or device that induces the giving of one kind of instrument under the belief of the maker that he is giving one of a different kind.³⁷ Where the defendant was induced to put his name on the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guarantee, he was not liable if he signed without knowing it was a bill and under the belief that it was a guarantee, and was not negligent in so doing.³⁸ If the signer of a note is negligent in signing it without knowledge of its terms he is liable to a *bona fide* holder.³⁹

A total failure of consideration nullifies a contract equally as a total want of consideration prevents its inception. Accommodation paper is without consideration in the hands of the accommodated parties.⁴⁰ Nor can a note be supported as a gift; for a gift is not consummate and perfect until a delivery of the thing promised; and, until then, the party may revoke his promise.⁴¹ If a note or bill be given for property as pur-

³⁶ *Andrews v. Wheaton*, 23 Conn. 112; *Wright v. Irwin*, 33 Mich. 32; *Thornton v. Wynn*, 12 Wheat 183, 6 L. ed. 595; *Withers v. Greene*, 9 How. 213, 13 L. ed. 109; *Drew v. Towle*, 27 N. H. 412, 59 Am. Dec. 380; *Stone v. Peake*, 16 Vt. 213; *Clopton v. Elkin*, 49 Miss. 95; *Nichols v. Hunton*, 45 N. H. 470; *Southall v. Rigg*, 4 Eng. L. & Eq. 366, 20 L. J. (C. P.) 145; *French v. Gordon*, 10 Kan. 370; *Morrill v. Aden*, 19 Vt. 505; *Lewis v. Cosgrave*, 2 Taunt. 2. See *Carpenter v. Phillips*, 2 Houst. 524.

³⁷ *Connolly v. Dammann*, 232 Ill. 175; *Woods v. Hynes*, 2 Ill. 103;

Easter v. Minard, 26 Ill. 494; *Gray v. Goode*, 72 Ill. App. 504.

³⁸ *Foster v. Mackinnon*, L. R. 4 C. P. 704.

³⁹ *Ward v. Johnson*, 51 Minn. 480, 38 Am. St. 515.

⁴⁰ *Jackson v. Warwick*, 7 T. R. 121; *Knight v. Hunt*, 5 Bing. 432; *Sparrow v. Chrisman*, 9 B. & C. 241; *Thompson v. Clublely*, 1 M. & W. 212.

⁴¹ *Nash v. Brown*, *Chitty on Bills*, *74, note x; *Edw. on Bills & N.* 307; *Fink v. Cox*, 18 Johns. 145, 9 Am. Dec. 191; *Easton v. Pratchett*, 1 Cr., M. & R. 798; *Shaw v. Camp*, 160 Ill. 425.

chased which has no existence there is no consideration;⁴² and it is the same if property bought is wholly without value.⁴³ A note or bill given for the price of a void or worthless patent right is without consideration.⁴⁴ So a contract by note, bill or otherwise to pay purchase-money of land conveyed by a void deed, as when made by a married woman;⁴⁵ or by a valid deed with covenants of warranty, by which no right or title passes.⁴⁶ And where property, either personal or real, is purchased with warranty of title or quality and it turns out that there is no title in the vendor, or that the property is destitute of the warranted quality and is worthless, and no actual benefit is transferred to the purchaser, the warranties will not constitute a consideration.⁴⁷ If a statute declares that the illegality of a contract shall make a note given because of it void the note will be void in the hands of an innocent purchaser for value before maturity,⁴⁸ but unless the statute expressly so declares mere illegality of consideration is not a defense to the note as against a *bona fide* holder thereof to whom it was indorsed for value before maturity.⁴⁹ The general rule that the validity of a contract is to

⁴² 2 Kent's Com. * 468; *Hastie v. Couturier*, 9 Ex. 102; *Barr v. Gibson*, 3 M. & W. 390; *Strickland v. Turner*, 7 Ex. 208; *Allen v. Hammond*, 11 Pet. 63, 9 L. ed. 633.

⁴³ *Taft v. Myerscough*, 197 Ill. 600; *Arnold v. Wilts*, 86 Ind. 368; *Brown v. Weldon*, 27 Mo. App. 251; *Shepherd v. Temple*, 3 N. H. 455; *Ramsey v. Sargent*, 21 id. 397; *Perley v. Balch*, 23 Pick. 283, 34 Am. Dec. 56; *O'Neal v. Bacon*, 1 Houst. 215.

⁴⁴ *Benton v. Sikyta*, 84 Neb. 808, 24 L.R.A.(N.S.) 1057; *Wray v. Warner*, 111 Iowa 64; *Smith v. Hightower*, 76 Ga. 630; *Clough v. Patrick*, 37 Vt. 421; *Joliffe v. Collins*, 21 Mo. 338; *Dickinson v. Hall*, 14 Pick. 217. But see *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306.

⁴⁵ *Warner v. Crouch*, 14 Allen

163; *Grout v. Townsend*, 2 Hill 554.

⁴⁶ *Rice v. Goddard*, 14 Pick. 293; *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297.

⁴⁷ *Rosenthal v. Rambo*, 165 Ind. 584, 3 L.R.A.(N.S.) 678; *Nettograph Mach. Co. v. Brown*, 28 Okla. 436, 34 L.R.A.(N.S.) 737; *Rice v. Goddard*, 14 Pick. 293; *Dickinson v. Hall*, id. 217; *Aldrich v. Stockwell*, 9 Allen 45; *Shepherd v. Temple*, 3 N. H. 455; *Mason v. Wait*, 5 Ill. 127. See *Owings v. Thompson*, 4 id. 502; *Vincent v. Morrison*, 1 id. 227; *Lamerson v. Marvin*, 8 Barb. 9; *Hoy v. Taliaferro*, 8 Sm. & M. 727; *Furniss v. Williams*, 11 Ill. 229; *Clark v. Snelling*, 1 Ired. 382; *Wilson v. Jordan*, 3 Stew. & P. 92.

⁴⁸ *Gray v. Robinson*, 95 Miss. 1.

⁴⁹ *Henry v. State Bank*, 131 Iowa 97, approving *Vallet v. Parker*, 6

be governed by the law of the place where it is made⁵⁰ does not apply where the contract because of which the note sued upon was given contravenes the criminal laws of the state in which action is brought on the note.⁵¹

Where the maker and payee of a note were owners of land and the former took a conveyance of it to sell it on joint account, and gave the note as security for prompt payment of the purchase-money when the land should be sold a defense to the note of a want of consideration was held good until the sale was made.⁵² A want of consideration destroys the validity of a contract without regard to the *bona fides* of the transaction, as where the defendant promised as administrator to pay a given sum for value received by one of the heirs of the intestate; or where a debtor pays part of his debt before it is due and a note is given him instead of a receipt to show that he is allowed interest on the sum paid; or where a note is given in renewal of another which was not founded on any consideration; or is given to a widow for a debt due to her deceased husband's representatives; or where it is given to the mother of a child that has been beaten to stay a prosecution for the injury; or where it is given on a mere moral or honorary obligation, not on anything which the law esteems a valuable consideration.⁵³ A total failure of consideration occurs where there was a consideration at the inception of the contract and it subsequently becomes wholly nugatory. This may be illustrated by a note or bill given for the purchase-money of goods to be subsequently delivered at a stated time and a failure to deliver the same.⁵⁴ Where a note was given in consideration of the relation of ap-

Wend. 615; Hopmeyer v. Frederick, 74 Ill. App. 301; Estate of Long v. Jones, 69 Ill. App. 615; Pope v. Hahnke, 155 Ill. 617, 28 L.R.A. 568.

⁵⁰ See § 358.

⁵¹ Pope v. Hahnke, 155 Ill. 617, 627, 28 L.R.A. 568; Faulkner v. Hyman, 142 Mass. 53; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Fisher v. Lord, 63 N. H. 514.

⁵² Marsh v. Bennett, 22 Ill. 313.

⁵³ Edwards on Bills, 227; Ten Eyck v. Vanderpool, 8 Johns. 120; Schoonmaker v. Roosa, 17 id. 300; Crofts v. Beale, 5 Eng. L. & Eq. 408, 20 L. J. (C. P.) 186, 15 Jur. 709; Slade v. Halstead, 7 Cow. 322; Geiger v. Cook, 3 W. & S. 266; Bryan v. Philpot, 3 Ired. 467; Heast v. Sybert, Cheeves, 177.

⁵⁴ Wells v. Hopkins, 5 M. & W. 7.

apprenticeship which the parties supposed was to be created between the maker's son and the payee, but which relation at the time of the trial it appeared never did exist between them, it was held the consideration wholly failed. By the statute of Anne the duty was laid on the master in consideration of the premium received by him to have the same inserted in the indenture and that instrument properly stamped. He having failed to perform that duty, and the time for it having expired, the relation was not instituted.⁵⁵

§ 543. **Partial want of consideration.** Partial want of consideration avoids a note or bill *pro tanto* where the holder is subject to defenses relating to the consideration as where a note is given on a settlement of account by mistake for more than is due;⁵⁶ and where a bill is drawn as to part for value, and as to the remainder for the accommodation of the plaintiff, the recovery will be limited to the consideration of value;⁵⁷ and it may be stated generally that where a note or bill is given for several distinct considerations and one is not a consideration which the law deems valuable so much of the promise as is founded upon that consideration is void, and there will be a deduction from the amount of the paper of so much as was included for that element of the consideration which is invalid,⁵⁸ and this partial defense is available although the amounts of the several considerations are not liquidated and fixed by the

⁵⁵ Jackson v. Warwick, 7 T. R. 121.

⁵⁶ Mercer v. Clark, 3 Bibb 224; Phetteplace v. Steere, 2 Johns. 442; Forman v. Wright, 11 C. B. 481. See Briscoe v. Kenealy, 8 Mo. App. 76.

⁵⁷ Darnell v. Williams, 2 Stark. 166.

⁵⁸ Littlefield v. Perkins, 100 Me. 96; Bates v. Butler, 46 Me. 387; Parish v. Stone, 14 Pick. 198; Collins I. Co. v. Burkam, 10 Mich. 283; Great Western Ins. Co. v. Rees, 29 Ill. 272; Clopton v. Elkin, 49 Miss. 95; Goss v. Whitehead, 33 id.

213; Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627; Barber v. Backhouse, Peake 61; Sparrow v. Chrisman, 9 B. & C. 241; Lewis v. Cosgrave, 2 Taunt. 2; Wintle v. Crowther, 1 Tyrw. 213; Gascoyne v. Smith, McClel. & Y. 338; Stephens v. Wilkinson, 2 B. & Ad. 320; Barker v. Morton, 7 Up. Can. App. 114; Allaire v. Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175; Payne v. Ladue, 1 Hill 116. But see Lash v. McCormick, 17 Minn. 403; Walters v. Armstrong, 5 id. 448; Leighton v. Grant, 20 id. 345; Whitacre v. Culver, 9 id. 295.

parties. In such case if one of two independent considerations on which a note is founded is one which the law deems valid and sufficient to support a contract and the other not, the note will be apportioned as between the original parties or such as have the same relative rights and the holder will recover to the extent of the valid consideration and no further; and the question what amount was founded on one consideration and what on the other will be settled by the jury upon the evidence.⁵⁹

⁵⁹ *Parish v. Stone*, 14 Pick. 198; *Loring v. Sumner*, 23 Pick. 98.

In *Parish v. Stone*, Shaw, C. J., said: "It seems very clear that want of consideration, either total or partial, may always be shown by way of defense; and that it will bar the action or reduce the damages from the amount expressed in the bill, as it is found to be total or partial respectively. It cannot, therefore, in such a case depend upon the state of the evidence whether the different parts of the bill were settled and liquidated by the parties or not. Where the note is intended in a great degree to be gratuitous, the parties would not be likely to enter into very particular stipulations as to what should be deemed payment of a debt and what a gratuity. The rule to be deduced from the cases seems to be this: that where the note is not given upon any one consideration, which, whether good or not, whether it fail or not, goes to the whole note at the time it is made, but for two distinct and independent considerations, each going to a distinct portion of the note, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, there the contract shall be apportioned, and the holder shall recover to the extent of the valid consideration,

and no further. In the application of this principle there seems to be no reason why it shall depend upon the state of the evidence showing that these different parts can be ascertained by computation; in other words, whether the evidence shows them to be respectively liquidated or otherwise. If not, it would seem that the fact, what amount was upon one consideration and what upon the other, like every other questionable fact, should be settled by the jury upon the evidence. This can never operate hardly upon the holder of the note, as the presumption of law is in his favor as to the whole note; and the burden is upon the defendant to show to what extent the note is without consideration. Suppose a father purposes, upon his son going into business, to aid him by an advance of several thousand dollars, and for that purpose gratuitously offers him his note for that sum; but as his son had performed services to the value of a few dollars, for which no price was agreed, upon giving his note the father, intending to cancel and discharge that and all other claims, takes a general receipt for all services and other dues, and afterwards, the note not having been negotiated, a suit should be brought on it by the payee against the maker, might not the defendant

§ 544. **Partial failure of consideration.** A partial failure of consideration is a subject on which there has been much conflict of authority. On principle there should be no difference between partial failure and partial want of consideration in respect to the mode of arriving at certainty of amount to be deducted on that account. Wherever the amount is provable for the purpose of a defense *pro tanto* on the ground of a partial want of consideration it ought to be provable for a like defense if the consideration has partially failed. Much has been done to settle the law on this subject by the declaration of the negotiable instruments act that "absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise."⁶⁰ In an English case, decided in 1824, it was declared that a partial failure of the consideration of a promissory note constitutes no ground of defense, if the *quantum* to be deducted on that account is not of definite computation, but of unliquidated damages.⁶¹ It was a case in which, according to the report, the real ground of complaint was inadequacy, and not part failure, of consideration. A note was given for 20*l.* for the plaintiffs' disclosing to the defendant an improvement in certain machinery, which turned out to be *less beneficial* than was anticipated by the parties. The improvement was not entirely useless; and therefore the sum agreed to be paid for the disclosure, although disproportionate to the benefit received, was not without consideration. In the absence of any warranty or undertaking of the promisee in respect to the extent to which the improvement should be beneficial the promisor bought the disclosure for such benefit, more or less, as he could derive from it; if small, he was obliged to be content; no element he had contracted for and had a right

show the want of consideration by way of defense *pro tanto*? And yet the amount must be settled by a jury; the evidence of the original agreement not distinguishing between what was payment and what

was gratuity." *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Field v. Austin*, 131 Cal. 379.

⁶⁰ Crawford's *Anno. Neg. Inst.*, Law (2d ed.), § 54.

⁶¹ *Day v. Nix*, 9 Moore 159,

to exact from the seller was wanting; if large, even beyond expectation, the seller was obliged to be content; he reserved no right to require more to be paid.⁶²

There is an important difference between a want or failure of consideration and its inadequacy. If the consideration is of value it is sufficient, although it is not adequate in the sense of being equal. A consideration is not deficient merely because the undertaking based upon it is of very much greater value. No defense of want or failure of consideration can be grounded on any such disparity.⁶³ There is no want of consideration where the promisor has received all he bargained for, and it is of some value; nor is there, under such conditions, a failure of consideration. It is enough that he gets all that he is entitled to exact from the other. A party entering into a contract is admonished by the law that it fixes no values except of money; that the amount which may be recovered from him on his express promise is not the absolute value of what he receives, as evidence might establish it, but the sum which he agrees, on his own judgment, and with a view to his own purposes, to pay for it. A purchaser is subject to the rule of *caveat emptor*; and although he may suppose that the subject of purchase has qualities of which it is in fact destitute, and for that reason engages to pay a sum for it greatly in excess of the true value, he is entitled to no redress on that account, and can ask for no abatement of the requirements of his contract in any such case which is unaffected by fraud or warranty.

In modern times the necessity for bringing cross-actions has been abridged by the practice and legislation increasing the scope of defenses as to matters connected with the consideration, not only of commercial paper, but of all other contracts.

⁶² See *Agra v. Leighton*, L. R. 2 Ex. 56.

⁶³ Upon an exchange of notes each is a valid consideration for the other and is fully available in the hands of the holder; and the fact that one of the notes is not paid at maturity does not sustain a de-

fense of failure of consideration in an action upon the other. *Rice v. Grange*, 131 N. Y. 149. This is the rule although the exchange is made for the mutual accommodation of the parties and one of the notes is worthless. *Farber v. National F & I. Co.*, 140 Ind. 54.

By the common law, even in an action on a *quantum meruit* for work done, there was, as late as the beginning of the last century, a hesitation in the English courts to allow the defendant to prove in reduction of damages that the work was done in an improper and insufficient manner; it was doubted whether a cross-action should not be brought.⁶⁴ In an action of *assumpsit* for rebuilding the front of a house the defendant showed under a plea of *non assumpsit* that the work was badly done. There was a conference of the English judges in respect to allowing such defense. Its allowance was treated as a departure from the previous practice.⁶⁵ It was resolved that the correct rule was, that if there has been no beneficial service there should be no pay; but if some benefit has been derived, though not to the extent expected, this should go to the amount of the plaintiff's demand.⁶⁶ Lord Ellenborough said: "Where a specific sum has been agreed to be paid by the defendant the plaintiff may have some ground to complain of surprise if evidence be admitted to show the work and materials provided were not worth so much as was contracted to be paid; because he may only come prepared to prove the agreement for the specified sum and the work done. But where the plaintiff comes into court upon a *quantum meruit* he must come prepared to show that the work done was worth so much, and therefore there can be no injustice in suffering the defense to be entered into even without notice."⁶⁷ And it was added by another member of the court that "if even a specific sum had been agreed to be paid, and notice given, then the defendant should be let into the defense. For after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed the plaintiff would not have done that which he engaged to do, the doing of which would be the consideration of the defendant's promise to pay, and the foundation on which his claims to the price stipulated for would rest; and, therefore, especially if he should have notice that the de-

⁶⁴ Basten v. Butter, 7 East 479.

⁶⁶ Farnsworth v. Garrard, *supra*.

⁶⁵ Farnsworth v. Garrard, 1 Camp.

38.

⁶⁷ Basten v. Butter, 7 East 479.

defendant resists payment on that ground, he ought to come prepared with proof that the work was executed properly.”⁶⁸ Thus the practice came into vogue of making defenses for defect of consideration to actions for fixed or agreed sums. But this was not permitted in England where a note or bill had been given. It was held there pretty uniformly that a partial failure of consideration was no defense in such cases.⁶⁹ The giving of such paper was treated, in respect to such a defense, as the payment of so much cash.⁷⁰ This distinction has not been recognized by the American courts. Where the action is between the original parties or others holding the paper subject to defenses a partial failure of consideration can be set up as a partial defense; in the latter case it is available to the same extent as though the action were brought by the original party and founded on the original contract or consideration.⁷¹

§ 545. **Same subject.** Many American cases hold that a partial failure of consideration is not available; that the defendant must resort to his cross-action.⁷² Occasionally a partial failure

⁶⁸ *Id.*, per Lawrence, J.

⁶⁹ *Morgan v. Richardson*, 1 Camp. 40; *Tye v. Gwynne*, 2 *id.* 346; *Trickey v. Larne*, 6 M. & W. 278; *Sully v. Frean*, 10 Ex. 535; *Georgian Bay L. Co. v. Thompson*, 35 Up. Can. Q. B. 64; *Gascoyne v. Smith, McC. & Y.* 338. But see *De Sewhanberg v. Buchanan*, 5 C. & P. 343.

⁷⁰ *Warwick v. Nairn*, 10 Ex. 762; *Jones v. Jones*, 6 M. & W. 84.

⁷¹ *Sykes v. Kruse*, 49 Colo. 560; *Pidcock v. Crouch*, 7 Ga. App. 299; *City D. Bank v. Green*, 138 Iowa 156; *Bank v. Ornsdorff*, 126 Mo. App. 654; *Wyckoff v. Runyan*, 33 N. J. L. 167; *Batterman v. Pierce*, 3 Hill 171; *Smith v. Smith*, 30 Vt. 139; *Durment v. Tuttle*, 50 Minn. 426, citing local cases; *Nichols & S. Co. v. Soderquist*, 77 Minn. 509; *Bay View B. Co. Tecklenberg*, 19 Wash. 469 (if the partial failure can be definitely ascertained by computation); *Field v. Austin*, 131

Cal. 379; *Allen v. Henn*, 197 Ill. 486.

⁷² *Washburn v. Picot*, 3 Dev. 390; *Russell v. Splater*, 47 Vt. 273; *Berlin v. Schermerhorn*, 21 Vt. 189; *Jordan v. Jordan*, Dudley 181; *Hinton v. Scott*, *id.* 245; *Scudder v. Andrews*, 2 McLean 464; *Stone v. Peake*, 16 Vt. 213; *Carpenter v. Phillips*, 2 Houst. 524; *Thrall v. Horton*, 44 Vt. 386; *McClain v. Williams*, 8 Yerg. 230; *Merrill v. Aden*, 19 Vt. 505; *Craig v. Fowler*, 34 Vt. 326, 80 Am. Dec. 680; *Hackett v. Schad*, 3 Bush 353; *Harris v. Pate*, 7 Ind. Ty. 493. See *Mitchell v. Vogt Mach. Co.*, 3 Ga. App. 542.

The statutory presumptions in favor of an indorsee for value before maturity must be overcome before a partial failure of consideration can be established. *McCormick v. Swen*, 36 Utah 6.

is allowed if the amount to be deducted on that account is liquidated and may be ascertained by mere computation. In a New Hampshire case a note was given for seventeen articles of machinery, with no separate valuation; five of the articles were at the time under a valid attachment against the vendor and were afterwards sold under execution in the attachment suit. In an action on the note an abatement was claimed by the defendant for part failure of consideration because of their loss. The court say: "To this extent the consideration has failed; and had there been a specific value fixed to the articles when the defendant purchased them the amount could now be deducted and allowed in this suit. But the value was not fixed. The whole seventeen articles were sold for \$1,200, and whether these five were worth five-seventeenths of that sum, or one-half, or one-third, or what they were worth, is a matter entirely unliquidated; and upon the authorities cited the ruling of the court excluding the defense was correct."⁷³ This strict rule has been changed in that state and in several others by statute;⁷⁴ and in many others it has been departed from upon general principles. In Maine an action was brought on a note given for the good will and practice of a physician; the defense was that after a certain period subsequent to the sale the vendor resumed practice in the same town. It was held that by such resumption the vendor deprived the defendant of a part of the consideration of the note, and although the injury was unliquidated it might be proved in mitigation of damages. Wells, J., said: "If there be a sale of two chattels for a gross sum and a note given for the price and one of the chattels is not the property of the vendor, and a partial want of consideration may be shown, why should not the same defense be allowed if both the chattels were the property of the vendor, and the title passed to the vendee, but the vendor destroyed one of them before delivery? In one case there is a want of consideration at

⁷³ Riddle v. Gage, 37 N. H. 519, 117. See Dyer v. Homer, 22 Pick. 253, and last note to § 544.

⁷⁴ Am. Dec. 151; Drew v. Towle, 27 N. H. 412, 59 Am. Dec. 380;

Kirkpatrick v. Muirhead, 16 Pa.

⁷⁴ Clough v. Baker, 48 N. H. 254. See § 54, Neg. Inst. Law, quoted in § 544.

the time when the contract is made to the extent of the value of one of the chattels; in the other a failure of it to the same extent caused by the misconduct of the vendor. There does not appear to be any good reason why the maker of the note might not defend on one ground as well as the other."⁷⁵ In Minnesota, West Virginia, Kentucky, Washington and Oregon a partial failure of consideration, though unliquidated, is available as a defense to the extent of the failure.⁷⁶ And this rule prevails in New Jersey.⁷⁷ In Minnesota one of the makers of a joint and several note may interpose, to defeat recovery *pro tanto*, the defense that there was a partial failure of consideration arising out of the breach of a contract of warranty entered

⁷⁵ Tuttle v. Tuttle, 101 Me. 287; Hathorn v. Wheelwright, 99 Me. 351 (noting that the rule declaring a partial failure of title to land was not a defense to a note has been changed by statute, and that in all other cases the rule has consistently been otherwise); Herbert v. Ford, 29 Me. 546. The judge continued: "Accordingly it was held in Dyer v. Homer, 22 Pick. 253, where there was a sale of chattels which was considered valid between the parties, but not so as to attaching creditors, and some of the chattels were taken and held by an attaching creditor, that the maker of the note given for them might prove the failure of the consideration in an action on the note. * * * If Clark, by resuming his practice, has prevented the defendant from enjoying the entire benefit of the contract, he ought not, through the plaintiff (the vendor's agent, to whom the note was payable), to be permitted to recover compensation for that which he has agreed the defendant shall enjoy, when by his own interference the defendant has been deprived of it. Clark is responsible in damages if there has

been a breach of his contract; but it does not appear from the current of authorities that the defendant is limited to that remedy alone. The consideration of the contract was the good will of the practice, and so far as that has been taken away by Clark there is manifestly a failure of it. The tendency of decisions in this country has been to allow a broader latitude of defense than was permitted by the rigid rules of the common law to bills of exchange and promissory notes where the justice of the case required it and a circuitry of action could be avoided."

A similar decision was made in Stacey v. Kemp, 97 Mass. 166, under the name of reducing the damages. See Hodgkins v. Moulton, 100 id. 309.

⁷⁶ Sullivan v. Sullivan, 22 Ky. 707, 7 L.R.A.(N.S.) 156; Federal I. & B. Co. v. Hock, 42 Wash. 668; Acme F. Co. v. Older, 64 W. Va. 255, 17 L.R.A.(N.S.) 807; Bisbee v. Torinus, 26 Minn. 165; Davis v. Wait, 12 Ore. 425.

⁷⁷ Wyckoff v. Runyon, 33 N. J. L. 107; Woodward v. Emmons, 61 id. 281, and local cases cited.

into with all the makers as to part of the property for which the note was given.⁷⁸ Where the purchaser of thirty-five acres of land at one hundred dollars per acre gave his note for one-half the consideration and paid the other half, and title to thirty acres failed, the court assumed, in the absence of evidence to the contrary, that the land was of equal value per acre and that an apportionment of the amount of the failure between the cash payment and the note was unnecessary. In addition to obtaining five acres of land the maker of the note secured under the covenants of the deed the right to resort to the covenants in the deed of his grantor's grantor, and was chargeable with the amount of the latter's liability upon them. If that grantor chose to give more than he was obliged to to be released from his covenants that, so far as the excess was concerned, was a matter between him and the maker of the note; it did not affect the rights of one who purchased the note after it became due.⁷⁹

A partial failure of consideration of a note given for the price of property sold, caused by breach of warranty, fraudulent misrepresentations or fraudulent overcharge may be shown in mitigation of damages;⁸⁰ and so if misrepresentations were made by the payee as to the amount due on the settlement of the account for which a note was given.⁸¹ A covinous note given to defraud creditors cannot be avoided by the maker for the fraud; it may be enforced against him; the statute declares the invalidity of the note only as to the party or parties whose right, debt or duty is attempted to be avoided.⁸² So a partial

⁷⁸ *Nichols & S. Co. v. Soderquist*, 77 Minn. 509. See *Waterman v. Clark*, 76 Ill. 428; *McHardy v. Wadsworth*, 8 Mich. 349.

⁷⁹ *Durment v. Tuttle*, 50 Minn. 426.

⁸⁰ *City D. Bank v. Green*, 138 Iowa 156; *Brown v. Roberts*, 90 Minn. 314; *Steckbauer v. Leykom*, 130 Wis. 438; *Nichols & S. Co. v. Soderquist*, *supra*; *Aultman v. Mason*, 83 Ga. 212; *Merrill v. Taylor*, 72 Tex. 293; *Burton v. Stewart*,

3 Wend. 236, 20 Am. Dec. 692; *Harrington v. Stratton*, 22 Pick. 510; *Coburn v. Ware*, 30 Me. 202; *Hammatt v. Emerson*, 27 id. 308, 46 Am. Dec. 598; *Haycock v. Rand*, 5 Cush. 26; *Davis v. Elliott*, 15 Gray 90; *Welch v. Hoyt*, 24 Ill. 117; *Lewis v. Cosgrave*, 2 Taunt. 2.

⁸¹ *Daniel v. Learned*, 188 Mass. 294.

⁸² *Carpenter v. McClure*, 39 Vt. 9, 91 Am. Dec. 370.

failure may be given in evidence to reduce damages where part of the articles for which the note was given were unskillfully manufactured, and not in compliance with the contract;⁸³ and to the extent of the depreciation, where a note is given for depreciated currency loaned at the nominal amount; and where a note is payable to a bank and its depreciated bills have been duly tendered in payment.⁸⁴ So a note given for prospective work which fails in part to be done by reason of the death of the payee is subject to a deduction proportioned to the amount of work left unperformed.⁸⁵ But it has been held that the consideration of a premium note to an insurance company cannot be impeached by showing that the company became insolvent during the period of the insurance, for the rights of other persons were involved.⁸⁶ And in other cases the amount of the failure of consideration may be of so uncertain a nature as to be incapable of any estimate, even upon testimony; and therefore the court will not make any inquiry concerning it.⁸⁷ But where a purchaser of personal property transferred and indorsed a note of a third person in payment, amounting to more than the purchase price, and received the vendor's note for the excess, on which he brought suit, it was held that such vendor, to establish entire failure of consideration, might show that the maker of the indorsed note was insolvent so that a suit thereon would be unavailing; and he need not release any part of the plaintiff's responsibility as indorser, for his liability would be limited to the amount received as consideration therefor.⁸⁸

§ 546. **Same subject.** A want or failure of consideration in a strict sense is a mere negation; as a defense it rests on the idea and principle of there being no valid contract; that it was

⁸³ *Spalding v. Vandercook*, 2 Wend. 431. See *Payne v. Cutler*, 13 id. 605.

⁸⁴ *Commercial & R. Bank v. Atherton*, 1 Sm. & M. 641; *Scott v. Hamblin*, 3 id. 285.

⁸⁵ *Clendinen v. Black*, 2 Bailey 488, 23 Am. Dec. 149. See *Gleason v. Clark*, 9 Cow. 57, holding that

evidence of negligence in the performance of professional services may be given in evidence under notice to reduce the amount.

⁸⁶ *Sterling v. Mercantile Ins. Co.*, 32 Pa. 75, 72 Am. Dec. 773.

⁸⁷ *Pulsifer v. Hotchkiss*, 12 Conn. 234.

⁸⁸ *Litchfield v. Allen*, 7 Ala. 779.¹

wholly or partially void from the beginning or afterwards wholly or partially ceased to be binding because lacking or losing this indispensable support. The distinction is very obvious between a full or partial defense based on the theory that the plaintiff's demand in whole or in part never had any valid existence and a defense which concedes the existence of such demand and succeeds by canceling or reducing that demand by setting up a counter-claim. The latter mode of defense, under the name of *recoupment*, has been considered.⁸⁹ To the extent that there is either a want or failure of consideration, as distinguished from mere inadequacy, the law in some form affords relief. If *wanting* as to a part of the contract, as we have seen, the contract is void *pro tanto* in its inception; there can be no recovery for such part whether it is apportionable by mere computation from *data* in the contract or must be ascertained by a jury upon testimony; and whether the action is upon the original contract or upon a note or bill. So far the English and American authorities agree. A partial failure of consideration generally, if not invariably, admits of another remedy by cross-action. Such failure may arise from accident and afford ground for rescission of the entire contract, as where some element or incident stipulated for in an executory purchase, and which is the leading inducement thereto, has ceased to exist before complete performance. A subsequent completion of the purchase would be a waiver of the objection. But if the value of the subject-matter of a purchase be impaired before delivery by the tortious act or the neglect of duty of the vendor recovery may be had therefor in a separate action, or it may be the ground of an abatement of the purchase price. A partial failure of consideration may also arise from the default of the plaintiff in the performance of some concurrent or precedent agreement, or may result from some act or default of the plaintiff, equivalent to a breach of some agreement subsequently to be performed and which was the consideration of the promise sued on. In the case of mutual agreements performance on one side is the consideration of the performance on the other,

⁸⁹ See § 168 *et seq.*

where they are concurrent or dependent. If one party fails to perform his part he cannot require performance of the other. A declaration in an action upon such a contract which does not aver performance of precedent conditions, or a readiness to perform concurrent stipulations fails to state a cause of action; it does not show that the consideration of the defendant's promise has been kept good.⁹⁰ If a note be sued on, the consideration of which was a contract of the payee to perform precedent or concurrent stipulations, and they have not been performed and the plaintiff in respect to them is in default, these facts may be alleged as a defense. Such a defense is a failure of consideration, and may be total or partial.⁹¹ It does not rest on rescission of the contract, nor is it recoupment.⁹²

In the case of independent stipulations the contract has a valid inception and is sustained on the principle that one stipulation is a consideration for another. Where the contract provides for some act to be done on one side in return for some subsequent act to be done on the other, the doing of the first act is a condition precedent, and the agreement to perform it is independent, and the consideration is the promise of the other party to perform the subsequent act. The consideration of the promise to perform such subsequent act is the performance, not the promise to perform the precedent condition. Where a promise is the consideration, if it is in binding form and made by a competent party, there is no want of consideration; and if its obligation is not afterwards impaired there is no failure thereof. By the strict common law a party bound by independent stipulations, those based on a promise as a consideration as distinguished from its performance, is bound to perform according to the tenor of his undertaking; that undertaking is

⁹⁰ Hall v. Perkins, 5 Ill. 548; Buckmaster v. Grundy, 2 id. 310; Washington v. Ogden, 1 Black 450; Lawrence v. Griswold, 30 Mich. 410; Rogers v. Cody, 8 Cal. 324; Dicken v. Morgan, 54 Iowa 684.

⁹¹ Perolin v. Young, 65 Wash. 300; Tyler v. Young, 3 Ill. 444, 35 Am. Dec. 116; Goodwin v. Nickerson, 116 N. H. 38.

son, 51 Cal. 166; Wells v. Hopkins, 5 M. & W. 7; Lawrence v. Griswold, 30 Mich. 410; Coppock v. Burkhart, 4 Blackf. 220; Rogers v. Cody, 8 Cal. 324. But see Waterhouse v. Kendall, 11 Cush. 128.

⁹² Thompson v. Richards, 14 Mich. 172.

enforced for all that it imports without regard to the ability of the other party subsequently to perform his promise which was the consideration.⁹³

§ 547. **Same subject.** Where A. sold his business as a dentist in a specified place to B., who gave his note for the agreed price, receiving from A. a bond conditioned that he would not practice as a dentist in that place, and suit was brought on the note after a part had been paid it was held that the defense of a part failure of consideration by reason of A. failing to perform the condition of the bond was inadmissible. The court say: "A part of this consideration he received at the time; all that could be received or enjoyed, and for what was to be done in the future, he received the contract, * * * as contained in and secured by said bond. This was evidently the consideration he received for which he agreed to pay the three thousand dollars for which the note was given, and all this consideration he received; he got all that he bargained for. But taking it as stated in the plea, that the bond was the consideration for the note, then there was no want of consideration, for the plea alleges that the bond was that consideration and that it was received according to the agreement of the parties. There was then no want of consideration either total or partial. Has there been any *failure* of this consideration? Has the bond which was the sole consideration for this note failed in any way? Is it not as valid a security now as at first? Has it proved to be of no binding force or effect? Has it become a void instrument since it was made? If it had been void from the beginning then there might have been a *want* of consideration. If it has become void since it was made, so as to be no longer of any force or effect as a security, then the consideration has *failed*. But it is not claimed that such is the fact. The bond, which is admitted to have been the consideration for which the defendant * * * agreed to pay three thousand dollars, and which was received just according to agreement, and which was a good and sufficient consideration for such

⁹³ Foster v. Jared, 12 Ill. 451; Read v. Cummings, 2 Me. 82. See § 544, n. 63.

promise at the time, remains in full force and effect; just as valid and binding now as it was the day it was given. If it was a sufficient consideration then, wherein has it failed to be so now?"⁹⁴ But it was formerly the peculiar function of equity to mitigate the severity of this rule of law where the real consideration, the thing promised, failed.⁹⁵ The principles of equity on this subject have, however, been largely incorporated into the common law, although not to the same extent in all jurisdictions. Under various circumstances where parties have bound themselves to conditions precedent, or by independent stipulations, they have been permitted to avoid this contract at law, as they could in equity, by showing that the promise, which was the technical consideration, had ceased to be of any value because, by some act or default of the promisor, he was unable to perform his promise. This doctrine is pointedly stated by Richardson, C. J., in a case which arose in New Hampshire: "When a promise of the payee is the consideration of a note and that promise fails altogether, so that the maker of the note loses all the advantage he might have expected to derive from it and nothing is left to him but a mere right of action for the

⁹⁴ *Clough v. Baker*, 48 N. H. 254. Sargent, J., further said: "The distinction between a failure of considerations and such a failure to perform on one side as gives the other party an election to rescind the whole contract, or to enforce it, has not always been made or clearly stated, and some confusion may be found in the authorities. *Tillotson v. Grapes*, 4 N. H. 444, is a case in which such a failure to perform his contract on one side as would authorize the other side to rescind the whole contract is improperly spoken of as a failure of consideration. 2 *Smith's L. Cases*, *9 and 10, in note to *Cutler v. Powell*, and cases cited; *Dodge v. McClintock*, 47 N. H. 383, and cases cited; *Wallace v. Antrim S. Co.*, 44

N. H. 521; *Campbell v. Jones*, 6 T. R. 570."

By a written agreement between A. and B. the former agreed that B. should have leave to cut timber and wood on his land, and B. agreed that A. should have leave to flow his land by means of a dam to a certain extent. They were treated as independent agreements, and it was considered that either might not only have his action for a breach of the contract in his favor, without regard to his performance of his contract to the other party, but that either in such a case might revoke his license at his option, whether the other party did or not, provided the license is on other grounds revocable. *Dodge v. McClintock*, 47 N. H. 383.

⁹⁵ *Morgan v. Smith*, 11 Ill. 104.

breach of that promise, we are of opinion that he may waive that right of action and treat the whole agreement as a nullity, if he so choose, and thus avoid the note. In such a case the substantial inducement which led the maker of the note to enter into the contract having totally failed justice requires that he should not be held to perform the contract on his part against his will. He may, if he please, perform the contract on his part and resort to an action for the breach of the contract on the other side; but he is not compelled to do this. These principles we consider as well settled by authority.”⁹⁶

548. Same subject. In a case in Illinois a note was given for the purchase-money of land; it was payable a month earlier than the contract required the vendor to make a conveyance. The action upon the note, however, was delayed until after the time appointed for conveying. The vendor had no title to the land when the contract was made and had none when the day arrived for performing it. Although payment of the purchase-money was a condition precedent yet, as the vendor had no power to convey and had neglected to obtain title, the consideration of the note was deemed to have entirely failed. Scates, J., says: “I should by no means regard it as want of failure of consideration that the covenantor had no title at the time of making the covenant, or at the time of the performance of a condition precedent by the other party, for peradventure he may obtain the title by or before the day of conveyance. The difficulty is in the proof, and not in the applicability of the defense. The old doctrine, holding a promise to be a consideration of a promise, should only be applied where no other consideration can be found available to sustain the agreement of the parties. Here we find another, a better, and a surer one. We reach the same goal by a shorter route. If the parties are unable to sustain their contract by the performance of the consideration we allow them to rescind it at once and without delay, and thus save the circuitry of action and costs occasioned by allowing the plaintiff to recover the money on the note and the defendant to recover back upon the breach of covenant. By

⁹⁶ Tillotson v. Grapes, 4 N. H. 444.

the delay in bringing this action the defendants are enabled to prove their defense by showing the inability of the obligors to assure the estate; and it seems to me to savor more of technicality, harshness, nay, injustice, than of reason or equity, to say to them because you agreed to pay a month before you were entitled to a conveyance that you must now pay the money and sue upon the covenant, although you are ready and able to show that the covenantors are not able to convey the estate which they agreed to convey." ⁹⁷ In another case in that state a plea of failure of consideration of a note averred that the payee was to plant a hedge for the maker which should become a complete protection against stock in from three to five years; that the note in question was given for moneys payable for such hedge at the time of planting; that the plants set out were winter-killed and useless, never having grown; and that it was then out of the power of the payee to make the hedge according to the agreement. Although the money for which the note was

⁹⁷ Gregory v. Scott, 5 Ill. 392. See Lull v. Stone, 37 Ill. 224; Davis v. McVickers, 11 Ill. 327; Owings v. Thompson, 4 Ill. 502; Deal v. Dodge, 26 Ill. 458; Tyler v. Young, 3 Ill. 444, 35 Am. Dec. 116.

The statute referred to in the foregoing cases does not define a failure of consideration. It provides that: "In any action commenced, or which may hereafter be commenced, in any court of law in this state, upon any note, bond, bill, or other instrument in writing for the payment of money, or property, or the performance of covenants or conditions, by the obligee or payee thereof, if such note, bond, bill, or instrument in writing was entered into without a good and valuable consideration; or, if the consideration upon which said note, bond, bill, or instrument in writing was made or entered into has wholly or in part failed it shall be lawful for

the defendant or defendants, etc., to plead such want of consideration, or that the consideration has wholly or in part failed, etc.; and if it shall appear that the consideration has failed in part the plaintiff shall recover according to the equity of the case." Scates' Comp. Stats., ch. 73, p. 292. Under this statute it was held that in an action upon a note given for the purchase-money of land, deeded with a covenant against incumbrances, money paid to extinguish an incumbrance should be deducted. Breese, J., said: "A part of the consideration of the note sued on was that the land sold was free from incumbrance. * * * To the extent, then, of this incumbrance there was a failure of consideration. Morgan v. Smith, 11 Ill. 199; Whisler v. Hicks, 5 Blackf. 100, 33 Am. Dec. 454; Smith v. Ackerman, 5 Blackf. 541; Buell v. Tate, 7 id. 55; Pomeroy v. Burnett, 8 id. 142."

given was due at the time of planting the hedge, and the note made payable one day after date, and the hedge was not to be completed until from "three to five years," it was held that the consideration had failed, a demurrer to the plea being taken as an admission of the statement that it was then out of the power of the payee to perform the agreement within the stipulated time.⁹⁸

The defense of a failure of consideration in such cases rests on the principle of a rescission of the contract. The defendant who has relieved himself from the performance of a condition precedent or any independent stipulation on the ground that the promise which was its consideration has altogether failed cannot afterwards claim damages for such failure. He has not himself performed, but has been absolved from furnishing the consideration on his part. A sale fills the definition of a valid contract where there is delivered or sold at a given price a tangible property or existing subject of any kind, with warranty, and which must possess value if the warranty be true. The contract for the purchase-money is a valid consideration on one side, and the undertaking which the warranty imports is a consideration on the other. The warranty of title against defect or of qualities is a contract for the present existence of facts. The acceptance of the property so warranted is no admission of the truth of the warranty; but where delivery and payment are to be simultaneous acts the warranty is generally relied on as the consideration for the price agreed to be paid. The money is parted with on the faith of the warranties—that is, that they are true, not that the purchaser will have only his remedy for damages. Such title as the vendor has is at once vested in the purchaser and the property is taken absolutely. If the warranties are not true they are broken at the time of the sale, but the fact is then undecided; they are to be verified or shown to be false by some future test. The same may be

⁹⁸ *Edwards v. Pyle*, 23 Ill. 354; *Litchfield v. Allen*, 7 Ala. 779; *Morgan v. Smith*, 11 Ill. 194; *Stone v. Fowle*, 22 Pick. 166. But *Schuchmann v. Knoebel*, 27 Ill. 175; see *Read v. Cummings*, 2 Me. 82; *Tillotson v. Grapes*, 4 N. H. 444; *Thompson v. Warren*, 5 Cold. 644.

said of a sale where a note is given for the price payable at a future day. Payment of the price is not a legal waiver of a warranty, though it may have some weight as an evidentiary fact to negative the breach thereof. If, however, before the price is paid upon an executed sale the fact can be established that the warranty was untrue, by the later and better authorities it may be shown either as an unliquidated partial failure of consideration or as a cross-claim, the damages upon which may be set off by recoupment. In England, where the action is brought on the original contract, fraud or breach of warranty in a sale, or failure of the plaintiff to perform his part of the agreement may also be proved in reduction of damages. The sum to be recovered for the price of the article may be reduced by so much as the article is diminished in value by reason of the fraud or non-compliance with the warranty.⁹⁹

§ 549. Consideration fraudulent or illegal in part. Fraud is a private wrong, and any entire contract into which it enters may be avoided *in toto* by the party against whom it was practiced.¹ If not avoided for the fraud and the injury therefrom only goes to part of the consideration the note may be avoided *pro tanto*, as for partial failure of consideration.² If the maker would repudiate the contract entirely for the fraud he must return the consideration unless it is wholly without value,³ but

⁹⁹ Lewis v. Cosgrave, 2 Taunt. 2; Street v. Blay, 2 B. & Ad. 456, as explained in Mondel v. Steel, 8 M. & W. 858, 870.

¹ Hazelton v. Sheckells, 202 U. S. 71, 50 L. ed. 939; Le Tourneux v. Gilliss, 1 Cal. App. 546; Henry v. State Bank, 131 Iowa 97; Elgin City B. Co. v. Hall, 119 Tenn. 548; Coburn v. Haley, 57 Me. 346; Wyman v. Heald, 17 Me. 329; Robinson v. Heard, 15 Me. 296; Lewis v. Cosgrave, 2 Taunt. 2; Solomon v. Turner, 1 Stark. 51; Nicewanger v. Bevard, 17 Ind. 621; Rose v. Wallace, 11 id. 112; Davis v. Jackson, 22 id. 233; Rodman v. Williams, 4 Blackf. 70; Cowger v. Gordon, id.

110; James v. Lawrenceburgh Ins. Co., 6 id. 525; Doughty v. Savage, 28 Conn. 146; Dow v. Higgins, 72 Ill. App. 302.

² Bischof v. Lucas, 6 Ind. 26; Stevens v. McIntire, 14 Me. 14; Allen v. Henn, 197 Ill. 486.

³ See Reeves v. Kelly, 30 Mich. 132.

If there is a total failure of consideration the maker of the note need not show in a suit to recover upon it that he returned or offered to return that for which the note was given. Taft v. Myerscough, 197 Ill. 600; Wynn v. Hiday, 2 Blackf. 123.

without doing this he may have a deduction to the extent that the subject-matter is diminished in value by reason of the fraud, wherever a part failure of consideration is allowed as a defense.⁴ But in England, where partial failure of consideration is not allowed as a defense to a note, it was held no defense in an action by the indorser against the acceptor that the latter had been imposed on in respect to the contract by the drawer, on account of which the acceptance was given, and that the plaintiff was privy to such imposition, where the acceptor did not wholly repudiate the transaction on discovering the imposition, but still retained possession of the premises under such contract, as the consideration had not altogether failed so as to render the bill wholly void.⁵ Where a note is given for several distinct items or considerations, one of which is afterwards discovered by the maker to be fraudulent, or where one item not chargeable to him is stealthily included therein without his knowledge, the note is not wholly void or voidable, but only to the extent of the fraudulent item.⁶

In a case in Ohio⁷ a member of a firm after dissolution, without authority from his copartners, renewed firm notes by giving a new note in the firm name. The new note, without any intent to defraud, was made to bear interest at ten per cent., and to include the individual note of one of the partners. The defendant, a member of the firm, supposing the new note was simply a renewal of the firm notes at six per cent., promised to pay it. It was held that such a new note was binding on him for the amount of the firm note surrendered on the renewal with simple interest from that time.⁸ So in a Mississippi

⁴ *Bischof v. Lucas*, 6 Ind. 26; *Coburn v. Ware*, 30 Me. 202; *Ham-matt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598. See *Sternburg v. Bowman*, 103 Mass. 325.

⁵ *Archer v. Bamford*, 3 Stark. 175, 1 C. & P. 64. See *Solomon v. Turner*, 1 Stark. 51.

But if the action were brought on the original contract for the price the rule laid down in *De Sew-hanberg v. Buchanan*, 5 C. & P.

343, would be applied. *Lorni v. Tucker*, 4 C. & P. 15.

⁶ *Griffiths v. Parry*, 16 Wis. 218; *Haycock v. Rand*, 5 Cush. 26; *Deering v. Chapman*, 22 Me. 48; *Brown v. North*, 21 Mo. 528; *Wade v. Scott*, 7 id. 509; *Andrews v. Wheat-on*, 23 Conn. 112.

⁷ *Wilson v. Forder*, 20 Ohio St. 89, 5 Am. Rep. 627.

⁸ See *Gamble v. Grimes*, 2 Ind. 392.

case it was stated in a plea to an action upon a note against a surety that he and another, before a sale by administrators, informed them that they would become the sureties of one K. for any amount of property he might buy at the sale. He purchased to the amount of \$1,138.45. Afterwards, and before the execution on the note in suit, K. became indebted to the administrators otherwise than for property bought at such sale in the further sum of \$400. The administrators included this sum also in the note and presented it, signed by K., to the defendant, and fraudulently and knowingly held the same out to him as for that sole consideration. The defendant being misled, and supposing that the note embraced only the amount of K.'s purchase at the sale, signed it. It was held that the note was not voidable *in toto*, but only to the amount of the excess.⁹ Where the fraud, however, is committed in procuring the execution of the note, as by misreading it to an illiterate person or substituting another for the one read, the note is wholly voidable.¹⁰ A fraud practiced on one of two joint makers is not available to the other.¹¹

§ 550. **Same subject.** Where part of the consideration of a note was illegal no apportionment can be made; the whole note is void. The principle that no count shall aid men who found their cause of action upon illegal acts is not only well settled, but is most salutary. It is fit and proper that those who make claims which rest upon violations of the law should have no right to be assisted by a court of justice; that courts should refuse their aid to those who seek to obtain the fruits of an unlawful bargain.¹² Thus, if a note be given for the

⁹ Clopton v. Elkin, 49 Miss. 95; Goss v. Whitehead, 33 id. 213.

¹⁰ Stacy v. Ross, 27 Tex. 3, 84 Am. Dec. 604; Griffiths v. Kellogg, 39 Wis. 290, 20 Am. Rep. 50.

¹¹ Booker v. Eller, 150 N. C. 555.

¹² First Nat. Bank v. Miller, 235 Ill. 135; O'Connor v. Kleiman, 143 Iowa 435; Alexander v. Hazelrigg, 123 Ky. 677; Sondheim v. Gilbert, 117 Ind. 71, 5 L.R.A. 432; Burke

v. Smith, 111 Md. 624; Padget v. O'Connor, 71 Neb. 314; Arnett v. Wright, 18 Okla. 337; Gardner v. Girtin, 69 Ill. App. 422; Tenny v. Foote, 95 Ill. 99; Douthart v. Congdon, 197 Ill. 349; McTigue v. McKee, 70 Ark. 293; Roby v. West, 4 N. H. 285, 17 Am. Dec. 423; Booth v. Hodgson, 6 T. R. 405; Card v. Hope, 2 B. & C. 661; Holland v. Hall, 1 B. & Ald. 53; Shaw v.

price of articles sold and a sale of a part of them was unlawful the note is not valid for any part.¹³ If part of the consideration of a note be an agreement to discontinue a criminal prosecution or to refrain from commencing one;¹⁴ or to do an act which would be a violation of official duty;¹⁵ or to indemnify against any unlawful act, as where a premium is to be given for insurance on a cargo the exportation of a part of which is prohibited by law,¹⁶ the note is wholly void; being an illegal contract, it is not divisible.¹⁷

Spooner, 9 N. H. 197, 32 Am. Dec. 348; Clark v. Ricker, 14 N. H. 44; Brigham v. Potter, 14 Gray 522; Sternburg v. Bowman, 103 Mass. 325.

¹³ Stanard v. Sampson, 23 Okla. 13; Carlton v. Bailey, 27 N. H. 230; Kidder v. Blake, 45 N. H. 530; Carlton v. Whitchee, 5 N. H. 196; Coburn v. Odell, 30 N. H. 540; Deering v. Chapman, 22 Me. 488, 39 Am. Dec. 592; Bliss v. Brainard, 41 N. H. 261; Greenough v. Balch, 7 Me. 461; Hanauer v. Doane, 12 Wall. 342, 20 L. ed. 439; Gray v. Hook, 4 N. Y. 449; Gammon v. Plaisted, 51 N. H. 444; Roby v. West, 4 id. 285, 17 Am. Dec. 423; Perkins v. Cummings, 2 Gray 258; Braitch v. Guelick, 37 Iowa 212; Gaitskill v. Greathead, 1 Dow. & Ry. 359; Scott v. Gilmore, 3 Taunt. 226; Snyder v. Wiley, 33 Mich. 495; Trist v. Child, 21 Wall. 441.

¹⁴ Shaw v. Spooner, 9 N. H. 199, 32 Am. Dec. 348; Hinds v. Chamberlin, 6 N. H. 225.

¹⁵ Waite v. Jones, 1 Bing. N. C. 656.

¹⁶ Parkin v. Dick, 11 East 502.

¹⁷ Widoe v. Webb, 20 Ohio St. 431, 5 Am. Rep. 664.

Where, however, an entire stock of goods is sold at one and the same time, but each article for a separate and distinct agreed value, the

contract is not to be regarded as entire and indivisible; and if the sale of some of the articles be prohibited by law the illegality will not render the sale of the other articles illegal also. Carleton v. Woods, 28 N. H. 290. The action was brought upon notes given for the whole purchase, and also for goods sold and delivered. The promise embraced in the notes was held entire, and part of the consideration being illegal, the notes were void; but it was held otherwise as to counts for goods sold and delivered. Woods, J.: "The various articles sold may well be regarded as sold separately, each article constituting the consideration for the promise to pay the price agreed for it. By the contract each article was separately valued. Its value was to be determined by its original cost and freight, and that price was to be paid for it. The bargain was in effect a contract to pay for each article a price to be determined in the manner before stated. The consideration for the promise to pay for the goods is not to be regarded as one and indivisible. The sale and delivery of each article formed the consideration in this case for the promise to pay the price for it. The contract was divisible. The fact that the

In a case in Ohio¹⁸ Scott, C. J., said: "The concurrent doctrine of the text-books on the subject of contracts is that if one of two considerations of a promise be *void* merely the other will support the promise; but, that if one of two considerations be *unlawful* the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act or two or more acts part of which are unlawful; because the whole consideration is the basis of the whole promise. The parts are

whole stock was sold at the same time can make no difference. The terms of the agreement are to be looked at in determining its character. It was not a case of a sale of an entire stock of goods for an entire price for the whole, without reference to the value of the separate articles sold. Instead of that, there was in fact a particular sum agreed to be paid for each article sold. This, we think, was the legal effect of the contract. And while the separate values of the articles sold can be ascertained, as fixed by the parties, the principle is not readily seen which would defeat the right of recovery for the stipulated price of that portion the sale of which was legal. Under a count like the present, less may be recovered than is declared for. A recovery may be had for a part although the claim may be defeated in part. * * * The contract for the goods sold in this case, then, not being entire, but divisible, and the prices of the several articles being agreed by the parties, and readily ascertainable, we are of

opinion that the plaintiff is entitled to recover, under the count for goods sold and delivered, the agreed price of the goods sold, excepting the spirituous liquors. There is a distinction between a case in which one or an entire promise, as a note, is made upon a consideration, a part of which is illegal, and a case where for an entirely good consideration several distinct things are granted or contracted to be done, one of which is unlawful. In the former case the promise is wholly void; in the latter the grant or promise, so far as legal, may be upheld. *Doe v. Pitcher*, 6 Taunt. 358; *Kerrison v. Cole*, 8 East 231; *Mouys v. Leake*, 8 T. R. 411; *Leavitt v. Palmer*, 3 N. Y. 19, 37; *Wigg v. Shuttleworth*, 13 East 87; *Howe v. Synge*, 15 id. 440; *Gaskell v. King*, 11 id. 165. See *Greenwood v. Bishop of London*, 5 Taunt. 727; *United States v. Bradley*, 10 Pet. 343; *Hyslop v. Clarke*, 14 Johns. 458; *Mackie v. Caines*, 5 Cow. 547, 15 Am. Dec. 477."

¹⁸ *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664.

inseparable.¹⁹ Whilst a partial *want* or *failure* of consideration avoids a bill or note only *pro tanto*, *illegality* in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy."²⁰ It has also been held that where a contract is void for illegality the subsequent repeal of the law which rendered it illegal will not relieve it of the objection.²¹ Nor will a seal protect from inquiry into the legality of the consideration.²² If partial payments are made upon a note of which an ascertainable portion of the consideration is illegal, and to a greater amount than that part of the consideration, the creditor, in the absence of a special appropriation of such payment by the debtor, is not at liberty to apply the same in satisfaction of the illegal part of the debt.²³

§ 551. Defect of consideration shown by parol evidence. The question how far a different bargain from that stated in

¹⁹ Metcalf on Cont. 246; Addison on Cont. 456; Chitty on Cont. 730; 1 Parsons on Cont. 456; 1 Parsons on Notes & Bills, 217; Story on Notes, § 190; Byles on Bills, 111; Chitty on Bills, 94; Norton on Bills & Notes (3d ed.) p. 291.

²⁰ And see comments in the same opinion on the case of Doty v. Knox County Bank, 16 Ohio St. 133.

²¹ Roby v. West, 4 N. H. 285; Jaques v. Withy, 1 H. Bl. 65; Gorsuth v. Butterfield, 2 Wis. 237.

²² Gray v. Hook, 4 N. Y. 449; Collins v. Blanter, 2 Wils. 347; Livingston v. Tremper, 4 Johns. 416; Tuxbury v. Miller, 19 id. 311.

²³ Gammon v. Plaisted, 51 N. H. 444; Caldwell v. Wentworth, 14 id. 431; Hall v. Clement, 41 id. 166; Hilton v. Burley, 2 id. 193; Warren v. Chapman, 105 Mass. 87; Haynes v. Nice, 100 id. 27, 1 Am. Rep. 78; Rohan v. Hanson, 11 Cush. 44. See Deering v. Chapman, 22 Me. 488, 39 Am. Dec. 592; Maybin v. Coulon, 4 Dall. 298.

In Greenough v. Balch, 7 Me.

461, there was an account between the parties of several transactions, part of which were legal and part illegal. After the last illegal transaction a payment was made on the account, which was considerably more in amount than the sum of both legal and illegal debits at that time; this payment was credited, but the account remained open and all the succeeding items were lawful. It was held that a note given for a balance subsequently accruing was not affected by the illegal items, for the new balance was deemed to arise from lawful charges; that the accounts being kept in continuation did not alter the case; the illegal items had been voluntarily paid and such payment could not be recovered.

In Brisbane v. Pratt, 4 Denio 63, the action being in the name of an indorsee of a note, which note was received after it became due, in the absence of any proof that he paid value for it, held, that there is a presumption that the action is

the bill or note may be proved by parol evidence to establish a defect of consideration has been much discussed and has elicited considerable contrariety of opinion. It is an undoubted rule of the common law that parol contemporaneous evidence shall not be received to vary or contradict a written contract.²⁴ This rule, however, does not preclude proof between proper parties to negative the presumption which the law raises that a note or bill is founded on a valuable consideration. Nor does it stand in the way of parol evidence to contradict an express and even specific admission in the paper of a consideration. It may be shown that there was no consideration, or a different one.²⁵ Nor does it exclude proof that the note or bill was given for accommodation when it is sued on by the accommodated party;²⁶ or that it was given for indemnity with a view to limiting recovery to the amount of the loss indemnified against,²⁷ or for future advances, and with a view to limiting recovery to the amount advanced.²⁸

brought for the benefit of the former holder, and his declarations made while he held the note and after it became payable that it was given for an illegal consideration are admissible for the defendant.

²⁴ 1 Greenl. Ev., § 275; 2 Jones, Ev., § 437; Adams v. Wordley, 1 M. & W. 374; Barnstable Sav. Bank v. Ballou, 119 Mass. 487; Woodbridge v. Spooner, 3 B. & Ald. 233; Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529; Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Hoare v. Graham, 3 Camp. 57; Hunt v. Adams, 7 Mass. 518; Wells v. Baldwin, 18 Johns. 45; Fitzhugh v. Runyon, 8 id. 375, id. 189; Warren Academy v. Starrett, 15 Me. 443; Harlow v. Boswell, 15 Ill. 56; Lane v. Sharpe, 4 Ill. 566; McCarthy v. Howell, 2 Ill. 341; Abrams v. Pomeroy, 13 Ill. 133; Mager v. Hutchinson, 7 Ill. 269.

²⁵ Peabody v. Munson, 211 Ill. 324; Tinker v. Midland Valley M.

Co., 25 Okla. 160; Bradner, Ev. (2d ed.), p. 200; Pollen v. James, 45 Miss. 129; Folsom v. Mussey, 8 Me. 400, 23 Am. Dec. 522; Abbott v. Hendricks, 1 M. & G. 791; Great Western Ins. Co. v. Rees, 29 Ill. 272; French v. Gordon, 10 Kan. 370; Cragin v. Fowler, 34 Vt. 326, 80 Am. Dec. 680; Aultman v. Mason, 83 Ga. 212, 218, quoting the text.

²⁶ Nesson v. Millen, 205 Mass. 515; Lombard v. Byrne, 194 Mass. 236; King v. Phillips, 12 M. & W. 705; Thompson v. Clubley, 1 id. 212; Violet v. Patton, 5 Cranch 142; Moore v. Cross, 17 How. Pr. 385; Fant v. Miller, 17 Gratt. 47; Robertson v. Williams, 5 Munf. 381.

²⁷ Haseltine v. Guild, 11 N. H. 390; Gilbert v. Duncan, 29 N. J. L. 133; Colman v. Post, 10 Mich. 422, 82 Am. Dec. 49; Bowker v. Johnson, 17 Mich. 42. See Homan v. Thompson, 6 C. & P. 717.

²⁸ Lawrence v. Tucker, 23 How. 15; Collins v. Carlisle, 13 Ill. 254.

Accommodation paper is made in contemplation of a consideration to be received by the accommodated party; until that consideration accrues the paper has no validity; when it

In *Bowker v. Johnson*, 17 Mich. 42, Judge Campbell says: "When a mortgage accompanies a note or bond it is a mere incident to the principal security, and the note or bond is the substantial evidence of debt. Yet it has always been held that it might be shown that the whole transaction, appearing on its face to be unconditional, was a security for something else, and no enforcement has been allowed for any other purpose than the actual one. The statute of frauds does not prevent trusts in personalty from being evidenced by parol, and a trust is therefore admitted to be shown against all but *bona fide* holders, whether it be to create a special interest, a defeasance, or any other similar equity. See *Catlin v. Birchard*, 13 Mich. 110. This doctrine has been applied in various ways. It has been allowed to convert an absolute deed into a mortgage. *Wadsworth v. Loranger*, Harr. Ch. 113; *Emerson v. Atwater*, 7 Mich. 12. To turn a contract of sale into a mortgage. *Batty v. Snook*, 5 Mich. 231; *Swetland v. Swetland*, 3 id. 482. To show that the original mortgagee had no interest in the securities. *Bishop v. Felch*, 7 Mich. 371. To show that a negotiable note secured by mortgage was really given for indemnity. *Colman v. Post*, 10 Mich. 422, 82 Am. Dec. 49. To show that a bond and mortgage for a fixed sum was given in consideration of a promised loan and a promised conveyance of property, and that there had not been a complete compliance with the promises. *Robinson v.*

Cromelien, 15 Mich. 316. In *Bennett v. Beidler*, 16 Mich. 150, a note was given for a sum of money, which was the price of the crops on certain lands purchased at auction at an estimated number of acres, with an agreement that the maker of the note might have a subsequent measurement made to ascertain the true amount of the purchase-money. The note having been paid by the maker to a *bona fide* holder and the land falling short, he was held entitled to recover back the surplus payment." The case under consideration was an action upon a promissory note for \$1,000. Upon the trial it appeared in evidence that this note, with another of like amount, was given under the following circumstances: Defendant bought out B.'s interest as partner in a brewery and was to pay \$3,000, one-third cash and the balance by these two notes; and was to assume and pay in full all of B.'s share in the debts of the firm, in which defendant succeeded him, and indemnify him against all liability and damages. B. showed a schedule of debts and assets as a basis of this arrangement, and it was agreed that if defendant paid debts beyond what appeared on the schedule he should be entitled to a corresponding deduction on the notes, which were to be left in bank to stand for that purpose. The defendant gave an unqualified bond to pay and indemnify, and executed the notes. One of the notes was indorsed by B. to a *bona fide* holder. Defendant paid claims in excess of the schedule list, of which B.'s half

has arisen the paper is good within its nominal amount to the extent that upon such consideration the accommodated party could incur a personal obligation.²⁹ When commercial paper is given to cover a loss which is contingently incurred on the faith of it, or to recover future advances which the receiver of the paper either binds himself or has an option to make, the payee holds it upon a legal consideration from the beginning; but until the loss happens in the one case, or advances are made in the other, the promise of payment between the immediate parties is dormant. A note given for the premium of insurance on taking out an open marine policy is of this character; it becomes operative and valid only as fast as risks are assumed on the policy, and to the extent of the premiums thereby earned.³⁰ Hence, the real consideration may be contingent, conditional or defeasible, and it may be shown by parol to be so; that it had not arisen, or, if it potentially existed at first, that it afterwards became nugatory so as not to support the promise to pay.³¹

§ 552. **Same subject.** The consideration being open to inquiry so far as the promise to pay depends upon its existence, continuance or amount, such promise may be indirectly varied

amounted to \$1,459.20. And referring to the case in hand the judge continued: "We can perceive no difference in principle between these cases. J. undertook absolutely to pay the debts of B., whatever might be their amount, and did pay them. But the price payable by J. was fixed upon the basis that such debts should be taken at a specified sum, and, if exceeding that, should entitle him to a corresponding reduction. So far as they were in excess they reduced the consideration for his notes; and, being capable of pecuniary calculation, and not in the nature of unliquidated damages, stand on the same footing as if he had given an accommodation note, or a note for money, in excess of a money price fixed at

the time. The debts were all in existence at the date of the transaction, and when ascertained and paid reduced to that extent the value received by J. of B. The agreement rendered it the duty of B. to hold the notes as security for no greater sum than was equitably due, and had he retained them both they would have been enforceable for no more." *First Nat. Bank v. Haulenbeek*, 65 Hun 54.

²⁹ See *First Nat. Bank v. Hinton*, 123 La. 1018.

³⁰ *Furniss v. Gilchrist*, 1 Sandf. 53; *Maine Mut. M. Ins. Co. v. Stockwell*, 67 Me. 382; *Elwell v. Crocker*, 4 Bosw. 22.

³¹ *Hughes v. Crocker*, 148 N. C. 318.

and controlled by parol evidence; not by showing that a different promise from the written one was made, but that it is different in legal effect as a consequence of a want, cessation or shrinkage of the consideration;—by evidence that the consideration implied had no existence; that it did not continue, or was, or has become, deficient in amount. The promise may thus be altogether undermined, postponed or reduced. A different agreement cannot be shown from that expressed in the note.³² A parol agreement contemporaneous with the making of a note by two that one of them shall be liable only in the event that it cannot be collected of the other;³³ that a note payable on demand shall not be demanded until after the maker's death;³⁴ that the note shall be void if a suit be compromised;³⁵ or if a verdict be obtained in an action between other parties,³⁶ is not admissible. So a note given for the right to vend a patented article in a particular county, payable at a certain time, cannot be affected by parol evidence that when it was executed it was verbally agreed that it should not be due and payable until sales to a specific amount had been made.³⁷ And an absolute note for purchase-money of land for which a quitclaim is to be executed is not subject to be defeated by proof of a contemporaneous parol agreement that if the land should be redeemed the note should be void.³⁸ Nor can a parol condition be proved in an action on such a note that it is to be void if other interests in the same land cannot be purchased in a particular manner.³⁹ The terms of a note or other written contract cannot be varied by evidence which goes simply to

³² The effect of the Illinois statute (2 Starr & Curtis, p. 2802) allowing the defense of failure of consideration of a note modifies the rule relating to varying a writing by parol; that rule gives way as to the note in suit, and also as to any other instrument executed in connection with and forming a part of the transaction which gave the note its existence. *Baker v. Fawcett*, 69 Ill. App. 300; *New York L. Ins. Co. v. Easton*, id. 479.

³³ *Mager v. Hutchinson*, 7 Ill. 266. See *Pike v. Street*, M. & M. 226.

³⁴ *Graves v. Clark*, 6 Blackf. 183; *Woodbridge v. Spooner*, 3 B. & Ald. 233.

³⁵ *Dale v. Pope*, 4 Litt. 166.

³⁶ *Foster v. Jolly*, 1 Cr., M. & R. 703.

³⁷ *Harlow v. Boswell*, 15 Ill. 56.

³⁸ *Lane v. Sharpe*, 4 Ill. 566.

³⁹ *Ely v. Kilborn*, 5 Denio 514.

the fact that a different promise to pay was made by the defendant from that reduced to writing.⁴⁰

An instrument not under seal may be delivered upon conditions the observance of which, as between the parties, is essential to its validity; and the annexing thereof to the delivery is not an oral contradiction of the written obligation, though negotiable as between the parties to it or others having notice.⁴¹ While parol evidence is not admissible to vary the effect of an undertaking, or merely to show that it was to be renewed, yet where the note does not contain the whole contract in pursuance of which it was made it is competent to show what that contract was and the purpose for which it was made.⁴² But this is only competent to show that the note has been diverted from its original purpose or to prove a defect of consideration.⁴³

⁴⁰ *Erwin v. Saunders*, 1 Cow. 249, 13 Am. Dec. 520; *Underwood v. Simonds*, 12 Metc. (Mass.) 275; *Adams v. Wilson*, id. 138; *St. Louis Perpetual Ins. Co. v. Homer*, 9 id. 39; *Holzworth v. Koch*, 26 Ohio St. 33; *Bookstaver v. Jayne*, 60 N. Y. 146; *Moseley v. Hanford*, 10 B. & C. 729; *Woodbridge v. Spooner*, 3 B. & Ald. 233; *Hoare v. Graham*, 3 Camp. 57; *Adams v. Wordley*, 1 M. & W. 374; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529; *Mahan v. Sherman*, 7 Blackf. 378; *State v. Overturf*, 16 Ind. 261.

⁴¹ *Benton v. Martin*, 52 N. Y. 570.

⁴² *Bookstaver v. Jayne*, 60 N. Y. 146. The answer of defendant J. to an action upon a promissory note stated that defendant G., who was a merchant doing business, was indebted to the plaintiff in the sum of about \$5,000; that an action had been commenced to recover the same; that, to induce defendant to become an indorser, plaintiffs promised that if J. would indorse G.'s note for \$4,000, at three months, Suth. Dam. Vol. 11.—39.

they would discontinue said action and give at least one renewal of the note; that, relying upon said agreement, defendant indorsed the note in suit; that plaintiffs did not perform their agreement, but, on the contrary, entered up judgment in said action, issued execution and levied upon said G.'s stock of goods, and thereby destroyed his credit and caused him to fail in business, and deprived said G. of the opportunity of eventually paying the note and relieving defendant of liability, and did not give a renewal of said note. The defendant claimed that thereby his indorsement became null and void. It was held that the plaintiffs utterly failed to carry out the agreement upon which the notes were indorsed by the defendant, and therefore had no right to enforce their collection. See *Holzworth v. Koch*, 26 Ohio St. 33; *Adams v. Wordley*, 1 M. & W. 374; *Bellows v. Folsom*, 2 Robert. 138.

⁴³ *Id.*

A plea to an action on a note payable one day after date stated that a certain specified part of the sum therein mentioned was included in consideration that suit should not be brought on the note for sixty days; and the suit being brought within that time, it was claimed that there was a partial failure of consideration. On demurrer this plea was held good. Proof of such facts would vary the legal effect of the note, but it does so consequentially by explaining the consideration.⁴⁴ In a late California case a written contract for the purchase of a business and the stock of a corporation designated an aggre-

⁴⁴ *Hill v. Enders*, 19 Ill. 163; *Morgan v. Fallenstein*, 27 id. 31.

Caton, C. J., said in the case last cited: "It may be that, strictly speaking, the agreement to pay the money mentioned in the note at the time there stated and the agreement not to enforce the payment of that amount till after the 1st of June, 1861, all being made at the same time, constituted but one agreement, only that part of it which is embodied in the note being reduced to writing, the rest being allowed to rest in parol, and that by the general rule of law this latter part, which was not embraced in the writing, could not be shown by parol. If that rule is to be applied in this case then it must in all similar cases; and it would be impossible in any case to show a total or partial failure of consideration of a note by parol, for the consideration of a note must necessarily form part of the agreement in pursuance of which the note is given; that part of the agreement which constitutes the consideration is never reduced to writing, and it must be shown by parol if it is ever shown. If I agree with you to deliver you my horse tomorrow, and you give me your note for \$100 in consideration thereof, here only

part of the agreement is reduced to writing by the execution and delivery of the note, and that portion which requires me to deliver the horse to-morrow is left in parol. Shall it be said that when I refuse to deliver the horse I may turn round and say you shall never prove it because that portion of the agreement was not put into the writing? The truth is that even the common law made an exception to that rule of evidence in cases where notes or other instruments for the absolute payment of money are given. It has always been admissible to show by parol the consideration upon which such instruments were executed. But whatever may have been the rule of the common law, our statute has expressly provided for this defense; and necessarily, to give effect to the statute, parol evidence must be admitted to show what the contract was, as well as to show that the consideration has failed. The statute has made no exception, and we can make none. A note or bond to pay money is necessarily but a part of the agreement between the parties, leaving out as it does all that portion of the agreement which induced the undertaking to pay the money; and if this part could not be shown by parol there

gate sum as the purchase price, no valuation being placed upon any of the items composing the consideration. The evidence disclosed that the value of the property, other than the stock, was estimated at ten thousand dollars, the sum paid in cash, and the stock itself at fifty-five dollars a share, making in the aggregate the amount of the notes. The stock was worthless, and if it was the sole consideration for the notes would have entitled their maker to judgment because of a total failure of consideration.⁴⁵

It may be shown in defense to an action upon a note which expresses that it is given for a lease that a part of the consideration was the good will of an insurance business and an insurance list, and that this part has been withheld.⁴⁶ So where the maker and payee of a note were owners of certain lands, and the maker took a conveyance to sell them on joint account, and as security to make prompt payment of the purchase-money, after the lands should be sold, made the note in question, these facts were deemed admissible; and it appearing that the lands remained unsold, there was held to be a want of consideration.⁴⁷ It is to be observed that a note given under such circumstances and for such a purpose is not void for want of consideration. It is valid as a security for the fulfillment of a trust. The transfer of the title to the maker was a consideration. Parol evidence being admissible even at law to show the fiduciary character of the transfer, it was permitted to have effect to restrain accordingly the written promise to pay; for upon the real consideration there was no equitable duty to pay until a sale had been made. In view of the trust there was no consideration for payment until that event—and this defense was a legal one. Caton, C. J., said:

must ever be a liability to a failure of justice. Nor is the exception to the general rule * * * confined to showing by parol a failure of consideration. Usury, and, in fine, any other defense arising out of the original agreement upon which the note was given, or of which the note

constitutes a part, may be shown by parol in order to establish a defense to the note."

⁴⁵ Field v. Austin, 131 Cal. 379.

⁴⁶ Great Western Ins. Co. v. Rees, 29 Ill. 272.

⁴⁷ Marsh v. Bennett, 22 Ill. 313.

"He (the plaintiff) might have held it till a consideration had arisen. This he did not choose to do, but brought his action, when in fact no consideration for the promise existed." It seems difficult to reconcile with this case one decided by the same court in the following year.⁴⁸ The opinion was delivered by the same judge, and he states the facts set forth in the notice as a pleading, constituting the alleged defense: "It shows that the several creditors of F. met him by appointment, of whom the plaintiff and defendant were two, and in pursuance of an arrangement then agreed to by all, W. gave his notes for the amounts of the several debts of the creditors present, as an evidence of the amounts due them from F.; that this note is one of those then given for the supposed amount due from F. to S. The notice further shows that it was agreed between all parties that W. was only to pay the several notes then given as he should collect the debts due F. Now, the notice nowhere states that he has not collected enough to pay all the notes, but it states that afterwards, but how long cannot be learned, the arrangement was broken up by F., with the consent of all parties, and the contract set aside, all the parties interested, including S., consenting thereto. The notice does not show, except by implication, that W. was to be empowered to collect F.'s debts." Upon this statement the judge proceeded to say: "If this notice is to be understood as stating that it was the agreement that W. should collect F.'s debts and pay the proceeds over *pro rata* in satisfaction of the notes as fast as he should collect the money, and that he should be liable to pay the notes only as fast as the collections would enable him to do so it clearly states a fact which the law cannot allow him to prove. This is not an attempt to prove a want or a failure of consideration of the note, but it is an attempt to vary the terms of the note."⁴⁹

⁴⁸ Walters v. Smith, 23 Ill. 342. See Harris v. Harris, 69 Ind. 181; King v. King, id. 467.

⁴⁹ The notice of defense which is set out in the report states that the note was given solely upon con-

sideration that F. "would assign over and deliver to the defendant a large amount of indebtedness due or to become due to him from third persons, and out of the proceeds of which, when collected, the defend-

§ 553. **Same subject.** In a Mississippi case⁵⁰ an administrator at a sale of his decedent's personal property proclaimed that the slaves about to be sold were subject to judgment liens, and he offered and agreed that in case they should be seized under the judgments the sale should be considered as void and the notes of the purchasers be given up. The slaves, on that assurance, sold for their full value. In an action brought by the administrator on a note given for the purchase-money it was held that the makers of it might show under the general issue that the slaves for the price of which the note was given were taken out of their possession and sold under judgments against the estate, and that the consideration of the note had thus failed. The court say the rule of law that parol testimony cannot be heard to vary written agreements has never been carried so far as to defeat the right to prove a failure of consideration.⁵¹ A promise cannot be en-

ant was to pay." Caton, C. J., said: "The paper says the money should be paid on or before the 25th of December, 1859, absolutely. The offer of parol proof is that he did not agree to pay the money absolutely on that or any other day, but that he only made a conditional promise that he would pay the note if he collected the money, but never without. Our statute allowing the failure or want of consideration of a note to be proved by parol never intended to allow parol proof to change the terms of a note which has been delivered and become operative. The rule that the writing must speak the intention of the parties is as applicable to a note as to any other written instrument. It is, no doubt, competent to show what the note was given for, but that does not alone constitute a defense; but in order to make out a defense it is necessary to show that W. did not at the time promise as the paper says he

did. This it was inadmissible to show by parol. What we said in *Lane v. Sharp* (3 Scam. 566) is directly applicable to this case, and sufficiently expresses our view of the law on this subject."

In *Great Western Ins. Co. v. Rees*, 29 Ill. 272, the court say: "The ruling of this court in *Lane v. Sharp* and in all subsequent cases founded upon that is to be considered as having no application to a case where no consideration or a total or partial failure of consideration is properly pleaded in an action brought upon an instrument of writing for the payment of money or property or the performance of covenants or conditions to an obligee or payee." See *Mann v. Smyser*, 76 Ill. 365; *Nichols v. Hunton*, 45 N. H. 470.

⁵⁰ *Buckels v. Cunningham*, 6 Sm. & M. 358.

⁵¹ *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Shepherd v.*

forced in full unless the consideration exists and continues intact as the promisee is bound to furnish and maintain it. The consideration of commercial paper may, and usually does, exist in parol; it may be intrinsically or conventionally conditional or contingent; it may be subject to suspense, change or rescission by oral stipulation; its value and duration may be assured or determinable in the same manner, and so that the defendant's promise will also be correspondingly absolute or mutable; be enforceable in full when the consideration is intact, and wholly or in part discharged if it be wanting, or if it fail entirely or partially. The cases already referred to of notes given for a special purpose, as for indemnity, future advances, or as security for other acts than that of paying the precise money mentioned in the instrument, are illustrations of the defeasibleness of such written promises as well as of the flexible nature and efficiency of the law in maintaining the conventional equipoise of right and obligation between the parties by proof relating to the consideration.

These principles were clearly recognized in an early case in Maine.⁵² The defendant was a wharfinger in G., to whom the plaintiff, living in P., had been in the practice of sending various kinds of lumber for sale, which the defendant sometimes sold for cash and sometimes on credit. Whenever he made sales he credited the plaintiff with the amount; it being, however, understood that he was not to be debtor therefor to the plaintiff till he should actually receive the money. On the 10th of June, 1828, he sold to one H. four hundred and seventy-eight dollars' worth of the plaintiff's lumber, taking his negotiable note for that sum, payable to the plaintiff in ninety days; the purchaser then being in good credit and the time comports with the usage in such cases. For the proceeds of this sale, among others, the plaintiff was credited in the defendant's books at the date of the note in suit. The plaintiff, wishing to make arrangements to preserve his property from being sacrificed by his creditors, made a nominal

Temple, 3 N. H. 455; Tillotson v.

⁵² Folsom v. Mussey, 8 Me. 400,
23 Am. Dec. 522.

sale to the defendant of all his lumber then on the latter's wharf, for the amount of which, and for the sum credited as above to the plaintiff in the defendant's books, including the amount sold to H., the note in controversy was made; it being then agreed orally between the parties that the defendant should sell the lumber, and collect what was due for lumber already sold, and account to the plaintiff therefor in the same manner as if no note had been given, and that his liability to the plaintiff should not be changed or affected by giving the note. The plaintiff then indorsed the note of H. to the defendant. Here was a sale in form and legal effect between the parties, though voidable by creditors, of lumber and a note; and the question was whether the note should be enforced for the full amount expressed, or whether the amount collectible thereon should be adjusted according to the eventual value of the consideration under the verbal bargain contemporaneously made. The opinion of the court by Weston, J., places the judgment upon broad principles which are believed to be sound and in accord with the best authorities of later date. He says: "It is an undoubted rule of the common law that parol testimony shall not be received to vary or contradict a written contract. In support of this principle many cases have been cited. That the defendant did make the contract declared on is not controverted. It is a note of hand which, like a specialty, imports a consideration, and, indeed, acknowledges one. Shall this written acknowledgment be contradicted by parol evidence? The rule upon which the defendant relies, strictly understood, would exclude it. And yet, that such evidence is admissible for this purpose is as well settled as the rule. Between the decisions which illustrate and enforce the rule and those which recognize the exception there may be an apparent discrepancy, but that will generally be found to arise from the different aspects in which they have been viewed. The case of *Barker v. Prentiss*⁵³ and the opinion of Chief Justice Parsons there given has maintained its ground in practice although the language used in subsequent opinions

⁵³ 6 Mass. 430.

* * * appears sometimes to lose sight of the distinctions there made. The position laid down in that case is that in all written simple contracts evidence of the consideration may be received between the original parties. And this is the uniform practice of our courts. If upon this inquiry it results that there was no consideration or that it has failed totally or partially, or that the contract was signed under mistake or misapprehension, the rights of the parties are determined as the justice of the case requires upon a view of all the facts. The plaintiff fails to recover, or he recovers a part only, of what the note or other contract expresses according to equity and good conscience. Of this character was the evidence in the case before us. It went to the consideration. The lumber which formed part of the consideration of the note was assumed to be worth a certain sum, but its final value was to depend on the sales. If overvalued, there would be a failure of consideration by the amount of the excess. If undervalued, the defendant was to pay the difference. As the estimate fell short of the value as ascertained, this part of the evidence operated in favor of the plaintiff. With regard to that part of the note in suit which arose from the H. debt, if that was not at the defendant's risk, if lost without negligence imputable to him, there would be a failure of consideration to that amount. Now the evidence proves that the defendant did not become the guarantor of the H. note, and that it was not taken at his risk. It has been lost. That loss must fall upon the plaintiff unless negligence in relation to it is chargeable to the defendant."

§ 554. **Same subject.** On like principles, in an action against the maker of a promissory note by an assignee with notice, it was held a good defense that the note was given in consideration of a tract of land and that at the time of making the note it was verbally agreed between the payee and the defendant that he should not be called on for its payment until the payee should obtain a patent from the United States for the land, which was expected before the note would by its

terms mature, and that the payee had not obtained the patent.⁵⁴ The court allowed the defense because the consideration for which the note was given had not been received by the defendant. Where a note was given instead of a receipt for money paid before it was due the transaction was allowed to be proved by parol, and the fact being admitted by demurrer, it was held that there was no good ground for a promise.⁵⁵ And where the only consideration of a note was a promise by the payee to convey to the maker on payment a tract of land, if the payee should own it, and if not, that he would buy it as cheap as he could and let the maker have it at cost, and the payee died insolvent before the note became due, without title to the land, it was ruled that the consideration of the note had wholly failed and the maker had a right to treat it as a nullity.⁵⁶ So in an action upon a note given for the price of personal property a parol agreement for a deduction in case the property should not prove to be of certain quality was deemed equivalent to a warranty, and on that defense the action was defeated.⁵⁷

An assurance given to a surety by the obligee, when solicited by the obligor to execute with him a writing obligatory, that the signing was but a matter of form and that he should not be applied to for payment has been proven as tending to show that the execution of the instrument was procured by fraud, in an action against such surety to enforce the obligation.⁵⁸ An acceptor sued by the indorsee of a bill may show by parol that the acceptance was for the plaintiff's accommodation and without consideration; and for this purpose that it was agreed that the bill, when due, should be taken up by the plaintiff.⁵⁹ A note purported to be for consideration due

⁵⁴ Gorham v. Peyton, 3 Ill. 363; Evans v. Freeman, 142 N. C. 61, and local cases cited.

⁵⁵ Slade v. Halsted, 7 Cow. 322.

⁵⁶ Tillotson v. Grapes, 4 N. H. 455. See First Nat. Bank v. Breese, 39 Iowa 640.

⁵⁷ Shepherd v. Temple, 3 N. H. 455.

⁵⁸ Miller v. Henderson, 10 S. & R. 590; Hain v. Kalbach, 14 id. 159, 16 Am. Dec. 484; Zeibert v. Grew, 6 Whart. 404. But see Barnstable Sav. Bank v. Ballou, 119 Mass. 487.

⁵⁹ Thompson v. Clubley, 1 M. & W. 212.

to the plaintiff for business transacted for the defendant; but it was allowed to be shown by parol that the real consideration for which it was made was future services which had not been performed.⁶⁰

Where the consideration of a note was the assignment of a half interest in a bond for the conveyance of land and it was agreed between the parties that the assignee should pay, by his note to the assignors, the same amount they had given therefor, and, through this misrepresentation, the note was taken for four times the sum paid for the same, the recovery was limited to the amount actually paid.⁶¹ It is often difficult to determine, on a given state of facts, whether the parol evidence offered goes to the contract or the consideration. The difficulty is particularly apparent where a note or bill is based upon some precedent transaction, and by a contemporaneous verbal agreement resort may be had to that transaction for a new and more accurate statement of the amount of the debt, or of some ground of deduction; or it is agreed that in a specified event the note or bill is to be void without actual payment; or that it shall be paid only out of some special fund contemplated to exist. In cases of doubt there is a leaning—of the English more strongly than of the American courts—against the admission of the evidence, and even where there is much reason to believe that the inducement to make or become a party to the bill or note was the promise held out of relief, in whole or in part, from the obligation in the manner indicated by such extraneous proof. If the evidence tends to show a defect of consideration it is admissible⁶² but otherwise not. This test, however, has not in all cases been very rigidly observed.⁶³ It may be well to express what is implied in the

⁶⁰ *Abbott v. Hendricks*, 1 M. & G. 791. See *Pecker v. Sawyer*, 24 Vt. 459.

⁶¹ *Stevens v. McIntire*, 14 Me. 14.

⁶² *Smith v. Brooks*, 18 Ga. 440.

⁶³ See *Keler v. Cohen*, 217 Pa. 522; *Goddard v. Hill*, 33 Me. 582; *Mahan v. Sherman*, 7 Blackf. 378; *Miller v. White*, id. 491; *Leighton*

v. Grant, 20 Minn. 345; *Lash v. McCormick*, 17 id. 403; *Walters v. Armstrong*, 5 id. 448; *Spring v. Lovett*, 11 Pick. 417; *Campbell v. Hodgson*, Gow 74; *Mosely v. Hanford*, 10 B. & C. 729; *Hodgkins v. Moulton*, 100 Mass. 309; *Sawyer v. Chambers*, 44 Barb. 42; *Allen v. Furbish*, 4 Gray 504, 67 Am. Dec.

preceding discussion, that the parties to a negotiable instrument may make the consideration for it a matter of contract, in which case parol proof is not admissible to show that it is other or different from that which is expressed.⁶⁴

§ 555. Liability of drawer and indorser for principal sum.

All persons joining in drawing a bill are liable to the holder as drawers, whether personally interested in the consideration or not; an accommodation drawer is liable to all parties who become the holders, except the accommodated party, in the due course of business unless there has been a diversion of the paper from the special use intended, when it is good only to a *bona fide* holder for value.⁶⁵ Where several persons join as drawers they are also jointly liable to the acceptor, if they draw without funds and he pays the bill. It is money paid at their request, and the amount paid is recoverable.⁶⁶ "The presumption that the drawer has funds in the hands of the acceptor may be rebutted. The drawee may show that he accepted and paid the bill for the accommodation of the drawer, and then, in the absence of any express stipulation, the law will imply an undertaking on the part of the drawer to indemnify the acceptor. On this implied obligation the acceptor may have an action against the drawer, but not on the bill itself.⁶⁷ As between the drawer and drawee the bill is a mere request or direction to pay money; it never speaks, as it does between other parties, the language of contract, or imports any obligation. When the acceptor sues, whether he declares specially on the implied promise to indemnify, or generally for money

67; *Pecker v. Sawyer*, 24 Vt. 459; *Warren Academy v. Starrett*, 15 Me. 443; *Isaacs v. Elkins*, 11 Vt. 679; *Fairfield County T. Co. v. Thorp*, 13 Conn. 173; *Foster v. Jolly*, 1 Cr., M. & R. 703; *Pike v. Street*, M. & M. 226; *Susquehanna B. & B. Co. v. Evans*, 4 Wash. C. C. 480; *Hill v. Ely*, 5 S. & R. 363; *Abbott v. Hendricks*, 1 M. & G. 791; *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 569; *Hyde v. Tenwipkel*, 28 Mich. 93.

64 *Reisterer v. Carpenter*, 124 Ind. 30; *Hubbard v. Marshall*, 50 Wis. 322.

65 See *Linn County Nat. Bank v. Crawford*, 69 Fed. 532.

66 *Griffith v. Reed*, 21 Wend. 502, 34 Am. Dec. 267.

67 Id., per *Bronson, J.*; *Young v. Hockley*, 3 Wils. 346; *Chilton v. Whiffin*, id. 13; *Chitty on Bills*, 344, 410.

paid, the bill itself is not the foundation of the action; it is but an item of evidence.”⁶⁸ The drawer’s contract, as such, to the holder of the paper is to pay the sum mentioned in the bill conditionally; that is, if the bill is not accepted and paid by the drawee, and notice of the dishonor be duly given. His liability is that of the first indorser of a promissory note.⁶⁹

The drawing as well as the negotiating of a bill implies an undertaking to the payee and to every other person to whom the bill may afterwards be transferred that the drawee is a person capable of accepting the bill and making himself responsible for its payment; that he shall, if applied to for that purpose, express in writing upon the bill an undertaking to pay when it shall become payable; that he shall pay it on presentment for that purpose when it becomes payable; and that if the drawee fail to do either he, the drawer, will pay the amount stated in the bill, with legal damages thereon, provided he have due notice of the dishonor.⁷⁰ The indorsement of a bill or note is equivalent to the drawing of a bill; the former is like a new bill drawn by the indorser on the drawee or acceptor; and the latter by the indorser on the maker in favor of the indorsee.⁷¹ The indorser warrants that the bill or note will be accepted and paid according to its tenor; that it is in every respect genuine; that it is valid; that the ostensible parties are competent and that he has lawful title to and

⁶⁸ *Griffith v. Reed, supra*. It was held in this case that there was no implied promise of the surety to repay the acceptor. But in *Suydam v. Westfall*, 2 Denio 205, such an action was sustained by the court of errors. Bockee, Senator, said: “As relates to all intervening parties the acceptor of a bill of exchange is considered to stand in the same position as the maker of a promissory note. The drawers are in the character of indorsers. But this analogy ceases when the acceptor has paid the bill from his own funds. The relation between

the drawer and the drawee is then reversed and the former becomes the debtor.”

⁶⁹ 1 *Parsons on N. & B.* 54; *Balingalls v. Gloster*, 3 East 481, 4 Esp. 268.

⁷⁰ *Bayley on Bills*, ch. 5; *Story on Bills*, § 108; *Edwards on Bills*, 287; *Evans v. Gee*, 11 Pet. 80, 9 L. ed. 639; *Mellish v. Simeon*, 2 H. Bl. 378; *Milford v. May*, 1 Doug. 55; *Mason v. Franklin*, 3 Johns. 202; *Walker v. Bank*, 13 Barb. 636, 9 N. Y. 582.

⁷¹ *Grinnell v. Herbert*, 5 A. & E. 436.

the right to indorse it.⁷² Of course, if the drawer's or indorser's contract in any of these particulars is not fulfilled he is liable either on the principle of the failure of consideration or on the contract.⁷³ The assignment by indorsement of a non-negotiable instrument calling for payment of money is an implied warranty, unless it be otherwise agreed, that there is a valid subsisting debt and that the maker of the instrument is solvent or will be when the claim falls due.⁷⁴ The indorser of a negotiable promise to pay money, though it be *quasi-commercial* paper—negotiable in form but lacking some elements of such paper, as town orders, always subject to equitable defenses,—guarantees the genuineness of it and the validity of the promise.⁷⁵

One who transfers a bill or note without indorsement impliedly warrants that it is valid so far, at least, as he has been connected with its origin, as that it is not to his knowledge void for usury.⁷⁶ So a drawer or indorser without recourse

⁷² *McConeghy v. Kirk*, 68 Pa. 200; *Condon v. Pearce*, 43 Md. 83; *Prescott Bank v. Caverly*, 7 Gray 216; *Shaw v. Outwater*, 77 Hun 87; *Remsen v. Graves*, 41 N. Y. 475; 1 *Daniel on Neg. Inst.*, § 669; *Turnbull v. Bowyer*, 40 N. Y. 456, 100 Am. Dec. 523; *Blethen v. Lovering*, 58 Me. 437; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Coolidge v. Brigham*, 1 Metc. (Mass.) 547; *Mills v. Barney*, 22 Cal. 240. See *Swall v. Clarke*, 51 Cal. 227.

A second indorsement admits the signature and capacity of every prior party, including the existence and capacity of the maker of the note. *Glidden v. Chamberlin*, 167 Mass. 486, 57 Am. St. 479.

⁷³ *Keys v. Keys*, 217 Mo. 48; *Chitty on Bills*, *95; *Edwards on Bills*, 291; 1 *Daniel on Neg. Inst.*, § 669; *Canal Bank v. Bank*, 1 Hill 287; *Little v. Derby*, 7 Mich. 325; *Gurney v. Womersley*, 4 E. & B. 133, 28 Eng. L. & Eq. 256; *Ap-*

pleton Bank v. McGilvray, 4 Gray 518, 64 Am. Dec. 92; *Hurst v. Chambers*, 12 Bush 155.

⁷⁴ *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 56 Am. St. 828.

⁷⁵ *Willis v. French*, 84 Me. 593, 30 Am. St. 416.

⁷⁶ *Drennan v. Bunn*, 124 Ill. 75; *Cressey v. Kimmel*, 78 Ill. App. 27; *Rumley Co. v. Dollarhide*, 86 id. 477; *Whitney v. Nat. Bank*, 45 N. Y. 305; *Bell v. Dagg*, 60 id. 528; *Smith v. Corege*, 53 Ark. 295; *Delaware Bank v. Jarvis*, 20 N. Y. 226. See *Brown v. Montgomery*, id. 287.

An oral warranty of the collectibility of a note is not within the statute of frauds. *Smith v. Corege*, *supra*; *Milks v. Rich*, 50 N. Y. 269. On such a warranty the assignor will be estopped by a judgment against his assignee, and if he directs the latter to sue the maker of the note he will be liable for the amount he received for it and the

undertakes that the paper is what it purports to be, a valid obligation of those whose names are upon it.⁷⁷ He is liable if any of the prior signatures are not genuine;⁷⁸ if the instrument was invalid between the original parties by reason of payment or set-off,⁷⁹ for want of consideration,⁸⁰ or illegality of the consideration, or if any prior party was incompetent, or the indorser without title;⁸¹ so if there be fraud or misrepresen-

costs of the suit. *Smith v. Corege, supra*. If, however, the genuineness of the note has been considered by the parties and the vendor has declined to warrant it the rule is otherwise. *Bell v. Dagg*, 60 N. Y. 528.

As to warranty by misrepresentation and concealment, see *Vance v. McBurnett*, 94 Ga. 251.

⁷⁷ *Challis v. McCrum*, 22 Kan. 157, 31 Am. Rep. 181; *Merriam v. Wolcott*, 3 Allen, 258, 80 Am. Dec. 69, overruling *Ellis v. Wild*, 6 Mass. 321; *Meyer v. Richards*, 163 U. S. 385, 411, 41 L. ed. 199, 209. The opinion in the last case refers to *Ellis v. Wild, supra*; *Baxter v. Duren*, 29 Me. 434, and *Fisher v. Rieman*, 12 Md. 497, as holding otherwise, and says it is doubtful, in view of *Hussey v. Sibley*, 66 Me. 192, 22 Am. Rep. 557, and *Milliken v. Chapman*, 75 Me. 306, 317, whether *Baxter v. Duren, supra*, would now be followed there. "The three cases referred to, it is needless to say, are practically disregarded by the entire current of American and English authority, and stand alone."

⁷⁸ *Wellington Nat. Bank v. Robbins*, 71 Kan. 748, 114 Am. St. 523; *Brown v. Ames*, 59 Minn. 476; *Lennon v. Grauer*, 159 N. Y. 433; *Damon v. Williamson*, 18 Ohio St. 515.

One who sells as agent will be personally liable unless he discloses

the fact of his agency and the name of his principal. *Brown v. Ames, supra*; *Bailey v. Galbreath*, 100 Tenn. 599.

⁷⁹ *Hillman v. Stanley*, 56 Wash. 320; *Ticonic Bank v. Smiley*, 27 Me. 225, 46 Am. Dec. 593; *Daskam v. Ullman*, 74 Wis. 474.

In the last case the purchaser paid the full amount of the note with interest due; took an assignment of a chattel mortgage and a mortgage of land which had been given to secure the note; sold the chattels under the mortgage and commenced foreclosure of the land mortgage. The defense of payment was established, and an action was thereafter brought to recover for the conversion of the chattels, the defense of which was tendered the assignor of the note, who declined it; judgment went against the assignee. In the foreclosure suit the assignor made the defense on the issue of payment. It was ruled that he was bound by both judgments and was liable to the assignee for the amounts thereof paid by him, and for reasonable attorneys' fees paid by him in both suits.

⁸⁰ *Blethen v. Lovering*, 58 Me. 437; *Gompertz v. Bartlett*, 2 E. & B. 849, 24 Eng. L. & Eq. 156.

⁸¹ 1 *Daniel*, Neg. Inst., § 670; *Giffert v. West*, 33 Wis. 617; *Hannum v. Richardson*, 48 Vt. 508, 21 Am. Rep. 152.

tation.⁸² The words "without recourse" apply only to the solvency of the prior parties.⁸³ One who transfers without recourse a note and a mortgage apparently given to secure it warrants the validity of the security.⁸⁴ One who sells municipal bonds does not unless he so stipulates, guarantee their validity and solvency; ⁸⁵ but only that they belong to him and are not forged.⁸⁶ This question has been recently considered by the federal supreme court in a case in which bonds of Louisiana were bought and sold in good faith as valid and lawful obligations; in fact, they were absolutely void, having never been lawfully put into circulation. The purchaser sued to recover the money paid. The case was determined according to the principles of the civil law, although the discussion covers the common-law rule as well. The conclusions arrived at are that by the civil law warranty, whilst not of the essence, is yet of the nature of the contract of sale, and is implied in every such contract unless there be a stipulation to the contrary. That by the common law the doctrine is universally recognized that where commercial paper is sold without indorsement or without express assumption of liability on the paper itself the contract of sale and the obligations which arise from it, as between vendor and vendee, are governed by the common law relating to the sale of goods and chattels; and that the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the question of forgery *vel non*, but depends upon whether he has delivered that which he has contracted to sell, this rule being designated in England as a condition of the principal contract, as the essence and substance of the thing agreed to be sold, and in this country being generally termed an implied warranty of identity of the thing sold, and that, so far as the practical result of the two systems of law is concerned, they lead to the same conclusion, and entitled the pur-

⁸² *Prettyman v. Short*, 5 Harr. 360. See *Curtis v. Brooks*, 37 Barb. 476.

⁸³ *McCormack v. Ware*, 13 Ky. L. Rep. 678 (Ky. Super. Ct.).

⁸⁴ *Waller v. Staples*, 107 Iowa 738.

⁸⁵ *Rouhs v. Bank*, 94 Tenn. 57.

⁸⁶ *Otis v. Cullom*, 92 U. S. 447, 23 L. ed. 496; *Richardson v. Marshall County*, 100 Tenn. 346.

chaser to recover the money paid with interest from the time of judicial demand.⁸⁷

The terms of the negotiable instruments act on this general subject are: Every person negotiating an instrument by delivery or by a qualified indorsement warrants: (1) That the instrument is genuine and in all respects what it purports to be; (2) That he has a good title to it; (3) That all prior parties had capacity to contract; (4) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee. Subdivision 3 does not apply to persons negotiating public or corporate securities, other than bills and notes. A subsequent section reads thus: Every indorser who indorses without qualification warrants to all subsequent holders in due course: (1) The matter and things mentioned in subdivisions one, two and three of the preceding section, and (2) That the instrument is at the time of his indorsement valid and subsisting. And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor; and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it.

Mr. Crawford,⁸⁸ the author of the act referred to, says of the last section given above that it makes an important change in the law. In *National Park Bank v. Seaboard Nat. Bank*⁸⁹ it was held that where a bank, which had acted merely as collecting agent, had paid the proceeds of a check over to its principal the bank making the payment could not recover from the collecting bank upon subsequently discovering that the check had been raised. In this case the check was presented by the S. Bank to the drawee bank through the clearing house, and hence there was no question as to the liability of

⁸⁷ *Meyer v. Richards*, 163 U. S. 385, 41 L. ed. 199, disapproving *Lit-tauer v. Goldman*, 73 N. Y. 506.

⁸⁸ *Anno. Neg. Inst. Law* (2d ed.), § 126.

⁸⁹ 114 N. Y. 28, 11 Am. St. 612.

the S. Bank as an indorser to an indorsee. But in *United States v. American Exchange Nat. Bank*⁹⁰ the court, proceeding upon principles similar to those relied upon in the New York case, held that the indorsement of a bank to which paper has been indorsed for collection does not import a guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal as stated upon the face of the paper, and that in such case the collecting bank was not liable after it had paid the proceeds to its principal although a prior indorsement was a forgery. But the statute applies to all indorsers who indorse without qualification and no exception is made of indorsers to whom the instrument has been indorsed restrictively.

Although the drawer or indorser is held to the implied warranties heretofore stated the damages are not assessed in respect to the principal sum according to the general rule applicable to warranties of quality or title of personal property, which is that the warrantor shall pay so much as the actual value of the property falls short of what it would be worth if the warranty had been kept good. On the contrary, where recourse is had to an indorser the recovery on account of the principal sum is limited to the amount paid; in other words, there is a compulsory refunding of the consideration and interest thereon.⁹¹ Where, however, a party purchases accommodation paper at less than its face, on representations made by a party to it that it is business paper, and he relies on them, he will be entitled to the whole sum payable by its terms although it exceeds the amount paid for it, with the

⁹⁰ 70 Fed. 232.

⁹¹ *Smeltzer v. White*, 92 U. S. 390, 23 L. ed. 508; *Munn v. Commission Co.*, 15 Johns. 43; *Cram v. Hendricks*, 7 Wend. 569; *Ingalls v. Lee*, 9 Barb. 647; *Hutchins v. McCann*, 7 Port. 94; *Noble v. Walker*, 32 Ala. 456; *Raplee v. Morgan*, 3 Ill. 561; *Shaeffer v. Hodges*, 54 Ill. 337; *Braman v. Hess*, 13 Johns. 52; *Short v. Coffeen*, 76 Ill. 245; *Wynn v. Suth. Dam.* Vol. II.—40.

Poynter, 3 Bush 54; *Semmes v. Wilson*, 5 Cr. C. C. 285; *Bank of United States v. Smith*, 4 id. 712; *Cook v. Clark*, 4 E. D. Smith 213; *Judd v. Seaver*, 8 Paige 548.

In *Mechanics' Bank v. Minthorne*, 19 Johns. 244, the plaintiff, as indorsee, was not precluded from recovering against the indorser seven per cent., the legal rate, by having discounted the note at six.

legal interest thereon.⁹² And if an indorser who has been made liable to his indorsee on account of his indorsement settles with the latter and obtains a transfer of the bill he may recover on it from the acceptor for his own use the same amount which his indorser might have recovered, or rather what he would have recovered if he had not negotiated the bill. And it is immaterial whether, upon such transfer, he paid more or less, or merely gave a new security.⁹³

§ 556. Interest on notes and bills. Interest is only allowed before maturity when expressly stipulated for;⁹⁴ but when it is clearly reserved it is calculated from the date of the instrument unless a different time is specified for it to begin.⁹⁵ The simple words "with interest," or similar phrase, will suffice to give interest from date.⁹⁶ And on such a general reservation of interest it may be recovered from date until paid, although at maturity no suit could be brought;⁹⁷ and it is the same if

⁹² *Burrall v. DeGroot*, 5 Duer 379.

⁹³ *Bunker v. Langs*, 76 Hun 543; *Deas v. Harvie*, 2 Barb. Ch. 448.

⁹⁴ *Evans v. Ozark O. Co.*, 103 Ark. 212.

Payments made on a note, payable at a fixed time, before it matures do not bear interest unless it is so agreed. *Blackshear Mfg. Co. v. Stone*, 8 Ga. App. 661.

⁹⁵ *Webber v. Webber*, 146 Mich. 31 (note antedated); *Kuerzi v. Scott*, 74 N. J. Eq. 218; *Bevier v. Covell*, 87 N. Y. 52; *Kennerly v. Nash*, 1 Stark. 453; *Hopper v. Richmond*, id. 507.

Interest on a note payable "one day after date without interest" bears interest only from the time of demand of payment. *Peirpoint v. Peirpoint*, 71 W. Va. 431, 43 L.R.A. (N. S.) 783.

⁹⁶ *Id.*; *Salazar v. Taylor*, 18 Colo. 538; *Campbell v. Jones*, 79 Ala. 475; *Hornstein v. Cifunio*, 86 Neb. 103; *Dewey v. Bowman*, 8 Cal.

145; *Winn v. Young*, 1 J. J. Marsh. 51, 19 Am. Dec. 52; *Ely v. Wither-spoon*, 2 Ala. 131; *Dickinson v. Tunstall*, 4 Ark. 170; *Inglish v. Watkins*, id. 199; *Kilgore v. Powers*, 5 Blackf. 22; *Pate v. Gray*, *Hemp. C. C.* 155; *Doman v. Dibden*, *Ry. & M.* 381; *Whitton v. Swope*, 1 Litt. 160; *Roffey v. Greenwell*, 10 A. & E. 222; *Connors v. Holland*, 113 Mass. 50; *Pittman v. Barrett*, 34 Mo. 84; *Smith v. Goodlett*, 92 Tenn. 230. See § 305.

A promise to pay an interest-bearing note covers the interest due. *Stern v. Smith*, 225 Ill. 430, 116 Am. St. 151; *Mowry v. Saunders*, 33 R. I. 45.

⁹⁷ A married woman, being administratrix, received a sum of money in that character and loaned it to her husband, and took for it the joint and several promissory note of her husband and two other persons, payable to her with interest; held, although she could not have maintained an action upon the

payable at the end of a specified time from the death of the maker.⁹⁸ But interest on a note payable within one year after the death of the maker is not recoverable before the expiration of that time.⁹⁹ Commonly speaking, an instrument of this sort, reserving interest in general terms, carries interest from date whether payable on demand or at a specified time. The reason is that the party making the promise is expected to keep it; and, if he does, no interest can be due from any other period than its date.¹ On a contract to pay interest annually, the fact that it was to be compounded with the principal if not paid, does not postpone the right to collect interest until the maturity of the note.² If unliquidated claims do not bear interest a counterclaim for unliquidated damages in an action on a note does not stop interest before verdict if the damages are not previously liquidated.³ Under the negotiable instruments act, "where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof."⁴ A stipulation for interest in excess of the legal rate, no time being specified

note during the life-time of her husband, yet he having died, and it having been given for good consideration, it was a chose in action surviving to her, and she might maintain an action upon it against either of the other makers at any time within six years after the death of her husband and recover interest from the date of the note. *Richards v. Richards*, 2 B. & Ad. 447.

⁹⁸ *Roffey v. Greenwell*, 10 A. & E. 222.

⁹⁹ *Randall v. Grant*, 59 App. Div. (N. Y.) 485. See *Larrabee v. Southard*, 95 Me. 385.

¹ *Roffey v. Greenwell*, *supra*. Lord Denman said in this case: "There is, indeed, another period from which it might be computed, that of the maker's death; but it

appears improbable that if that was his intention he should not have expressed it with more distinctness. We think that in the absence of all particular proof we must presume the note to have been given for value, so that interest would be due from the date. If that be doubtful the instrument ought to be construed most strongly against the maker." *Washband v. Washband*, 24 Conn. 500; *Adairs v. Wright*, 14 Iowa 22. See *Carter v. King*, 11 Rich. 125; *Rollman v. Baker*, 5 Humph. 406; *Powell v. Guy*, 3 Dev. & Batt. 70.

² *Rowe v. Schertz*, 74 Mo. App. 602; *Carter v. Carter*, 76 Iowa 474; *Fox v. Gray*, 105 Iowa 433.

³ *Smith v. Turner*, 33 Ore. 379.

⁴ *Crawford's Neg. Inst. Law* (2d ed.), p. 25.

and the words "with interest" not being used, is for interest after maturity only.⁵

The courts adopt a construction favorable to interest or most strongly against the maker; and where interest is promised to be paid in general terms in case the note shall not be paid at maturity it is computed from date.⁶ The rate stipulated to be paid before maturity generally governs to the date of payment or judgment, if not in contravention of any statute;⁷ and upon the assumption that such was the intention of the parties such agreements are construed to mean that interest at the conventional rate shall continue not only to the

⁵ *Dunlap v. Kelley*, 115 Mo. App. 610, citing *Wernwag v. Mothershead*, 3 Blackf. 401; *Billingsley v. Cahoon*, 7 Ind. 184; *Hackenberry v. Shaw*, 11 id. 392.

⁶ *United States Nat. Bank v. Waddingham*, 7 Cal. App. 172; *Groff v. Groff*, 209 Pa. 603.

The time interest begins to run on a note drawing interest after maturity is not affected by a subsequent agreement extending the time it shall mature; the date named in the note governs. *Dashiell v. Moorley*, 44 Tex. Civ. App. 87.

A note payable in six months without interest bears interest after that time. *Roberts v. Smith*, 64 Tex. 94, 53 Am. Rep. 744; *Ball v. Belden* (Tex. Civ. App.), 126 S. W. 20.

Several notes were payable at distant days; some at three per cent. per annum, if paid at maturity; "if not, six per cent. interest to be paid;" and one payable without interest, "until the note is out, if not paid then lawful interest until paid." They were not paid at maturity, and it was held that interest was recoverable according to the agreements therein from date. *Dagett v. Pratt*, 15 Mass. 177;

Parvin v. Hoopes, *Morris* 294; *Horn v. Nash*, 1 Iowa 204; *Hackenberry v. Shaw*, 11 Ind. 392.

Billingsley v. Cahoon and *Wernwag v. Mothershead*, *supra*, are perhaps distinguishable, and not to be considered as inconsistent; because in each the agreement was for a higher rate of interest upon default than the law would give in the absence of any agreement; and hence, as effect could be given to the language employed without allowing interest from the date of the notes it was allowed to run from their maturity only. 2 *Parsons on N. & B.* 382, note *d*. See *Flanders v. Chamberlain*, 24 Mich. 305.

The opening part of a contract of conditional sale, which was designated as a note, contained an absolute promise to pay interest, while the latter part provided that interest should be paid on condition that a sum named was not paid within one year. Interest was allowed from the date of the contract. *Third Nat. Bank v. Spring*, 28 N. Y. Misc. 9.

⁷ *Jennings v. Moore*, 189 Mass. 197 (it seems); *Dashiell v. Moody*, 44 Tex. Civ. App. 87. See § 306 *et seq.*

time specified for payment, but until actual payment. There is, however, a want of harmony in the decisions upon this point. In Minnesota the legal rate governs arbitrarily after maturity if the parties have stipulated for a rate generally above it or have even expressly agreed that such rate shall be computed until the debt is paid. Any rate in excess of the legal rate stipulated to be paid while the debtor is in default is treated as penalty, and only the legal rate is allowed.⁸ In many cases elsewhere it has been held that the agreement fixing the rate without specifying the period for which it shall be computed is intended to have effect only during the period of credit; that if the parties desire to regulate the rate to be allowed afterwards they should do so expressly by agreeing that it shall continue after maturity or "until paid."⁹ In Connecticut the conventional rate before maturity is applied during the period of default, not so much on the ground that the contract as such covers that period, as on the principle that it should be deemed a just rate because the parties had agreed to it before maturity.¹⁰

A stipulation for interest without stating the rate is a contract for the legal rate; and this rate and the validity of any stipulation specifying the rate are to be determined by the law of the place of contract, which is the place where the contract is entered into unless it was made with reference to the laws of some other state or country. A contract is governed by the laws of the place where it is to be performed.¹¹ If

⁸ Interest at the agreed rate after maturity is due where the time for payment has been extended and a less rate fixed upon during the period of forbearance if payment is not made at the expiration of that time. *North v. Walker*, 66 Mo. 453; *Mutual Ben. L. Ins. Co. v. Daniels*, 67 Neb. 91. See § 310.

⁹ *Zeller v. Leiter*, 114 App. Div. (N. Y.) 148. See § 309; *Brewster v. Wakefield*, 22 How. 127, 16 L. ed. 303; *Burnhisel v. Firman*, 22 Wall.

170, 22 L. ed. 766; *Haywood v. Miller*, 14 Wash. 660.

The words "until paid" relate to the maturity of the note; the legal rate governs thereafter. *Wright v. Hanna*, 210 Pa. 349.

¹⁰ See § 309. In ch. 8, the subject of interest in its general features is fully treated.

¹¹ *Gaylord v. Johnson*, 5 McLean 448; *Arrington v. Gee*, 5 Ired. 590; *McQueen v. Burns*, 1 Hawks 476; *Doris v. Coleman*, 7 Ired. 424; *Hunt v. Hall*, 37 Ala. 702; *Barney v.*

made in one state or country and payable in another, and not made to evade the usury laws of one of them, it will be sus-

Newcomb, 9 Cush. 46; Campbell v. Nichols, 33 N. J. L. 81; Lee v. Selleck, 20 How. Pr. 275, 33 N. Y. 615; Hyatt v. Bank, 8 Bush 193; Cook v. Moffat, 5 How. 295; Bright v. Judson, 47 Barb. 29; Everett v. Vandryes, 19 N. Y. 436; Bailey v. Heald, 17 Tex. 102, 14 Tex. 226; Lizardi v. Cohen, 3 Gill 430; Worcester Bank v. Wells, 8 Metc. (Mass.) 107; Lewis v. Owen, 4 B. & Ald. 654; Smith v. Buchanan, 1 East 6; Quin v. Keefe, 2 H. Black. 553; Lainbridge v. Wilcocks, Bald. 536; Boyce v. Edwards, 4 Pet. 111, 7 L. ed. 938; Cooper v. Waldegrave, 2 Beav. 282; Braynard v. Marshall, 8 Pick. 194; Wilde v. Sheridan, 21 L. J. (Q. B.) 260, 16 Jur. 426, 11 Eng. L. & Eq. 380; Barker v. Sterne, 9 Ex. 684, 25 Eng. L. & Eq. 502; Hanrick v. Andrews, 9 Port. 9; Healey v. Gorman, 15 N. J. L. 328; Evans v. Clark, 1 Port. 388; Evans v. Irwin, id. 390; Chase v. Drew, 47 N. H. 405; Hoppins v. Miller, 17 N. J. L. 185; Butters v. Olds, 11 Iowa 1; Burton v. Anderson, 1 Tex. 93; Lines v. Mack, 19 Ind. 223; Peacock v. Banks, Minor 387; Peck v. Mayo, 14 Vt. 33, 29 Am. Dec. 205; Ramsey v. McCauley, 2 Tex. 189; Chambliss v. Robertson, 23 Miss. 302; Jack v. Nichols, 5 N. Y. 178; Kavanaugh v. Day, 10 R. I. 393, 14 Am. Rep. 691; Hackettstown Bank v. Rea, 6 Lans. 455, 64 Barb. 175; Agricultural Nat. Bank v. Sheffield, 4 Hun 421; Scofield v. Day, 20 Johns. 102; Newman v. Kershaw, 10 Wis. 333; Findlay v. Hall, 12 Ohio St. 610; McClintock v. Cummins, 3 McLean 158; Consequa v. Willings, Pet. C. C. 229; Archer v. Dunn, 2 W. & S. 327; Ralph v. Brown, 3 id. 395; Anonymous, Mart & Hayw. 149; Consequa v. Fanning, 3 Johns. Ch. 587, 17 Johns. 511, 8 Am. Dec. 442; Stewart v. Ellice, 2 Paige 604; Pomeroy v. Ainsworth, 22 Barb. 118; Irvine v. Barrett, 2 Grant's Cas. 73; Roberts v. McNeely, 7 Jones 506, 78 Am. Dec. 261; Sweet v. Dodge, 4 Sm. & M. 667; Gaillard v. Ball, 1 N. & McC. 67; Jaffray v. Dennis, 2 Wash. C. C. 253; Cowqua v. Laudebrun, 1 id. 521; Busby v. Caraac, 4 id. 296; Bank of Illinois v. Brady, 3 McLean, 268; Moore v. Davidson, 18 Ala. 209; Lefler v. Dermotte, 18 Ind. 246; Von Hemert v. Porter, 11 Metc. Mass.) 210; Winthrop v. Carlton, 12 Mass. 4; Hawley v. Sloe, 12 La. Ann. 815; Little v. Riley, 43 N. H. 109; Bolton v. Street, 3 Cold. 31; Summers v. Mills, 21 Tex. 77; Whitlock v. Castro, 22 id. 108; Butler v. Meyer, 17 Ind. 77; Bent v. Lauve, 3 La. Ann. 88; Smith v. Smith, 2 Johns. 235, 3 Am. Dec. 410; Don v. Lippmann, 5 Cl. & F. 1; Balme v. Wombough, 38 Barb. 352; Collins I. Co. v. Burkam, 10 Mich. 283; Fergusson v. Fyffe, 8 Cl. & F. 121; Cash v. Kenion, 11 Ves. 314; Robinson v. Bland, 2 Burr. 1077; Ekens v. East India Co., 1 P. Wms. 395; Houghton v. Page, 2 N. H. 42, 9 Am. Dec. 30; Lapice v. Smith, 13 La. 91; Mullin v. Morris, 2 Pa. 85; Chapman v. Robertson, 6 Paige 627; Richards v. Globe Bank, 12 Wis. 692; McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651; Van Schaick v. Edwards, 2 Johns. Cas. 355; Pearce v. Wallace, 1 Har. & J. 48; Goddin v. Shipley, 7 B. Mon. 575; Camp v. Randle, 81 Ala. 240.

tained if the rate of interest is valid by the laws of either.¹² But the fate of a contract which violates the laws of both the country or the state where it is made and that where it is to be performed will be determined by those of the former.¹³

Where the rate is governed by any other than the law of which the court takes judicial notice it is for the jury to ascertain what the rate by that law is as a fact; but it is for the court, as a matter of law, to direct them as to the place according to the laws of which the interest is to be assessed.¹⁴ Where the rate is governed by the laws of another jurisdiction they must be alleged and proved;¹⁵ otherwise interest according to the law of the forum will be given.¹⁶ In Illinois the contract governs the rate of interest; if it is usurious under the law of another state the defendant must show it.¹⁷

¹² Thomas v. Clarkson, 125 Ga. 72, 6 L.R.A.(N.S.) 658; Andrews v. Pond, 13 Pet. 65, 10 L. ed. 61; Richards v. Globe Bank, 12 Wis. 692; Jewell v. Wright, 12 Abb. Pr. 55, reversed, 30 N. Y. 259, 86 Am. Dec. 372; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306; Bowen v. Bradley, 9 Abb. Pr. (N. S.) 395; Cope v. Wheeler, 41 N. Y. 303; Agricultural Nat. Bank v. Sheffield, 4 Hun 421; Vliet v. Camp, 13 Wis. 198; Engler v. Ellis, 16 Ind. 475.

¹³ Andrews v. Pond, *supra*; Pine v. Smith, 11 Gray 38; Mix v. Madison Ins. Co., 11 Ind. 117; Adams v. Robertson, 37 Ill. 45.

¹⁴ Gibbs v. Fremont, 9 Ex. 25; Leavenworth v. Brockway, 2 Hill 201; Wheeler v. Pope, 5 Tex. 262; Hill v. Georgia, id. 87; Pridgen v. McLean, 12 id. 420; Ingram v. Drinkard, 14 id. 351; Evans v. Clark, 1 Port. 388.

¹⁵ Surlott v. Pratt, 3 A. K. Marsh. 174; Burton v. Anderson, 1 Tex. 93; Wheeler v. Pope, 5 Tex. 262; Hill v. George, id. 87; Abel v. McMurray, 10 id. 350; Pridgen v. Mc-

Lean, 12 id. 420; Ingram v. Drinkard, 14 id. 351; Evans v. Clark, 1 Port. 388; Camp v. Randle, 81 Ala. 240.

According to the foregoing cases where the note sued on is payable in another state no interest at all can be allowed unless the law of the state where it is payable is proved and shows a right to interest. See § 358 *et seq.*

¹⁶ Surlott v. Pratt, *supra*; Desnoyer v. McDonald, 4 Minn. 515; Martin v. Martin, 1 Sm. & M. 176; Brown v. Gracy, D. & R. N. P. 41, note; De La Chaumette v. Bank, 9 B. & C. 208; Fouke v. Fleming, 13 Md. 392; Whidden v. Seelye, 40 Me. 247, 63 Am. Dec. 661; Deem v. Crume, 46 Ill. 69; Prince v. Lamb, 1 id. 378; Chumasero v. Gilbert, 26 id. 39; Hall v. Kimball, 58 id. 58; Lougee v. Washburn, 16 N. H. 134; Hall v. Woodson, 13 Mo. 462; Gordon v. Phelps, 7 J. J. Marsh. 619; Leavenworth v. Brockway, 2 Hill 201; Booty v. Cooper, 18 La. Ann. 565.

¹⁷ Walker v. Lovitt, 250 Ill. 543.

Under a code provision expressing the recognized principle of equity that "an honest mistake of the law as to the effect of an instrument on the part of both contracting parties, when such mistake operates as a gross injustice to one, and gives an unconscientious advantage to the other, may be relieved in equity," where both the maker and payee of a note intended that it should bear no interest and ignorantly supposed that this would result from the omission in it of any reference concerning interest, equity will, on behalf of the maker, when sued upon the note by the indorsee of the payee correct such mistake, the plaintiff having taken the note as a donation and with knowledge that the parties did not intend that it should bear interest.¹⁸

§ 557. Interest as damages to be paid by maker or acceptor. Where the note or bill is silent as to interest none is payable until maturity.¹⁹ If it be not then paid interest is universally allowed from maturity unless the delay is by the fault of the holder.²⁰ And so much is interest the customary and invariable compensation for money delinquent on commercial paper that where a party undertakes to pay a debt by means of a bill or note and fails to do so interest will be allowed as it would accrue upon such note or bill if it had been given according to the undertaking.²¹ If paper is payable on demand interest does not run until demand is made by suit or otherwise.²² But a

¹⁸ *Loudermilk v. Loudermilk*, 98 Ga. 780.

¹⁹ *Siff v. Forbes* (N. Y. Misc.), 84 N. Y. Supp. 169.

²⁰ *Gantt v. Mackenzie*, 3 Camp. 51; *Thorndike v. United States*, 2 Mason 1; *Robinson v. Bland*, 2 Burr. 1077; *Bann v. Dalzel*, M. & M. 228; *Laing v. Stone*, 2 M. & Ry. 561; *Greenleaf v. Kellogg*, 2 Mass. 568; *Hastings v. Wiswall*, 8 id. 455.

²¹ *Marshall v. Poole*, 13 East 98; *Slack v. Lowell*, 3 Taunt. 157; *Farr v. Ward*, 3 M. & W. 25; *Rhoades v. Selsey*, 2 Beav. 350; *Beeher v. Jones*, 2 Camp. 428, note.

Interest is recoverable on a check payment of which was stopped after the payee received credit for it. *Weant v. Southern T. & D. Co.*, 112 Md. 463.

²² *Hudson v. Daily*, 13 Ala. 722; *Vaughan v. Goode*, Minor 417; *Free-land v. Edwards*, Mart. & Hayw. 207; *Lewis v. Lewis*, id. 191; *Hard v. Palmer*, 21 Up. Can. Q. B. 49; *Patrick v. Clay*, 4 Bibb. 246; *Bartlett v. Marshall*, 2 id. 467; *Schmidt v. Limehouse*, 2 Bailey 276; *Penn. S. D. & T. Co. v. Thomas*, 4 Pa. Dist. 421. See *Darling v. Wooster*, 9 Ohio St. 517.

note expressing no time when payable is due immediately and bears interest from date.²³ An instrument expressing that the maker owes the holder a sum named, for value received, is not a promissory note, but a mere acknowledgment of a debt, and although the maker was bound to pay on demand, if no demand was made, no time stipulated for payment, and no contract or usage requiring the payment of interest before judicial demand is shown the liability for interest does not antedate such demand.²⁴

The rate of interest after maturity for default of payment, even when not expressly or by implication fixed by contract, is generally held to be that prescribed by the law of the place of contract; in other words, the law of the place where the note is made payable or of the place on which the bill is drawn.²⁵ If no place of payment is mentioned that where the note is made or the bill accepted is the place of contract. But the place may be affected by circumstances, as the residence of the parties and the place where the money is to be used.²⁶ A bill was drawn on a resident of the state of New York, and

²³ Horn v. Hansen, 56 Minn. 43, 22 L.R.A. 617; Rogers v. Colt, 21 N. J. L. 19; Purdy v. Phillips, 11 N. Y. 406, 1 Duer 369; Gaylord v. Van Loan, 15 Wend. 308; Lewis v. Lewis; Freeland v. Edwards, *supra*; Francis v. Castleman, 4 Bibb 282, 1 Am. Neg. Cas. 900.

²⁴ Gay v. Rooke, 151 Mass. 115, 21 Am. St. 434, 7 L.R.A. 392.

²⁵ Campbell v. Nichols, 33 N. J. L. 81; Scofield v. Day, 20 Johns. 102; Mullen v. Morris, 2 Pa. 85; Boyce v. Edwards, 4 Pet. 111, 7 L. ed. 799; Braynard v. Marshall, 8 Pick. 194; Chapman v. Robertson, 6 Paige 627; Thompson v. Powles, 2 Sim. 194; Hosford v. Nichols, 1 Paige 220; Gaylord v. Johnson, 5 McLean 448; Bank of Illinois v. Brady, 3 id. 268; Bright v. Judson, 47 Barb. 29; Lee v. Selleck, 33 N. Y. 615; Cooke v. Crawford, 1 Tex.

9, 46 Am. Dec. 93; Burton v. Anderson, 1 Tex. 93; Wheeler v. Pope, 5 id. 262; Andrews v. Hoxie, id. 171; Barney v. Newcomb, 9 Cush. 46; Hunt v. Hall, 37 Ala. 702; 2 Parsons on N. & B. 371. But see Goddard v. Foster, 17 Wall. 123, 21 L. ed. 589; Wood v. Corl, 4 Metc. (Mass.) 203; Ayer v. Tilden, 15 Gray 178, 77 Am. Dec. 355.

²⁶ Davis v. Coleman, 8 Ired. 424.

In Austin v. Imus, 23 Vt. 286, it was held that as between the parties to a promissory note executed in the state of New York and made payable generally, interest should be allowed at the Vermont rate if it appears from the circumstances attending its execution that it was the expectation and intention that it would be paid there. See Thompson v. Ketcham, 8 Johns. 189.

by him accepted to be paid in that state, by a resident of Illinois. The acceptance was for the accommodation of the drawer and for the purpose of being afterwards negotiated by him to raise funds to be used in his business in Illinois, he to provide for its payment. After acceptance the acceptor placed the bill in the hands of the drawer and he negotiated it for a greater rate of discount than was allowed by the laws of either state. It was held to be governed by the laws of Illinois. Strong, J., said: "The case is exactly the same as it would be if the defendants had been residents of Chicago, where the draft was drawn, and had accepted it at Chicago for the accommodation of the drawer, designating New York as the place of payment. It is plain, therefore, that the contract is an Illinois contract and that the rights and liabilities of the parties must be determined according to the laws of that state." It was treated as a controlling fact that, before the acceptance had any operation, before the instrument became a bill, the defendants, who were the acceptors, sent it to Illinois for the purpose of having it negotiated in that state.²⁷

§ 558. Liability of drawer or indorser for interest as damages. When not fixed by the contract the liability is governed by the law of the place where the contract of the drawer or indorser is made; for their contract is implied, and the implication is that it is to be performed at the place where it is made.²⁸ The rule of liability under the English and South Australian bills of exchange acts is stated in a note.²⁹ The

²⁷ *Tilden v. Blair*, 21 Wall. 241, 22 L. ed. 632; *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 3 C. C. A. 1, 52 Fed. 191, 17 L.R.A. 595. See § 364.

²⁸ *Gibbs v. Fremont*, 9 Ex. 25; *Boyce v. Edwards*, 4 Pet. 111, 7 L. ed. 799. See § 358.

²⁹ The English bills of exchange act, 1882 (sec. 57, ch. 61, 45-46 Vict.), provides that where a bill is dishonored the measure of damages shall be:

(1) The holder may recover from

any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser:

(a) The amount of the bill.

(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case.

liability of an acceptor of a bill for interest as damages will be determined upon equitable considerations. If the delay in payment has been caused by the fault of the drawer interest will not be allowed, especially after the lapse of a long period of time and the death of the parties to whom the acceptor might look for indemnity.³⁰ The holder of a note with interest payable annually loses no rights against the parties to it, whether they are makers or indorsers, by neglecting to demand interest, and he has the election to demand it or wait and collect it with the principal.³¹ On the maturity of a note an indorser is liable for both principle and interest, upon demand and notice, although these measures had not been taken to make him chargeable as the interest fell due each year.³² If the indorser is a party to the original contract to pay interest annually by his indorsement he guarantees the performance of that contract; otherwise he would be liable only for part of the obligation assumed by the maker. But to impose liability for interest as it falls due demand must be made and notice given.³³

(c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2) In the case of a bill which has been dishonored abroad, in lieu of the above damages the holder may recover from the drawer or an indorser, and the drawer or indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3) Where by this act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

The South Australian act (47-48 Vict., No. 312, sec. 57) is identical

with the above except that sub-section 1 (b) contains the words after interest thereon, "at the rate of ten pounds per centum per annum." Under this act it has been ruled that when a bill of exchange has been dishonored out of that colony the only damages which the holder can recover are the amount of the re-exchange, with interest thereon, as provided by sub-section 2, and that he has no option to sue for interest under sub-section 1. In re Commercial Bank of South Australia, 36 Ch. Div. 522.

³⁰ Spaethe v. Anderson, 18 N. Z. 149.

³¹ National Bank v. Kirby, 108 Mass. 497.

³² Id.; Howe v. Bradley, 19 Me. 31; First Nat. Bank v. County Com'rs, 14 Minn. 77.

³³ Mt. Mansfield H. Co. v. Bailey, 64 Vt. 151, 16 L.R.A. 295.

§ 559. Notes and bills are payable only in money. Within the domain of the law merchant there is a great variety of moneys made legal tender by many sovereignties, and in many jurisdictions are other currencies not legal tender, but which, to a considerable extent, perform the functions of money by being freely paid and received as a substitute in all local transactions. When an instrument in the form of a note or bill is payable in some special currency the question has often arisen whether it was payable in money.³⁴ The determination of his

³⁴Black v. Ward, 27 Mich. 191. A note made and indorsed in Michigan and payable "in Canada currency" was held to be payable in money, and therefore negotiable. Campbell, J., said: "The indorser's contract being governed by the laws of this state, and the note having been made here, its negotiability must in our courts be tested by our statute; but as that is like the statute of Anne, in requiring the paper to be payable in *money*, the only inquiry in this regard is what may be included in that term. It will be found by examining the authorities that the word 'money' has been used for some purposes in a very wide sense, and for others in a restricted sense. When questions have come up in construing negotiable paper it has never been extended beyond coin and paper at par value. In England, in the case of *Miller v. Race*, 1 Burr. 452, which involved the rights of holders of stolen Bank of England bills, the language of Lord Mansfield and of the judges was so pointed in treating such notes as cash, that if the question now discussed had been mooted, there can be little doubt how it would have been decided. A series of decisions made afterwards sustained tenders in such bills, where no objection had been made to the

medium in which the tender was made. *Polglass v. Oliver*, 2 Cr. & J. 15, 16; *Brown v. Saul*, 4 Esp. 267; *Wright v. Reed*, 3 T. R. 554. And these decisions have been followed universally in this country. The first time when the negotiability of a bill payable in Bank of England notes came up for decision was in the interval between 1797 and 1818, during which the bank was restrained from making specie payments. The statutes containing this restriction provided that if the amount of any debt were tendered in notes the debtor should not be arrested on the debt. Tomlin's Law Dic., 'Bank of England.' It was held in *Grigby v. Oakes*, 2 B. & P. 526, that under this statute notes were not a legal tender. Reference was made by some of the court to the peculiar terms of the statute, as limiting the effect of the tender to an exemption from arrest. In *Ex parte Davison*, Buck 31, and *Ex parte Imeson*, 2 Rose 225, it was held that notes payable in 'cash or Bank of England notes' were not negotiable. In 1834 the notes were made a legal tender; but by the present law they are not such in Scotland or Ireland. Fisher's Dig., 'Bank of England,' 'Tender.' No case has since been reported in which any such question

question in the affirmative places the instrument in the category of commercial paper; but if decided in the negative it belongs

was raised; and whether the silence of the courts arises from the change of the law, whereby the notes are made equivalent to coin, or from any custom excluding any mention of notes in drawing up negotiable paper, we have no means of judging. Where the notes are always convertible and at par with gold, and are a legal tender, there does not seem to be any very good reason for holding a bill payable in notes to be any more objectionable than one payable in coin. In this country all paper not payable expressly in gold is impliedly payable in greenbacks; and we cannot conceive that it can change the legal character of any security to express in it precisely what the law implies. Where a promissory note is payable in anything which is not a legal tender, the authorities are generally, though not universally, against its negotiability. In *New York* and *Ohio* bank bills issued under state authority, and where the courts hold they are bound to recognize their quality judicially, have been held at par to represent money, so that notes payable in cash, or in such notes, have been adjudged negotiable. *Keith v. Jones*, 9 Johns. 120; *Judah v. Harris*, 19 Johns. 144; *Swetland v. Creigh*, 15 Ohio 118. But in the same states paper payable expressly in any other bills, or in the bills of specified banks of the state, has been held not negotiable. *Leiber v. Goodrich*, 5 Cow. 186; *Shamokin Bank v. Street*, 16 Ohio St. 1; *Thompson v. Sloan*, 23 Wend. 71, 35 Am. Dec. 546; *Little v. Phoenix Bank*, 2 Hill 425, 7 id. 359. Elsewhere, except where there are stat-

utes to the contrary, there is no considerable support for the doctrine that paper payable expressly in the bank notes of private corporations is negotiable.

"Under the laws of this state bank bills may be levied on, and may be paid over as cash, if the creditor is willing to receive them; but if he refuses they must be sold 'as other chattels.' Comp. L., §§ 6096, 6456. If the term 'Canada currency' should be confined to private bank notes it would be difficult to hold this paper negotiable. In *Thompson v. Sloan* the supreme court of New York held that a note payable in Buffalo in 'Canada money' was not negotiable. This, however, is not, as we think, in accordance with the general current of decision. Judge Story says: 'If it be payable in money it is of no consequence in the currency or money of what country it is payable; in the currency or money of England, France, Spain, Holland, Italy, America or any country.' Story on Bills, § 43; *Chitty on Bills*, 153, 158. We cannot, with any propriety, refuse to recognize the right of every country to fix its currency, and it is impossible for any civilized government to exist without some legal standard of money. The only question here is whether a note payable in 'Canada currency' is, or is not, payable in money. It is claimed on the one side and denied on the other that the term 'currency' is confined in our usage to paper which is not money. Upon this question many authorities have been cited, and we have examined each of them with such other references as we have been able to discover, and are led

to another class of contracts which are not governed by the law merchant. The currency payable in order to give the contract

to the conclusion that there is no foundation for any such doctrine. The only cases in which it has been held that 'currency' does not mean money (except where it has been qualified by some further definition) are certain cases in Iowa and Wisconsin, all of which rest entirely upon decisions where the paper in question was expressly payable in bank notes. None of these decisions support the idea that 'currency' and 'bank notes' are purely convertible terms, and the inference is unwarranted, unless founded on what does not appear in any of those decisions. The decision in *Wright v. Hart*, 44 Pa. 454, that paper payable '*in current funds at Pittsburgh*' was not negotiable, was also rested, without any further discussion, upon the authority of former decisions applicable to paper payable in bank notes.

"In *Dillard v. Evans*, 4 Ark. 175, the term 'common currency of Arkansas' (in which certain paper was made payable) was held designed to point out a different currency from that which was legal, and to refer to depreciated paper, which was then, in fact, the common medium of business. And in *Farwell v. Kennett*, 7 Mo. 595, it was held that the insertion of the words 'payable in currency' indicated a design to change the legal import which would have been found had no such words been inserted. And in *Conwell v. Pumphrey*, 9 Ind. 135, the use of the term 'current funds' was held for the same reason an intentional variation. Subsequent decisions in each of those states have either overruled these cases or so interpreted them as not to make

them apply to a case like the one before this court. Reference will be made presently to these later decisions. With these exceptions the general course of authority is in favor of the negotiability of paper payable in currency or current funds. And these decisions rest upon the ground that those terms mean 'money,' as the necessity of having negotiable paper, payable in money, is fully recognized. There is, however, some difference in the methods of arriving at this result, and it is proper to refer to the cases which have used careless language, as well as to those which have laid down rules cautiously. The fact that the bills of sound banks have been received promiscuously with the legal money of the country has led here, as in England, to remarks from courts, based on the assumption — which is well founded — that persons usually do not prefer one to the other, and they sometimes speak of payment in either as amounting to the same thing. It is only where the question is directly presented of a tender actually made in one or the other that discrimination becomes necessary. Thus in *Lacy v. Holbrook*, 4 Ala. 88, where a bill of exchange, payable '*in funds current in the city of New York*,' was held negotiable, it was so held because deemed to be payable in cash, in gold or silver coin, 'or its equivalent.' So in *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Laughlin v. Marshall*, 19 Ill. 390; *Swift v. Whitney*, 20 Ill. 144, and *Hunt v. Devine*, 37 Ill. 137, promissory notes or certificates of deposit, payable in 'currency,' were held to be negotiable on the same ground;

the qualities of negotiable paper must be money, not in the

but there is reference made to the equivalence of bank notes with other money, which are open to the same hyper-criticism that the court confounded real with conventional money. It is to be observed, however, that none of the cases called for any decision as to what would be a legal tender in payment of such notes.

"The decisions of other states are less open to remark. In Arkansas, where the rule is strict in denying negotiability of paper not payable in money (see *Hawkins v. Watkins*, 5 Ark. 481, and *Dillard v. Evans*, 4 Ark. 175), it was held in *Graham v. Adams*, 5 Ark. 261, that a note payable in 'good, current money of the state' was negotiable. The court, after some discussion, remark: 'A good currency, then, in our opinion, means nothing more than a lawful currency, and that is current coin to the United States.' In *Wilburn v. Grer*, 6 Ark. 255, it was held a note payable in 'Arkansas money' was payable in current coin of the United States, and therefore negotiable. In *Burton v. Brooks*, 25 Ark. 215, it was held a note payable in 'greenback currency' was payable in the currency of the United States, and not in national or other bank notes, and that the meaning was the same as if it had been made payable in dollars only. In Indiana, in *Drake v. Markle*, 21 Ind. 433, it was held that the term 'currency' meant money, and that a note payable therein was negotiable. This case practically overrules *Conwell v. Pumphrey*, which as we have seen, was decided on the assumption that parties never use unnecessary words in making negotiable paper.

In Mississippi, in *Mitchell v. Hewitt*, 5 Sm. & M. 361, the note was payable in 'currency of the state of Mississippi.' The court say that this phrase 'can only mean that which has been declared to be a legal tender, because currency implies lawful money.' Reference was made to an early Pennsylvania case, *Wharton v. Morris*, 1 Dall. 133, where, upon a similar state of facts, it became necessary to define the words of a note. The court there held that 'lawful' and 'current' were synonymous words, and said the 'lawful current money of Pennsylvania,' that which was declared to be a lawful tender, and consequently became the legal currency of the land, was the money emitted under the authority of congress. In *Lee v. Biddis*, 1 Dall. 175, 1 L. ed. 88, it was further held (as must necessarily be the case if courts are to construe such language) that evidence could not be received to give any other explanation. In Minnesota, in *Butler v. Paine*, 8 Minn. 324; currency was held to be lawful money; and the following definition from *Bouvier's Law Dictionary* was approved: 'The money which passes at a fixed value from hand to hand; money which is authorized by law.' In Missouri, where, in an earlier case (*Farwell v. Kennett*, 7 Mo. 595), it had been held, as it had been in Indiana, that words of surplusage must have a controlling and repugnant meaning, and that a note payable 'in currency' was not payable in money, it was distinctly held in *Cockrill v. Kirkpatrick*, 9 Mo. 688, that paper payable in 'currency of Missouri' was payable in lawful money of the

popular sense merely, but money which entitles the holder to

United States, and that Missouri currency could mean nothing else. In Tennessee it was held, in *Searcy v. Vance*, Mart. & Y. 225, that paper payable in 'Tennessee money' was only payable in gold and silver, and that those words would not include bank notes. The same state holds paper payable in current bank notes of Tennessee, or in such notes generally, not to be negotiable. *Kirkpatrick v. McCullough*, 3 Humph. 171, 39 Am. Dec. 158; *Whiteman v. Childress*, 6 Humph. 303; *Simpson v. Moulden*, 3 Cold. 429; *McDowell v. Keller*, 4 Cold. 258. In Louisiana it was held, in *Fry v. Dudley*, 20 La. Ann. 368, that a bill of exchange payable 'in currency' is payable in legal current money, and a person who receives such a bill for collection is not authorized to receive anything else. In *Ehle v. Chittengo Bank*, 24 N. Y. 548, a dividend 'payable in New York state currency,' was held payable in cash. And it was held incompetent to inquire of a cashier what he understood that phrase to mean. The court say: "The term 'New York state currency' must be held to mean what the ordinary signification of those words implies, unless by some general known usage some other technical meaning can be attached to it."

"We have been referred to the case of *Gray v. Worden*, 29 Up. Can. Q. B. 535, as bearing adversely on this point. That case decides that a note payable 'in Canada bills' is not negotiable, even though construed to mean government legal tender notes. It is based upon the decisions made in England and America relative to paper payable

in bank notes, and holds the official notes as mere promises to pay money, and not as money. That doctrine would not be admissible under our legal tender laws. But the case is chiefly relied on for some remarks it contains distinguishing the word 'currency' from 'money.' It seems to have been supposed by counsel that this distinction was the same as between bills and money; or, in other words, that currency and bills are synonymous. This is an evident misapprehension. The language used is this: 'There is a difference between money and currency. In *Landsdowne v. Landsdowne*, 2 Bligh 78, Lord Redesdale said, in 1820: "There is no lawful money of Ireland. It is merely conventional. There is neither gold nor silver coin of legal currency; nothing but copper. There is no such thing as Irish money; it is Irish currency." See, also, *Kearney v. King*, 2 B. & Ald. 301; *Sprowle v. Legge*, 1 B. & C. 16. The distinction which the Canada court points out is not one between paper and coin, but between the values of money in different countries. In the cases referred to it appears that the difference between the Irish pound sterling and the English pound sterling was such that twelve English pounds were equivalent to thirteen Irish pounds. In like manner, a Canadian pound represents only four-fifths of an English pound, and the old New York pound was but two dollars and a half; the New York shilling being twelve and a half cents, the Canadian shilling twenty cents, and the British shilling taken nominally at about twenty-five cents. The pound in Jamaica

legal tender currency.³⁵ Notes payable in current bank notes are not negotiable paper.³⁶ In an action on such a note or other

is five-sevenths of the English pound. *Scott v. Bevan*, 2 B. & Ad. 78. Judge Story has collected some learning on this subject in *Conflict of Laws*, §§ 308-313. See, also, *Taylor v. Booth*, 1 C. & P. 286; *Cope v. Cope*, 15 Sim. 118. In *Macrae v. Goodman*, 10 Jur. 555, 5 Moore, P. C. 315, a similar consideration came up in regard to 'Holland currency,' where that term was used in a contract made in Guiana, the colonial guilder being different from the Dutch guilder. In *Landsdowne v. Landsdowne* the question was whether, under a marriage settlement, a rent charge on lands in Ireland was payable in English currency, that is to say, whether the annuity of 3,000*l.* was to be in English pounds sterling or at a less rate. The currencies of Ireland and England have, it is said, been equalized since that decision. But there was not then, as remarked by Lord Redesdale, any Irish coinage, and the difference was merely one of computation."

In *Hogue v. Williamson*, 85 Tex. 553, 34 Am. St. 823, 20 L.R.A. 481, the cases of *Black v. Ward* and *Thompson v. Sloan*, *supra*, are considered; it is said the latter was decided in 1840, and it was to be inferred that at that time the dollar was not a denomination of the lawful money of Canada, and that it was also to be inferred that when the Michigan case arose this had been changed, and the denomination of Canada money corresponded with that of the United States. Upon this theory these cases may be reconciled.

³⁵ *Black v. Ward*, *supra*.

³⁶ *Whiteman v. Childress*, 6 Suth. Dam. Vol. II.—41.

Humph. 303; *Looney v. Pinckston*, 1 Overt. 384; *Childress v. Stuart*, Peck 276; *Gamble v. Hatton*, id. 130; *Lawrence v. Dougherty*, 5 Yerg. 435; *Kirkpatrick v. McCullough*, 3 Humph. 171, 39 Am. Dec. 158; *Hopson v. Fountain*, 5 Humph. 140; *Crawford's Neg. Inst. Law* (2d ed.), p. 9.

In the last case suit was brought on a note payable "in current bank money of the state of Mississippi." On the trial the jury were instructed that this did not entitle the holder to the numbers of dollars specified in it with interest; that the word *money* had a technical legal meaning, signifying dollars and cents of constitutional currency, to wit, gold and silver. But on error this was held wrong. *Reese, J.*, said: "We cannot consent to the correctness of this definition of the word *money*. It is a generic term, embracing, according to the subject-matter of the discourse of writing, every species of coin or currency—guilders, guineas, Napoleons, eagles and bank notes as well as dollars. But if its meaning were, as the circuit court holds, when standing alone, *per se*, still, like all other words, its meaning will be modified by accompanying words or phrases. Here the accompanying and qualifying words are current *bank* money of the state of Mississippi. *Bank money* means that species of money called *bank notes*; and of that species the parties in this case meant that sort or variety called Mississippi bank notes. They may not be the very best, but, at all events, they are those about which the parties contracted. The meaning and intention of the parties on the face

like form of agreement the plaintiff must prove the value of such bank paper; otherwise, it has been held, he is not entitled

of the instrument it is not difficult to perceive. Whether, on the grounds of policy, it would originally have been better, in the construction of all such instruments, to have held the word *dollar* to have referred, not to the numerical amount of the bank notes, but to the standard of value, it is now useless to inquire. The principle in cases where it can apply has been long and well established. Society conforms to it in their contracts, and it must be adhered to. The measure of damages in this case is the value of the current Mississippi bank notes when the covenant was payable." *Hixon v. Hixon*, 7 Humph. 33. In *Baker v. Jordan*, 5 id. 85, in covenant, there was a plea of covenants performed; no proof was introduced except a note for dollars payable in current bank notes. It was held that the jury was warranted in giving a verdict for the number of dollars called for.

Ward v. Latimer, 12 Tex. 438: Action on two notes payable in *cash notes*. The court charged the jury that if "cash notes at the time the notes sued on were due were the circulating medium of the country, and were generally the medium of trade, they thereby took the place of money and were to be considered its equivalent, provided the same value was attached to them by the community generally. Held, not error. The proper criterion of the value of "cash notes" is not the price at which they were purchasable at the time in cash, but the value at which they were used in the ordinary and general transactions of trade by the community.

A draft payable in Arkansas

money, held not a bill of exchange. *Hawkins v. Watkins*, 5 Ark. 481. Nor will debt lie on a note payable in North Carolina bank notes. *Derberry v. Darnell*, 5 Yerg. 451. Bank notes are treated as depreciated currency. *Gamble v. Hatton*, Peck 130; *Kirkpatrick v. McCullough*, 3 Humph. 171, 39 Am. Dec. 158. So current bank notes.

A note payable in current bankable funds, though given during the ascendancy of the confederacy for confederate money, held good for its face value in United States currency. *Taylor v. Turley*, 33 Md. 500. And so in *Williams v. Moseley*, 2 Fla. 304, it was held that a note payable in "current Florida money" is payable in good funds.

A note payable in United States six per cent. interest-bearing bonds is not a promissory note. *Easton v. Hyde*, 13 Minn. 90. Nor is a note payable in commonwealth bank notes. *Mitchell v. Waring*, 4 J. J. Marsh. 233.

The holder of a check payable in *current funds* may demand current money par funds, money circulating without any discount, and cannot be compelled to take depreciated bank notes. *Mare v. Kupfer*, 34 Ill. 286; *Galena Ins. Co. v. Kupfer*, 28 Ill. 332, 81 Am. Dec. 284; *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773.

A certificate of deposit payable in "currency" is not negotiable. *Huse v. Hamblin*, 29 Iowa 501, 4 Am. Rep. 244. A certificate of deposit payable in "current funds" is negotiable. The words quoted, when used in commercial transactions as the expression of the medium of payment mean **current**

to judgment for any sum.³⁷ And it has been held, if payable in "current bank notes," without any other description, they would be regarded such as are convertible into specie at the counter where they are issued and pass at par in the ordinary transactions of the country.³⁸ A note expressed to be payable in Mexican silver dollars is negotiable; the exchange into current coin is upon proof of their relative value.³⁹ But it is otherwise where a note is payable, principal and interest, in New York exchange, which is property.⁴⁰ In an action on a note made in Alabama and payable in dollars at the end of two years from November 1, 1861, there then being very little, if any, confederate currency in circulation there, it was adjudged competent to look to the surrounding circumstances as well as the facts of the transaction and the understanding of the par-

money or funds which are current by law as money. *Hatch v. First Nat. Bank*, 94 Me. 348; *Laird v. State*, 61 Md. 311; *Bull v. Bank of Kasson*, 123 U. S. 105, 31 L. ed. 97; *Telford v. Patton*, 144 Ill. 611; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39, 4 Am. St. 526. See 1 *Dan. on Neg. Inst.* (5th ed.) § 56. In *Chicago F. & M. Ins. Co. v. Keiron*, 27 Ill. 501, "*Illinois currency*" received the same construction. In *Marine Bank v. Chandler*, 27 id. 325, "current bank notes" were given the same meaning. In *Marine & F. Ins. Co. v. Tincher*, 30 id. 399, and in *Swift v. Whitney*, 20 id. 144, held that currency is the same. In *Moore v. Morris*, id. 258, that a good current money is the same. *Trowbridge v. Seaman*, 21 Ill. 101. *McCormick v. Trotter*, 10 S. & R. 94, holds that a note payable "in notes of the chartered banks of Pennsylvania" is not a negotiable note. *Confederate Note Case*, 19 Wall. 548, 22 L. ed. 196, in "dollars," in a transaction occurring in insurgent states during the

war, there was a latent ambiguity. Parol evidence might show to what currency it referred. A general deposit of the bills of the bank receiving it must be repaid at the nominal amount although current at only one half their amount at the time of the deposit. *Bank v. Wister*, 2 Pet. 318, 7 L. ed. 437; *State v. Cassel*, 2 Har. & G. 407, bank notes considered as money, and larceny graduated by their nominal value.

³⁷ *McKiel v. Porter*, 4 Ark. 584; *Elliott v. Chilton*, 5 id. 181.

³⁸ *Id.*; *Pierson v. Wallace*, 7 Ark. 282; *Bizzell v. Brewer*, 9 id. 58. See *Bush v. Canfield*, 2 Conn. 485.

It was held in *Edwards v. Morris*, 1 Ohio 239, that an obligation to pay in the notes of a specified bank must be paid in the notes of that bank or their numerical value in money. Their price in money cannot be substituted.

³⁹ *Hogue v. Williamson*, *supra*.

⁴⁰ *Chandler v. Calvert*, 87 Mo. App. 368.

ties, as shown by parol, to ascertain what dollars were meant. These considerations induced the determination that the parties intended to pay and receive such currency as should be passing currently as money in ordinary transactions at the place of payment when the note should become due.⁴¹

§ 560. **Re-exchange and damages on bills dishonored.** A bill of exchange, as its name imports, is generally to exchange a debt or credit due in one place or country for a debt or credit due in another place or country. Therefore, the drawers and indorsers are respectively liable thereon to the holder for all damages sustained by him in consequence of its dishonor.⁴² Among them is to be included a sum sufficient to cover the premium necessary to be paid in re-exchange,⁴³ for the engagement of the drawer and indorser of every bill is that it shall be paid at the proper time and place; and, if it be not so paid, the holder is entitled to indemnity for the loss arising from this breach of contract. The general law merchant of Europe authorizes the holder of a protested bill immediately to redraw from the place where the bill was payable, on the drawer or indorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays.⁴⁴ His indemnity requires him to draw for such an amount as will make good the face of the bill, together with interest from the time it ought to have been paid, and the necessary charges of protest, postage, and brokers' commission, and the current rate of exchange at the place where the bill was to be demanded or payable, or the place where it was drawn or negotiated.⁴⁵

⁴¹ *Smith v. Norman*, 3 Tenn. Cas. 419 (1875).

⁴² *Edwards on Bills*, *730.

⁴³ *Id.*

⁴⁴ *Kent's Com.* 115.

⁴⁵ *Id.*; *Norton on Bills & Notes* (3d ed.) p. 170 *et seq.*; *Pavenstedt v. New York L. Ins. Co.*, 203 N. Y. 91, applying the rule to a bill drawn in a foreign country by a New York corporation directed to

itself there and calling for payment there; *In re Gillespie*, 16 Q. B. 702 (the rule has not been changed by the Bills of Exchange Act, 1882).

If a bank owning and holding a foreign bill remits it for collection to a correspondent abroad and it is protested for nonpayment the latter cannot recover damages against the former on account of the protest, though the bank had failed before

Hence re-exchange is the expense incurred by the bill being dishonored in a foreign country in which it was payable, and returned to the country in which it was made or indorsed, and there taken up. The amount depends on the course of the exchange between the countries through which the bill has been negotiated. It is not necessary for the plaintiff to show that he has paid the re-exchange; it suffices if he is liable to pay it.⁴⁶ Where a re-exchange bill is drawn the payment of it fulfills the drawer's or indorser's engagement of indemnity; if not, the holder may sue on the original bill and will be entitled to recover what the drawer or indorser ought to have paid; that is to say, the amount of the re-exchange bill. This is the amount whether such a bill be in fact drawn or not.⁴⁷

the protest was made and was then indebted to its correspondent. *Ham-bro v. Casey*, 110 U. S. 216, 28 L. ed. 125.

⁴⁶ *Chitty on Bills*, 684.

⁴⁷ *Suse v. Pompe*, 8 C. B. (N. S.) 537. In this case it is explained that the course of business as to the sale and purchase of foreign bills is as follows: When a London merchant has to receive money from a correspondent abroad he instructs his bill-broker to sell an amount of florins (or whatever is the current coin of the country on which the bills are to be drawn) sufficient at the current rate of exchange to raise the amount in sterling money which he has to receive. The rate of exchange is constantly varying; but usually the fluctuations do not amount to much. As soon as the seller (the merchant) knows at what rate of exchange the bills have been sold he draws them in florins or other foreign money; and then the bills simply entitle the buyer of them to receive so many florins (or as the case may be), and they contain no allusion whatever to the amount of sterling money paid for

them. Inasmuch, however, as there is no rate of exchange for foreign bills at Liverpool or other places in the interior, and as, by reason of the fluctuations in the rate of exchange, merchants at these places do not know at what rate their bills will be sold in London they are unable to draw them in foreign coin, it is usual to draw such bills in sterling money, but "payable at the exchange as per indorsement." The London correspondent, when he has sold the bill and knows the amount of foreign money which the buyer is to have, indorses them payable at the agreed rate of exchange; and then the bills are practically turned into bills payable in foreign money. The action was brought by the indorsee against the indorser of two drafts similar in form, one of which was as follows:

"Liverpool, 21 Feb. 1859. For £750 stg. Four months after date pay this, our first of exchange (second and third not paid), to the order of ourselves, the sum of seven hundred and fifty pounds sterling, at the exchange as per indorsement,

§ 561. **Same subject.** The doctrine of re-exchange is founded upon equitable principles. A bill is drawn, for example, in

value in ourselves, and place to account as per advice from

"E. BUSCH & Co.

"To Carl Von Thornton, Vienna."

(Second and third of the same date and tenor.)

The following is a copy of the memoranda and indorsements on the second of the set:

"In need with Messrs. F. H. Hametz & Co. First for acceptance with M. G. Molle, 580 Jaquerielle. Pay Messrs. Wilh, Bunge & Co. or order, value in account.

"E. BUSCH & Co.

"Pay Messrs. Suse & Sebeth, or order, at the exchange of eleven guilders, five cents, new Austrian currency, per pound sterling, value of the same. London, 22d March, 1859.

"Pay to the order of Messrs. Kendler & Co. value in account.

"SUSE & SEBETH."

The bills were accepted but protested for nonpayment. The particulars of the plaintiffs' claim under the money counts were for sums paid for the draft at its inception and protest charges, as follows:

"Messrs. Wilhelm, Bunge & Co.:
£750 0 0 } Bought 22d March.
£490 11 0 }

	£	s.	d.
Paid March 25th, 1859	1,240	11	0
Interest to June, 5 per cent.	16	16	5
Brokerage, 1 per cent.	15	10	
Protest charges fl. 3.82			
And3.82			

Fl. 7.64

At fl. 14.5 10 6

Postage 5 4

1,258 18 1"

The defendants insisted that they were only liable for the value in sterling money in florins, 13,708.7c, on the day the bills became due, with interest and expenses, which at the then rate of exchange would be 952l. 12s. 9d., and this latter sum having been paid into court, the amount in dispute between the parties was 306l. 5s. 4d. The plaintiffs' claim was that the holder had the option of demanding back the sum they paid for the purchase of the bills, or of having recourse to the *recambio* account, whichever they should find most to their advantage.

Byles, J.: "The main question in this case is this: When a bill drawn and indorsed in England, and payable abroad, is dishonored by the acceptor's nonpayment, what is the extent of the indorser's liability to the holder? The defendants contend that the holder is entitled to the amount of the re-exchange, and to neither more nor less. This amount they have paid into court. The plaintiffs, on the other hand, contend that he (the holder) is entitled, at his option, either to the amount that he gave for the bill in England, or to the re-exchange. The solution of this question depends on the contract of the indorser. That contract is an engagement by the indorser that, if the drawee shall not at maturity pay the bill, he (the indorser) will, on due notice, pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity. Such also is the indorser's contract as understood in America. Story on Bills, 107. Apply this contract

this country, payable in Paris, France. The payee gives a premium for it under the expectation of receiving the amount

to the present case. The holders are entitled to receive a certain number of Austrian florins in Vienna on the day when the bill is at maturity. They have, in effect, bought from the indorsers so many Austrian florins, to be received in Vienna on that day. It should seem to follow, that, on nonpayment by the drawee, the holders are entitled, as against the indorsers, to so much English money as would have enabled them in Vienna, on that day, to purchase as many Austrian florins as they ought to have received from the drawee, and further, to the expenses necessary to obtain them. The most obvious and direct mode of obtaining that English money is to draw in Vienna on the indorsers in England a bill at sight for as much English money as will purchase the required number of Austrian florins at the actual rate of exchange on the day of dishonor, and to include in the amount of that bill the interest and necessary expenses of the transaction. The whole amount is called in law Latin '*recambium*,' in Italian '*recambio*,' in French '*rechange*,' and in English '*re-exchange*.' The bill itself is called in French '*retraito*.' This bill for re-exchange being negotiated at Vienna puts into the pocket of the holders at the proper time and place the exact sum which they ought to have received from the drawee. * * * If the indorser were held liable for the amount which the indorsee gave for the bill, when the amount is more than the indorsee ought to have paid, the contract of the indorser would be extended; he would be held liable, not merely for the damages sus-

tained by *the breach of the contract*, but for the damages sustained by *the making of the contract*. For a portion of these damages the holder must have sustained, though the contract had been performed by the drawee paying the bill."

The statement and illustration of the nature of the transaction which gives rise to the question of exchange and re-exchange by counsel, in *De Tastet v. Baring*, 11 East, 285, has been often quoted as apt and comprehensive: "A merchant in *London* draws on his debtor in *Lisbon* a bill in favor of another for so much in the currency of *Portugal*, for which he receives its corresponding value at the time in *English* currency; and that corresponding value fluctuates from time to time, according to the greater or less demand there may be in the *London* market for bills on *Lisbon*, and the facilities of obtaining them: the difference of that value constitutes the rate of exchange on *Lisbon*. The like circumstances and considerations take place at *Lisbon*, and constitute in like manner the rate of exchange on *London*. When the holder, therefore, of a *London* bill drawn on *Lisbon* is refused payment of it in *Lisbon*, the actual loss which he sustained is not the identical sum which he gave for the bill in *London*, but the amount of its contents if paid at *Lisbon*, where it was due, and the sum that it will cost him to replace the amount upon the spot by a bill upon *London*, which he is entitled to draw upon the persons there who are liable to him upon the former bill. That cost, whatever it may be, constitutes his actual loss and the charge

at the time and place where the bill is made payable. It is protested for non-payment. Now, the payee and holder is entitled to the amount of the bill in Paris. The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying him, at Paris, the principal, with costs and charges; or by paying him in this country those sums, together with the difference in value between the whole sum at Paris and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris and payable in this country, which would sell at Paris for the sum claimed.⁴⁸ The exchange is sometimes direct, at other times circuitous, depending in some degree upon the commercial intercourse between the two countries where the bill is drawn and where it is made payable. Having engaged, as drawer or indorser of the bill, that it should be paid at the place on which it is drawn, he is bound to indemnify the holder for the loss sustained by him in consequence of the non-payment.⁴⁹ He

for re-exchange. And it is quite immaterial whether he in fact redraws such a bill on *London* and raises the money upon it in the *Lisbon* market; his loss by the dishonor of the *London* bill is exactly the same, and cannot depend on the circumstance whether he repays himself immediately by redrawing for the amount of the former bill, with the addition of the charges upon it, including the amount of re-exchange if unfavorable to this country at the time; or whether he wait till a future settlement of accounts with the party who is liable to him on the first bill here; but that party is at all events liable to him for the difference: for as soon as the bill was dishonored the holder was entitled to redraw. That, therefore, is the period to look to. It ought not to depend on the rise or fall of the bill market, or exchange

afterwards; for, as he could not charge the increased difference by his own delay in waiting till the exchange grew more unfavorable to *England* before he redrew, so neither could the party here fairly insist on having the advantage if the exchange happened to be more favorable when the bill was actually drawn. Where re-exchange has been recovered on the dishonor of a foreign bill, it has not been usual to prove that in fact another bill was redrawn."

See *Bank of United States v. United States*, 2 How. 711, 11 L. ed. 439; *Crawford v. Branch Bank*, 6 Ala. 15; *Mellish v. Simeon*, 2 H. Bl. 378; also, *Grimshaw v. Bender*, 6 Mass. 157.

⁴⁸ *Bank of United States v. United States*, 2 How. 711, 11 L. ed. 439.

⁴⁹ *Edwards on Bills*, *734; 2 *Daniel on Neg. Inst.*, p. 396.

must pay re-exchange according to the course of exchange between the countries through which the bill was actually negotiated.⁵⁰ It has been said that the drawer ought not to be liable for any but the direct re-exchange between the place of drawing and the place of payment unless he has given permission to negotiate the bill in other places. But such permission is implied by the drawer issuing a negotiable instrument, since the holder for the time is entitled to indorse it to any person he pleases; and, on the other hand, the last holder being entitled, in case of its dishonor, to redraw on any previous indorser in order to make good his recourse against the indorser, who again has a right to do the same with any prior indorser, the drawer, as he is liable for all the consequences of dishonor, must be liable for the accumulated re-exchange arising on the successive redrafts because that results from the negotiability of the document which he has issued.⁵¹

The acceptor by his acceptance binds himself to pay the bill, and as to its contents his undertaking is the same as though he had made his note for the specified sum. He is not bound by his acceptance beyond that, and is, therefore, not liable to the holder for re-exchange. The authorities are not numerous.⁵² Gibson, C. J., thought it a little remarkable that in so commercial a country as America the point had not been raised before; and not less so that it was first decided in England so late as 1810, and with so little remark as to the principle of the decision. It came up on a motion to direct that the master allow the expense of re-exchange in a judgment against the defendant as an acceptor, to which the court barely answered that it could not be done against one who charged himself by his acceptance with no more than a liability to pay according to the law of his country, and that if he do not the holder has his remedy against the drawer.⁵³ It has, however, been supposed,

⁵⁰ *Mellish v. Simeon*, 2 H. Bl. 378.

⁵¹ *Thomson on Bills*, 445. But see *Story on Bills*, sec. 402.

⁵² *Watt v. Riddle*, 8 Watts 545; *Trammell v. Hudmon*, 56 Ala. 235.

⁵³ *Napier v. Schneider*, 12 East

420. See *Woolsey v. Crawford*, 2 Camp. 445; *Bowen v. Stoddard*, 10 Metc. (Mass.) 375; 43 Am. Dec. 442; *Newman v. Goza*, 2 La. Ann. 642; *Hanrick v. Farmers' Bank*, 8 Port. 539; *Dawson v. Morgan*, 9 B.,

in view of certain decisions, that the acceptor is not exempt from the payment of re-exchange when sued by the drawer after the draft has been returned protested to him and he has paid such damages.⁵⁴ If the acceptor by force of his acceptance is liable to the drawer after the latter has been compelled to pay re-exchange, to avoid circuity he ought to be liable directly to

& C. 618; *Van Arsdale v. Boardman*, 3 How Pr. 60; *King v. Phillips*, Pet. C. C. 350; *Armstrong v. Brown*, 1 Wash. C. C. 43, 321; *Watt v. Riddle*, 8 Watts 545; *Bain v. Ackworth*, 1 S. C. Const. 107; *Sibely v. Tutt*, 1 McMull. Eq. 320; *Edwards on Bills*, 733; *Chitty on Bills*, *686.

In *Woolsey v. Crawford*, 2 Camp. 445, an action by the payee against the acceptor, it was contended on behalf of the plaintiff that the defendant was answerable for all the damage that had been suffered by the plaintiff from the bill being dishonored. Lord Ellenborough answered: "You may as well state that by reason of the bill not being paid the plaintiff was obliged to raise money by mortgage. You must proceed for re-exchange against the drawer. He undertakes that the bill shall be paid, or that he will indemnify the holder against the consequences. The acceptor's contract cannot be carried further than to pay the sum specified in the bill, and interest according to the legal rate of interest where it is due."

⁵⁴ Bayley on Bills, p. 656, note: "It seems reasonable that the acceptor should be liable to all parties where he has effects, and to all excepting the drawer where he has not."

Mr. Parsons (1 Notes & B. 650) says: "The acceptor, it is said, is not liable for re-exchange, as he is bound only for the sum he promises to pay with legal interest.

But for this he is bound to the holder; and also to the drawer if he pays the bill. And if the default of the acceptor compels the drawer to pay this bill, and these damages with it, it would seem on general principles that the drawer's claim on the acceptor should cover the whole amount."

Mr. Daniel (Neg. Inst., § 1450, 5th ed.) says: "Our view is this: If the drawee authorizes the bill to be drawn (which is a virtual acceptance as to the drawer who draws the bill, or the holder who takes it on the faith of the authority), or if there is an acceptance when the bill is presented for acceptance, the acceptor is bound for all damages, including re-exchange, which may result to the drawer immediately from the dishonor of the bill. If the holder sues the drawer and recovers re-exchange, the acceptor should reimburse him, as his own default occasioned the liability. If the holder sues drawer and acceptor together, the acceptor would likewise be liable, because the drawer, on paying the amount, would immediately have a claim over against him. And even if the acceptor was sued alone, he should be held bound for the re-exchange. We can see no philosophy in the cases which hold him liable only when he has specially instructed the drawer to draw for a separate valuable consideration. His liability arises out of his contract to

the holder, who is entitled to recourse for it; but no case has yet occurred in which a claim of this kind has been sustained against the acceptor except in behalf of the drawer. And in the principal cases in which the drawer has been allowed to recover re-exchange from the acceptor the obligation to pay such re-exchange has grown out of the special facts of the case,⁵⁵ as where money has been advanced for the acceptor at the place where the bills were drawn and he had authorized his creditor to there draw for his reimbursement. On such facts the debtor, as such, is under a legal obligation to replace the money at the place where it was advanced; and any necessary loss on bills which he directs to be drawn, on account of the difference of exchange, is justly chargeable to him.⁵⁶ The latest decisions in England expressly affirm the liability of an acceptor to the drawer for re-exchange, or fixed damages in lieu thereof, as the natural and proximate consequence of the breach of his contract as acceptor.⁵⁷ This liability is not affected by the Bills of

pay the bill. A precedent debt is a valuable consideration; and if he accepts to pay the debt in a particular way, he should bear the consequential damages which his default occasions: and as Thomson has well said: 'If the drawer or indorser is liable to such damage to the holder, there seems to be no reason why the acceptor, who is more immediately bound to him, should not also be liable for this direct consequence of his breach of contract.'"
Thomson on Bills, 447.

⁵⁵ *Bowen v. Stoddard*, 10 Metc. (Mass.) 375.

⁵⁶ *Lanusse v. Barker*, 3 Wheat. 101, 4 L. ed. 343; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Coolidge v. Poor*, 15 Mass. 427; *Boyle v. Zacharie*, 6 Pet. 635, 8 L. ed. 527; *Riggs v. Lindsay*, 7 Cranch 500; *Francis v. Rucker*, 2 Amb. 672; *Walker v. Hamilton*, 1 De G., F. & J. 602.

⁵⁷ *In re General South American*

Co., 7 Ch. Div. 637; *In re Gillespie*, 16 Q. B. Div. 702, 18 id. 286; *Prehn v. Royal Bank of England*, L. R. 5 Ex. 92; *Walker v. Hamilton*, 1 De G., F. & J. 602.

In *Prehn v. Royal Bank*, *supra*, the defendants, bankers at Liverpool, undertook to accept the drafts of plaintiffs, merchants at Alexandria and Liverpool, the plaintiffs undertaking to put the defendants in funds to meet the bills at maturity, and the defendants receiving one-half per cent. for the accommodation. Bills were accordingly accepted by the defendants, and the plaintiffs duly provided the defendants with funds exceeding the amount of the acceptances. Before the bills became due the defendants' bank had stopped and they gave notice to the plaintiffs that they would be unable to meet the bills. The plaintiffs arranged with another house in Liverpool to take up the bills, paying two and one-half per

Exchange Act of 1882, although the re-exchange is not expressly provided for by section 57, the principle laid down being pre-

cent. commission, and they were also obliged to pay to the bankers the expenses of protesting the bills at Liverpool and Alexandria; and had also to incur expenses in telegraphic communications between those places. The decision was that the acceptors of the bills were liable for the commission and the notarial and telegraphic expenses which the drawers had incurred.

In *Walker v. Hamilton, supra*, the bills were drawn by a factor in Louisiana on his principals in England, by their direction, to cover his advances and commissions; they were protested after acceptance, and the drawer had taken them up and paid 10% per cent. damages according to the laws of Louisiana. The Lord Chancellor (Campbell) said: "I am clearly of opinion that Mr. Hamilton had a right to prove for this 10% per cent. under the deed. It would be a great injustice if he had not. He is employed by (the acceptors) to buy goods for them upon commission, to send these goods to Liverpool, in the United Kingdom, and he is desired by them to draw bills upon them for the price of the goods and commissions, which they undertake to accept and pay. He does buy the goods; he does draw the bills. The bills are accepted, and when due are dishonored; and then what is the situation of Mr. Hamilton? He is sued and obliged to pay the amount of 10% per cent. in consequence of a law subsisting in Louisiana. As the case was ingeniously put by Mr. Robinson, they asked him to be their surety, and he became their surety by drawing the bills, and in that character was called on to pay. But a surety

has a right against his principals to be recouped what he has paid as surety at their request. Therefore, according to law and justice, this demand ought to be satisfied, and upon this general principle, that it is a damage naturally flowing from the breach of the contract. Where there is a contract, the party who breaks that contract is liable for what may be considered the natural and proximate consequence of that breach of contract. Here was a promise to pay the bills when they became due; that promise was broken; the payment of the 10% per cent. was the natural and direct consequence of that breach of contract, and therefore the party to whom that promise was made, and who suffered from that breach of the promise, is very ill-used if he has not a right to be indemnified in respect of the loss which he has thus sustained.

"This reasoning, I think, applies generally to the drawer of a bill in a foreign country, or an acceptor in another foreign country, where there may be a re-exchange, or some law giving a fixed sum in payment of exchange; because what is paid under that law, in lieu of re-exchange, is a necessary consequence of the breach of the contract on the part of the acceptor of the bill; and I have no doubt that in an action at law in an English court it might be recovered on setting out the acceptance, the dishonor, and *per quod*, that the plaintiff was compelled to pay the 10% per cent. to the holder of the bill. That seems to me to be the correct principle, and we have the authority of Pothier (*Cont. d' Exchange, par.*

served by section 97.⁵⁸ It is limited, however, to the amount

Dapin, pl. 117) for its being the law of France, and it has been, I believe, since included in the commercial code of the Code Napoleon (Code de Commerce, liv. 1, tit. 8, § 13). We have the authority of Story, the great jurist (Story on Bills of Exchange, § 398), who gives countenance to the doctrine; and we have that which Mr. Daniel was unable to cope with, viz.: the express authority of an English court of justice in the case of Francis v. Rucker, 2 Amb. 672, which is expressly in point with the present. It was a case that was well considered by Lord Camden, who so felt the great importance of it that in order to settle the law solemnly and finally, he was not satisfied to do what I believe he might have done in bankruptcy, but he directed a bill to be filed so that his opinion might be reviewed, and the opinion of the House of Lords, if necessary, taken upon it. His decision, however, was not appealed against. It has, I believe, been considered law ever since, and is, in my opinion, consistent with reason and good sense.

"If there had been subsequent decisions which were at variance with it, we might have been bound by the more recent authorities; but notwithstanding all the diligence which has been exercised by Mr. Daniel and his learned junior, they have brought no single authority that conflicts with that case; because in *Ex parte Moore*, 2 Bro. Ch. 597, the proof was allowed; some observations were made by Lord Thurlow respecting *Francis v. Rucker*, but he acquiesced in it, and

the proof was allowed. In *Napier v. Schneider*, 12 East 420, a gentleman at the bar asked for a reference to the master as to the amount that was due on a bill of exchange and for re-exchange (not 10*l.* or 20*l.* per cent. or any given percentage), and the court held that the master was not competent to enter into all this calculation. But if it had been a fixed sum of 10*l.* per cent. the master would have had no difficulty; and I am inclined to believe that in such a case the counsel who made the application would have succeeded instead of failing. The case of *Woolsey v. Crawford*, 2 Camp. 445, is at most a *nisi prius* case, and the point there decided only applied to the re-exchange, not to a sum which was liquidated, which could have been easily ascertained; and as to this *nisi prius* case, if it had been expressly in point, I should have said that it could not at all outweigh the solemn decision of *Francis v. Rucker*. But the case before us is distinguishable from it, because it is only there said that a claim in respect to re-exchange could not be admitted, and here we are not upon re-exchange, but upon a liquidated sum of 10*l.* per cent. I do not, therefore, find any authority at all to conflict with the case of *Francis v. Rucker*, and upon that I think we may safely decide in favor of this demand."

Lord Justice Turner said: "I say nothing as to how this case would stand as between a holder and the acceptors, because that is not the case before us; but as between the drawer and the acceptor, in my opinion, there is a liability in the acceptors which would have been

due on the bill at the time it is dishonored; ⁵⁹ and in New York is not affected by fluctuations in an irredeemable foreign currency. ⁶⁰

§ 562. When re-exchange or damages not recoverable. Re-exchange is not allowed on promissory notes. Where, however, the maker of a note or other debtor has failed to pay money in the country where it was payable and is sued on his contract in another country he is probably liable not only to the par of exchange in the money of the forum, but to damages equal to the rate of exchange for obliging the creditor to receive payment at the place of recovery instead of at the place appointed in the contract for payment. ⁶¹ This liability does not depend on any rule applicable exclusively to commercial paper. Promissory notes may be drawn with an express provision that they are to be paid with exchange on a certain place. ⁶²

Where, after protest, a bill is paid by the acceptor in the country in which, according to its tenor, it was payable no exchange can be claimed by the holder against a prior indorser or drawer. It is only where the bill is returned home and there taken up that this allowance can be demanded. For the injury occasioned by the delay of payment the law deems the interest

provable under a bankruptcy. Therefore the case of *Francis v. Rucker* is distinct upon this point; and I do not think that that authority, after having examined the petition which was presented in the bankruptcy, is confined at all to the special circumstances of the particular case. Whatever the effect of the case at law may be, as between the holder and the acceptor, they do not, in my judgment, affect the case as between the drawer and the acceptor, and in my opinion, therefore, our answer must be in the affirmative.

⁵⁹ *In re Gillespie*, 16 Q. B. Div. 702.

⁵⁹ *In re Gillespie*, 18 Q. B. Div. 286.

⁶⁰ *Pavenstedt v. New York L. Ins. Co.*, 113 App. Div. (N. Y.) 866.

⁶¹ *Grant v. Healey*, 3 Sumn. 523; *Scott v. Bevan*, 2 B. & Ad. 98; *Cash v. Kennion*, 11 Ves. 314; *Smith v. Shaw*, 2 Wash. C. C. 167; *Bank v. Wright*, 10 Mo. 719; *Lee v. Wilcocks*, 5 S. & R. 48; 1 *Parsons on N. & B.* 664; *Edwards on Bills*, *726.

⁶² *Pollard v. Herries*, 3 B. & P. 335; *Grutacap v. Woulluise*, 2 McLean 581; *Smith v. Kendall*, 9 Mich. 241, 80 Am. Dec. 83; *Leggett v. Jones*, 10 Wis. 34. But see *Atkinson v. Manks*, 1 Cow. 707.

an equivalent.⁶³ And where damages are given in lieu of re-exchange, as by the commercial usage of Massachusetts, and as is now the case by express provisions of the statutes of many states, the same principle of exemption applies.⁶⁴ The payment of one of a set of bills is a payment of all, and a waiver of damages which may have accrued on the prior protest of another.⁶⁵ If the bill is, on presentation, paid in part and protested for the residue, the re-exchange is confined to the unpaid part or the damage is apportioned thereto.⁶⁶ And if paid in part by the acceptor after protest the damages or claim for re-exchange is discharged *pro tanto*. The damages are incident to the principal. If that be paid, or as far as paid at the place appointed, the incident or accretion which would otherwise attach to it ceases.⁶⁷ Collection of the bills from the acceptor by execution has the same effect as payment by him. Nor will this effect be avoided by the fact that the former action against him was not in the name of the plaintiff if it was for his benefit.⁶⁸

⁶³ Bangor Bank v. Hook, 5 Me. 174; Porter v. Ingraham, 10 Mass. 88; Bayley on Bills, 387.

⁶⁴ Bangor Bank v. Hook, *supra*; Page v. Warner, 4 Cal. 395.

⁶⁵ *Id.*

⁶⁶ In re Gillespie, 18 Q. B. Div. 286; Laing v. Barclay, 3 Stark. 38.

⁶⁷ Bangor Bank v. Hook, 5 Me. 174.

⁶⁸ Warren v. Coombs, 20 Me. 139.

In New York, by the former rule of damages on bills, the holder of a bill on London returned protested for nonpayment was entitled to recover from the drawer or indorser there the contents of the bill at the rate of exchange at the time of the notice of dishonor, with twenty per cent. damages and interest. Graves v. Dash, 12 Johns. 17 (reversing Hendricks v. Franklin, 4 id. 119); Denston v. Henderson, 13 id. 322. And the same rule was applied when the protest was for nonacceptance. United States v. Barker,

1 Paine 156. But in Pennsylvania the recovery on nonacceptance was only of interest from the time of protest. Taan v. Le Gaux, 1 Yeates 204; Morris v. Tarin, 1 Dall. 147, 1 L. ed. 76, 1 Am. Dec. 233.

In Hargous v. Lahens, 3 Sandf. 213, the bill in question was drawn in New York on parties in France, and after acceptance was protested for nonpayment. Notwithstanding a subsequent part payment by the acceptor, it was held that the damages by the law of New York on the whole bill were recoverable from the drawers. The holder's right to recover from them, it was held, became perfect on the return of the draft and a subsequent part payment had no influence in reducing that fixed and determinate liability. After being so returned, if the bill be sent back to the place of payment and a partial payment thereon is then made by the acceptor or a tender of the balance due upon

These damages are allowed only to the parties on whose account and risk the remittance is made. Parties receiving a bill as conditional payment of an antecedent debt, and not in satisfaction of it, are not entitled to damages.⁶⁹ If bills are drawn by a party who has no purpose to transfer funds to a foreign country, nor to have the amount they represent employed there, but for the object of having such amount remitted to the country in which they are drawn, re-exchange is not recoverable.⁷⁰

§ 563. By what law liabilities governed. The contracts of the several parties to a bill, as well as to a note, are governed by the laws of the place where they are severally made.⁷¹ Those of the maker and acceptor may be modified by expressly appointing

the face of the bill is defective if accompanied by the condition that the bill be delivered up without payment or offer to pay the damages. The holders are entitled to retain the bill to enforce their claims for damages against the proper party. He is entitled to his damages on nonpayment, irrespective of the place where he may subsequently receive entire or partial payment. See *De Rham v. Grove*, 18 Abb. Pr. 43.

⁶⁹ *Chapman v. Steinmetz*, 1 Dall. 261, 1 L. ed. 128; *Keppele v. Carr*, 4 id. 155.

In the last case Shippen, J., said: "It appears * * * to be settled law that where a bill of exchange is not paid and received in satisfaction of a debt due from a merchant to his correspondent, it goes at the risk of the debtor; and the creditor, who remits it for acceptance and payment, stands on the footing of an agent only until the bill is actually paid. Then, in point of justice, it seems but fair to allow every incidental or casual profit and emolument to the party who is exposed to all the hazard and incon-

venience of the remittance. * * * He is entitled to damages on whose account and risk the bill is remitted." *Watts v. Willing*, 2 Dall. 100, 1 L. ed. 306; *Evans v. Smith*, 4 Bin. 366; *Dehers v. Harriot*, 1 Showers 163; *Brown v. Jackson*, 1 Wash. C. C. 512; *Hopkins v. Kenworthy*, 3 Johns. Cas. 436; *Thompson v. Robertson*, 4 Johns. 27.

⁷⁰ *Williams v. Ayers*, 3 App. Cas. 133, 24 Moak 82.

⁷¹ *Garrigue v. Kellar*, 164 Ind. 678, 108 Am. St. 324, 69 L.R.A. 870; *Cherry v. Sprague*, 187 Mass. 113, 67 L.R.A. 33, 105 Am. St. 381; *Palmer v. Hill*, 140 Mich. 468; *Conrad v. Lepper*, 13 Wyo. 473. See *Jennings v. Moore*, 189 Mass. 197.

It is said in a recent Maine case: "It is true that the *lex loci contractus* governs as to the validity and construction of the contract. But the *lex fori* governs as to all matters pertaining to the remedy. That law governs as to the negotiability of the contract, because upon it depends the question who has a right of action." *Roads v. Webb*, 91 Me. 406, 412, 64 Am. St. 246, citing

a different place of payment.⁷² But the contract of the drawer and indorsers is implied, and they are presumed to contract with reference to the law of the place where the instrument is drawn or indorsed, for that is also the place where their several contracts are to be performed.⁷³ It must, therefore, often occur that the measure of damages will be different as to the several parties. The liability of the drawer will be governed by the law of the place where the bill is drawn, among other things, in respect to interest and exchange, or damages in lieu of it, and each of several successive indorsers may contract several and

Pearsall v. Dwight, 2 Mass. 90, 3 Am. Dec. 35, and referring to *McRae v. Mattoon*, 10 Pick. 53; *Warren v. Copelin*, 4 Metc. (Mass.) 597; *Foss v. Nutting*, 14 Gray 485; *Leach v. Greene*, 116 Mass. 534.

⁷² *Midland S. Co. v. Citizens' Nat. Bank*, 34 Ind. App. 107 *Lienkauf B. Co. v. Haney*, 93 Miss. 613; *Trower v. Hamilton*, 179 Mo. 205; *Bank v. Bright-C. Com. Co.*, 139 Mo. App. 110; *Vennum v. Mertens*, 119 Mo. App. 461; *Mayer v. Roche*, 77 N. J. L. 681, 26 L.R.A. (N.S.) 763; *Montana C. & C. Co. v. Cincinnati C. & C. Co.*, 69 Ohio 351.

It is presumed that a note executed in the state of the parties' residence was delivered there; adding to the name of the payee his place of residence in another state does not make the note a contract of such state. *Strawberry Point Bank v. Lee*, 117 Mich. 122. See *Cox v. National Bank*, 100 U. S. 704, 25 L. ed. 739.

⁷³ *Smith v. Myers*, 207 Ill. 126; *Johnson County Sav. Bank v. Kramer*, 42 Ind. App. 548; *Hammond v. American Exp. Co.*, 107 Md. 295; *Hackley Nat. Bank v. Barry*, 139 Wis. 96; *Guignon v. Union T. Co.*, 156 Ill. 135, 47 Am. St. 186; *Brady v. McGehee*, 1 Tenn. Cas. 154; *Suth. Dam. Vol. II.—42.*

Douglas v. Bank, 97 Tenn. 133; *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 52 Fed. 191, 3 C. C. A. 1, 17 L.R.A. 595; *Lockwood v. Lindsey*, 6 D. C. App. Cas. 396; *In re Commercial Bank of South Australia*, 36 Ch. Div. 522, 526; *Allen v. Kemble*, 6 Moore P. C. 314; *Gibbs v. Fremont*, 9 Ex. 25; *Freese v. Brownell*, 35 N. J. L. 285, 10 Am. Rep. 239; *Bank of United States v. United States*, 2 How. 711, 11 L. ed. 439; *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79; *Lennig v. Ralston*, 23 Pa. 137; *Price v. Page*, 24 Mo. 67; *Page v. Page*, 24 Mo. 596; *Bouldin v. Page*, id. 595; *Kuenzi v. Elvers*, 14 La. Ann. 391, 74 Am. Dec. 434; *Raymond v. Holmes*, 11 Tex. 54; *Everett v. Vendryes*, 19 N. Y. 436; *Slacum v. Pomery*, 6 Cranch 221; *Cook v. Litchfield*, 9 N. Y. 279, 5 Sandf. 330; *Dow v. Rowell*, 12 N. H. 49; *Aymar v. Sheldon*, 12 Wend. 443; *Yeatman v. Cullen*, 5 Blackf. 246; *National Bank v. Green*, 33 Iowa 140; *Trabue v. Short*, 18 La. Ann. 257; *Short v. Trabue*, 4 Met. (Ky.) 299; *Dundas v. Bowler*, 3 McLean 400; *Williams v. Wade*, 1 Mete. (Mass.) 82; *Artisans' Bank v. Park Bank*, 41 Barb. 602; *Glidden v. Chamberlin*, 167 Mass. 486, 494.

different liabilities, each being bound according to the law of the place where his indorsement is made.⁷⁴

Re-exchange varies with the fluctuations of commercial intercourse, influenced somewhat by local circumstances and the general state of the money market. In some instances, owing to peculiar circumstances, it has been found to exceed forty or even fifty per cent. To avoid so ruinous a charge, so uncertain a rule of damages and one so difficult to establish by evidence the states of the Union have by legislation or commercial usage substituted a certain amount of damages on protested foreign bills in lieu of re-exchange.⁷⁵ Chief Justice Parsons said:⁷⁶ "According to the law merchant, uncontrolled by any local usage, the holder is entitled to recover the face of the bill and the charges of the protest with interest from the time when the bill ought to have been paid, and also the price of re-exchange, so that he may purchase another good bill for the remittance of the money and be indemnified for the damage arising from the delay of payment. But he cannot claim the ten per cent. of the bill which it is here the usage to pay. But the rule of damages established by the law merchant is, in our opinion, absolutely controlled by the immemorial usage in this state. Here the usage is to allow the holder of the bill the money for which it was drawn, reduced to our currency at par, and also the charges of protest, with American interest on those sums from the time when the bill should have been paid; and the further sum of one-tenth of the money for which the bill was drawn, with interest upon it from the time payment of the dishonored bill was demanded of the drawer. But nothing has been allowed for re-exchange, whether it is below or at par. This usage is so ancient that we cannot trace its origin; and it forms part of the law merchant of the commonwealth. Courts of law have always recognized it and juries have been instructed to govern themselves by it in finding their verdicts. * * * The origin of this usage was probably founded in the convenience of

⁷⁴ 1 Daniel on Neg. Inst., p. 683.

⁷⁵ Grimshaw v. Bender, 6 Mass.

⁷⁶ Bank of U. S. v. U. S., *supra*; 157.
Lennig v. Ralston, 23 Pa. 137.

avoiding all disputes about the price of re-exchange, and to induce purchasers to take the bills by a liberal substitution of ten per cent. instead of a claim for re-exchange.” 77

77 In *Hendricks v. Franklin*, 4 Johns. 119, Spencer, J., said: “The right to recover twenty per cent. damages on the protest of a foreign bill of exchange rests with us on immemorial commercial usage, sanctioned by a long course of judicial decisions. In Great Britain (2 H. Bl. 378) there is no such usage, and hence there the difference of exchange is always taken into consideration, and their courts of justice allow the usual rate of re-exchange upon the protest of a foreign bill. In Pennsylvania, as early as the year 1700, the legislature enacted that if any person within that province should draw or indorse any bill of exchange upon any person in England or other parts of Europe, and the same be returned unpaid with a legal protest, the drawer and all concerned should pay the contents of the bill, together with twenty per cent. advance for the damage thereof in the same specie as the bill was drawn, or current money of that province equivalent to that which was first paid to the drawer or indorser. It is presumed that our rule to allow twenty per cent. on the protest of a foreign bill was originally co-extensive with the rule established in Pennsylvania, and that the same reason induced both rules. The twenty per cent. was in lieu of damages, in case of re-exchange, and because there was no course of exchange from London to New York, and to avoid the constant uncertainty and fluctuation of exchange. If these were not the inducements to the allowance of such heavy damages as twenty per

cent., I confess myself unable to discover them. It certainly could not be intended merely as a mulct, nor with any other view than to remunerate the party for all his damages in being disappointed in the honoring of his bill.”

Morris v. Stokes, Mart. & Hayw. 4, was a default and inquiry. The court ruled that evidence might be given of the difference of exchange between this country and Philadelphia, and in the charge (as bills had not been usually drawn in Edenton, and no one knew the exchange) the court said to the jury that they might discover the exchange by attending to the value of hard money in this country, and knowing what dollars passed at in Philadelphia.

In New York the holder was entitled to recover not only the twenty per cent. damages, together with the interest and charges, but also the amount of the bill liquidated by the rate of exchange, or price of bills on England, or other places of demand in Europe, at the time of the return and notice to the party to be charged. 3 Kent's Com. 115-117; *Denston v. Henderson*, 13 Johns. 321; *Graves v. Dash*, 12 id. 16; *Hendricks v. Franklin*, 4 id. 119; *Scofield v. Day*, 20 id. 102; *Bank v. Osgood*, 4 Wend. 607; *Wendell v. Washington & W. Bank*, 5 Cow. 161.

Appleton, C. J., in *Wood v. Watson*, 53 Me. 300 (1865), said: “Damages given on foreign bills of exchange for nonpayment are as much part of the contract as interest. *Bank of United States v. United States*, 2 How. 711, 737, 11 L. ed.

The damages now allowed in this country are regulated by statutes in several states; these establish different rates in the several states, and in some instances give damages on inland bills. Prior to the adoption of the uniform Negotiable Instruments acts these statutes were common, but since the uniform act, as it was presented to the several states, contained no provision for damages, a number of the states, upon adopting the act, repealed directly or by implication the damage statutes theretofore in force. The exact situation in any given state can be determined only by an examination of the statutes thereof; the substance of these statutes as disclosed by the latest accessible revisions or compilations is given in a note.⁷⁸ Because of

439, 449. The percentage allowed by statute on the protest of a foreign bill is a commutation for interest, damage and re-exchange. It is a statutory liquidation of damages by which the parties are to be governed. *Lloyd v. McGarr*, 3 Pa. 482. Now mercantile usage has established the damages on bills on London, in case of dishonor in Massachusetts, as determined in *Grimshaw v. Bender*, 6 Mass. 157; and in this state, in *Snow v. Goodrich*, 14 Me. 235, at ten per cent., instead of re-exchange. This usage forms part of the law of the state. It had been of so long continuance that, in 1809, when the judgment of the court in *Grimshaw v. Bender* was pronounced, Mr. Chief Justice Parsons said that its origin could not be ascertained. It must, therefore, be deemed a part of the law merchant and as obligatory as any portion of the common law until it shall be modified or changed by the legislature. Whether the rule of damages is established by statute or by a long-continued usage having the force of law it is to be deemed part of the contract of indorsement. The rule referred to, not having been altered by the liqui-

dation, must be regarded as remaining in full force. It is not for the court to change the law whenever a monetary crisis occurs." See *Bowen v. Stoddard*, 10 Metc. (Mass.) 375.

⁷⁸ Alabama: Five per cent. on the amount drawn for, whether the bill be inland or foreign, or whether protested for nonacceptance or non-payment. Damages cover exchange except when bill is payable in a foreign currency, when exchange is added. Code, 1907, §§ 5145-5149.

Alaska: Ten per cent., if payable without the limits of the United States; five per cent. if payable therein. Comp. L. 1913, §§ 622, 623.

Arizona: The R. S. of 1913 appear to be silent on the subject. No repeal clause is contained in the Negotiable Instruments Act as adopted in 1901, but it is uncertain whether or not the prior statute (R. S. 1887, § 131, p. 70), allowing ten per cent. on the amount drawn for by any merchant upon his non-resident agent, with interest and costs of suit, is still in force.

Arkansas: On protested bills drawn or negotiated in the state, if payable therein, two per cent. If payable in Alabama, Louisiana,

the failure of the legislators, in enacting the Negotiable Instruments laws, to make clear their purpose as to pre-existing statutes respecting damages on bills protested for non-acceptance or

Mississippi, Tennessee, Kentucky, Ohio, Indiana, Illinois, or Missouri, or any point on the Ohio river, at the rate of four per cent. If payable at any other place in the United States, five per cent. If payable at any post or place beyond the limits of the United States, ten per cent. If accepted and protested for nonpayment, when drawn by a person without the state and within the United States, six per cent.; and if drawn by a person without the United States, ten per cent. These damages are in addition to expense of protest and interest at the rate of ten per cent. per annum on the amount specified in the bill. Dig. of Stats., 1904, §§ 502-504.

Interest is allowed on the principal only; not on the damages. *Craig v. Price*, 23 Ark. 663.

California: For interest accrued before notice of dishonor, re-exchange, expenses, and all other damages in favor of holders for value only, on nonacceptance or nonpayment of any bill drawn or negotiated in the state, damages are given as follows: On bills drawn upon any person within the state, two per cent.; drawn upon any person out of the state, five per cent.; drawn upon any person in a foreign country, fifteen per cent. upon the amount of the bill; interest is allowed from the time of notice of the dishonor and demand of payment. *Kerr's Cyc. Code*, 1908, §§ 3234-3235. See *Pratalongo v. Larco*, 47 Cal. 379; *Page v. Warner*, 4 id. 395.

Colorado: Prior to the adoption of the Negotiable Instruments Act the subject was covered by 1 Mills'

Ann. Stats., 1891, ¶ 241, p. 491, which provided damages of ten per cent. with legal interest from the time the bill became payable, and costs of protest, on foreign bills or those drawn upon any person out of the state, on nonacceptance or nonpayment. The revisors of *Court-right's Stats.*, 1914, and *Mills' Ann. Stats.*, 1912, however, express the opinion in notes to the form of the Negotiable Instruments Act now in force in Colorado that the earlier statute was thereby repealed, despite the absence of an express provision to that effect. But see *Selover on Negotiable Instruments*, 2d Ed. note, p. 279.

Connecticut: On protest of a bill of exchange drawn on a person in the city of New York, two per cent. on the principal sum; drawn on a person in New Hampshire, Vermont, Maine, Massachusetts, Rhode Island, New York (except the city), New Jersey, Pennsylvania, Delaware, Maryland or Virginia, or in the District of Columbia, three per cent.; drawn upon a person in North Carolina, South Carolina, Ohio, Illinois, Indiana, Michigan, Kentucky or Georgia, five per cent.; drawn upon a person in any other state, territory or district of the United States, eight per cent. Such damages stand in the place of interest and all other charges to the time when notice of protest is given and demand of payment made, and are to be determined without reference to the rate of exchange. *Gen Stats.* 1902, § 4361.

Delaware: On bills drawn on a person beyond the seas and returned unpaid with legal protest,

non-payment, an ambiguous situation has been created in several states. In some instances the Negotiable Instruments Act

twenty per cent. Rev. Code, 1915, § 2842, p. 1326.

Florida: On foreign protested bills, five per cent. Comp. L. 1914, § 3072.

Georgia: On any bill, draft or order protested for nonacceptance or nonpayment payable out of the state and within the United States, five per cent. on the principal, in addition to interest and protest fees, for which the drawer, indorser or acceptor is liable; if payable without the limits of the United States, ten per cent. Parks' Ann. Code, 1915, §§ 4281-4282.

Idaho: There is no provision contained in Rev. Codes, 1908. The revisor's note states that the earlier statute covering this subject is "deemed repealed," but the Negotiable Instruments Act as adopted in 1903 contained no repeal clause.

Illinois: The earlier statute on this subject was repealed by the Negotiable Instruments Act in 1907. See R. S. 1915-16, ch. 98, § 214.

Indiana: On protested bills drawn or negotiated within, payable out of, the state and in the United States, five per cent.; payable out of the United States, ten per cent. on the principal sum. Beyond such damages no interest or charges, accruing prior to protest, allowed, but interest may be recovered from the date of protest, but no damages beyond cost of protest, if upon notice of protest and demand of principal the same be paid. And a holder to recover damages must have paid value. On any bill drawn or negotiated in the state, and payable at any place without the state, but in regard to which it shall appear that it was not to be present-

ed for acceptance or payment at that place, if means were provided for its discharge within the state, no damages or charges for protest are allowed. Burns' Ann. Stats., 1914, §§ 9077-9082.

Iowa: The provisions of the code fixing the damages were repealed by the Negotiable Instruments law. See Supplement of Code, 1913, p. 1271, § 3060a.

Kansas: The statute previously in force on this subject was repealed by a section of the Negotiable Instruments Act. See Dassler's Stats., 1909, § 5445.

Louisiana: The rate of damages to be allowed upon the usual protest for nonacceptance or nonpayment of bills of exchange drawn or negotiated in the state is, on bills drawn on and payable in foreign countries, ten per cent.; on all bills drawn on and payable in any other state in the United States, five per cent. on the principal sum specified in such bill. Damages are in lieu of interest, charges of protest and all other charges incurred previous to and at the time of giving notice of nonacceptance or nonpayment, but the holder is entitled to recover lawful interest upon the aggregate amount of the principal sum, and of the damages thereon from the time at which notice of protest for nonacceptance or nonpayment shall have been given and payment demanded. When the contents of the bill are expressed in the money of the United States, the amount of the principal and of the damage is ascertained without any reference to the rate of exchange; but when expressed in foreign currency the principal and damages are

contain a repealing clause covering "all acts or parts of acts inconsistent herewith"; in others, no repealing clause whatever

determined by the rate of exchange; but when the value of such foreign coin is fixed by the laws of the United States, the value thus fixed must prevail. Marr's Ann. R. S. 1915, §§ 430-433.

Maine: Damages on protest of bills of exchange of a hundred dollars or more, payable by the acceptor, drawer or indorser of one in the state, are, if payable at a place seventy-five miles distant, one per cent.; if payable in the state of New York, or in any state northerly of it and not in the state, three per cent.; if payable in any Atlantic state or territory southerly of New York and northerly of Florida, six per cent.; and in any other state or territory, nine per cent. R. S. 1904, p. 745, § 56.

Maryland: The holder of a bill of exchange, drawn in the state, on any person in a foreign country, regularly protested, is entitled to recover so much current money as will purchase a good bill of exchange of the same time of payment and upon the same place, at the current exchange of such bills, and also fifteen per cent. damages upon the value of the principal sum, with costs of protest and legal interest; if drawn on any person in any other of the United States and protested, the holder may recover in the same way a sum sufficient to buy another bill of the same tenor, and eight per cent. damages on the principal sum, and interest from the time of protest and costs. It is also provided that indorsers of such bills, who shall have paid the principal and the damages prescribed by statute, may recover the same with interest from the drawer, or any

other person liable to him on the bill. Ann. Code, 1911, pp. 267-268, §§ 1-5.

The indorser of a bill, remitted to his original character as holder and payee, cannot recover under the last section of this statute, but only as holder. Bank of United States v. United States, 2 How. 711, 11 L. ed. 439; 1 Parsons on N. & B. 657-8, note.

Massachusetts: The holders of bills drawn or indorsed in the state and payable without the United States, duly protested for non-acceptance or nonpayment, are entitled to the current rate of exchange at the time of the demand, and five per cent. on the contents thereof, and interest on the contents from the date of the protest. The amount of contents, damages and interest are in full of all damages, charges and expenses. If the bill is payable within the states of Maine, New Hampshire, Vermont, Rhode Island, Connecticut or New York, two per cent.; New Jersey, Pennsylvania, Maryland or Delaware, three per cent.; Virginia, West Virginia, North Carolina, South Carolina or Georgia, or the District of Columbia, four per cent.; if in any other of the United States, or the territories thereof, five per cent. If the bill is for a sum not less than one hundred dollars, and payable within the state at a place not less than seventy-five miles from the place where drawn or indorsed, one per cent. in addition to the contents thereof, and interest on the contents. R. L. 1902, ch. 73, §§ 11-12, pp. 626-627.

Michigan: The Negotiable Instruments Act (Howell's Stats., 2d

is included. In such cases the revisors, unable to know the legislative intent, have been put to the necessity of a choice

Ed., § 2863), apparently repealed the provisions contained in earlier compilations, although the repealing clause contains reference to no particular act. Before the passage of this act it was provided (2 Comp. L., 1897, §§ 4874-4875) that damages could be collected as follows: On bills payable at any place without the state, but within Wisconsin, Illinois, Indiana, Pennsylvania, Ohio or New York, three per cent. on the contents of the bill; if payable within either of the states of Missouri, Kentucky, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, Virginia or the District of Columbia, five per cent.; and if payable elsewhere within any of the United States or the territories thereof, ten per cent. If the bill was payable without the limits of the United States the holder could recover the same, with the current rate of exchange at the time of demand, and damages at the rate of five per cent. upon the contents thereof, together with interest on said contents from the date of protest; said sum to be in full of damages, charges and expenses.

Minnesota: Damages on protested bills payable without the limits of the United States are the bills with the current rate of exchange at the time of the demand and ten per cent. on the contents, with interest thereon from the time of protest, to be in full of all damages, charges and expenses. If the bill is drawn on any person in the United States, but out of the state, five per cent. damages, together with costs and charges of protest, besides the

amount of the bill and legal interest. Gen. Stat. 1913, §§ 6013-6014.

Mississippi: Damages on bills drawn on any person out of the state but within the United States, five per cent. on the amount, besides interest on the same; out of the United States, ten per cent., besides interest, and the holder is also entitled to all costs and charges. No damages on domestic bills. Code, 1906, §§ 4003-4004.

Missouri: When any bill of exchange, expressed to be for value received, drawn and negotiated within the state, is duly presented for acceptance or payment, and protested for nonacceptance or nonpayment, the drawer and indorsers, having due notice of the dishonor, are required to pay damages as follows: If drawn on any person at any place within the state, four per cent. on the principal sum. If drawn on any person out of the state but within the United States or the territories, ten per cent. If drawn on any person without the United States or the territories thereof, twenty per cent. If accepted and not paid, the damages allowed are four per cent., if drawn by any person within the state; if drawn by any person without the state, but within the United States, damages are allowed at the rate of ten per cent.; if drawn without the United States, at the rate of twenty per cent. The damages can be recovered only by the holder of a bill who has paid a valuable consideration for it or for some interest in it. If payment is made of a bill, with the interest and protest charges, drawn within the state on any person at a place in it, within

whether to include the old statute among those still in force, or to ignore it as repealed by implication, on the theory that the

twenty days after demand, no damages are recoverable. If a bill is expressed to be paid in the money of the United States, the amount due and damages are to be determined without reference to the rate of exchange between this state and the place on which it is drawn; if in the money or currency of any foreign country, then the amount due, exclusive of damages, is to be ascertained by the rate of exchange, or the value of such foreign currency at the time of payment. R. S. 1909, §§ 10166-7, 10168-70. See *State Bank v. American H. L. Co.*, 121 Mo. App. 324.

Nebraska: Since the adoption of the Negotiable Instruments Act, R. S. 1913, ch. 54, there has been no provision for damages in this state, the above chapter having effected the repeal of the earlier act covering this subject.

Nevada: The R. L. of 1912 carry no reference to this subject, except as stated in the regular form of the Negotiable Instruments Act. There is, however, no repeal clause in that act, so that it remains a question whether or not the law as stated in Comp. L. 1900, §§ 2758-2761 and § 2763 is still in force. That law provided: bills drawn upon any person in any of the United States east of the Rocky Mountains, fifteen per cent.; if upon a person in any foreign country, twenty per cent. Such damages were in lieu of interest, charges of protest and all other charges incurred previous to and at the time of giving notice of nonpayment; but the holder was entitled to recover lawful interest upon the principal sum specified in such bill, and damages thereon from

the time of giving notice of protest. If the contents of the bill were expressed in money on account of the United States, the sum due thereon and the damages allowed for its nonpayment were to be determined without reference to the rate of exchange between the state and the place where the bill was drawn. If the contents were expressed in the money of any foreign country, the amount due, exclusive of the damages, would be ascertainable by the rate of exchange or the value of such foreign money at the time payment was demanded. The damages were recoverable only by a holder who had paid value.

New Mexico: On bills drawn upon a person out of the United States, twelve per cent. upon the principal sum, with interest on the same from the time of protest; if upon a person in any of the United States or territories thereof, six per cent., with interest. Stats., Codif. 1915, § 592.

North Carolina: The Negotiable Instruments Act (R. S. 1908, ch. 54), contains no repealing clause, but the revisor has not included among the laws now in force the earlier statute on this subject. That law (1 Code of 1883, § 48) provided: The damages on protested bills of exchange, drawn or indorsed in the state, should be as follows: for bills upon any person in any other of the United States, or in any of the territories thereof, three per cent.; for bills payable in any other place in North America (except the northwest coast of America), or in any of the West India or Bahama Islands, ten per cent.; for bills payable in the islands of Ma-

Negotiable Instruments laws, designed to unify legislation on that subject, were intended to cover all the law governing these

deira, the Canaries, the Azores, the Cape de Verde Islands, or any other state or place in Europe or South America, fifteen per cent.; if payable in any other part of the world, twenty per cent. on the principal.

North Dakota: On bills drawn upon any person in the state, two per cent.; on any person in the states of South Dakota, Nebraska, Iowa, Minnesota, Wisconsin, Illinois, Missouri or Montana, three per cent.; on any person in any other of the United States or territories, five per cent.; on any person in any place in a foreign country, ten per cent.; and from the time of notice of dishonor and demand of payment, lawful interest upon the aggregate amount of the principal sum specified in the bill and the damages. Comp. L. 1913, § 7124.

Ohio: No damages are allowed by statute now on bills drawn or negotiated in this state. The former statutes imposed twelve per cent. damages when any bill was legally protested for nonacceptance or nonpayment, if drawn on any person without the jurisdiction of the United States; and six per cent. if drawn on any person within the jurisdiction of the United States and without the jurisdiction of that state, and such bills bore six per cent. interest from the date of the protest until paid. But no damages were allowed if there was an agreement or understanding that the bill might be paid at any other place than that on which it was drawn. Swan's R. S., Derby's ed. (1854), 576.

In *Farmers' Bank v. Brainerd*, 8 Ohio 292, a bill drawn upon a per-

son in Ohio payable in New York, and protested for nonpayment, was held not to entitle the holder to six per cent. damages for protest. And in *Commercial Bank v. Reed*, 11 Ohio 498, six per cent. damages on a protested bill addressed by mistake to the defendant in Ohio, instead of at Philadelphia, where the bill was payable, could not be recovered, nor be set off against a subsequent claim, if paid with a full knowledge of the facts.

Oklahoma: The repeal clause of the Negotiable Instruments Act of 1909 (R. L. 1910, ch. 49, p. 1059) is "construed to repeal *in toto* the old law on the subject," according to the revisor's note. The old law appeared in 1 Stats. 1903, at p. 679.

Pennsylvania: The holder of bills of exchange drawn or indorsed in the state, and returned unpaid with a legal protest, may recover from the drawer or indorser the damages hereafter specified, over and above the amount of the bill and the charges of protest, with interest thereon from the time of protest and notice; that is to say, if such bill shall have been drawn upon any person in any of the United States or the territories thereof, except Upper and Lower California, New Mexico and Oregon, five per cent.; for bills payable in these excepted states and territories, ten per cent.; for bills payable in China, India, or other parts of Asia, Africa, or islands in the Pacific ocean, twenty per cent.; for bills upon Mexico, the Spanish Main, West Indies, or other Atlantic islands, east coast of South America, Great Britain, or other places in Europe, ten per cent.; for bills upon places on the west coast

instruments. The statutes cited in the annotation below give the situation as nearly as can now be ascertained. These

of South America, fifteen per cent.; and for bills upon any other part of the world, ten per cent. upon such principal sum. The amount of such bill, and of the damages payable thereon, is ascertained by the rate of exchange or value of the money or currency mentioned in such bill at the time of notice of protest and demand of payment. Purdon's Dig., 1907, pp. 3310-3311, ¶¶ 179-180.

A bill drawn in the state and signed in blank, though sent abroad to be filled up and negotiated, is within the statute. *Lennig v. Ralston*, 23 Pa. 137.

Rhode Island: Damages on protested bills returned for nonacceptance or nonpayment from any place without the United States, ten per cent. besides charges of protest. After protest, six per cent. interest. On bills drawn on parties in other states of the United States, returned under protest, five per cent., and charges of protest, besides interest from the time of protest. Gen. Laws, 1909, ch. 201, §§ 1-3, pp. 674-675.

South Carolina: Damages on protested bills drawn upon persons in the United States but out of the state, ten per cent.; on all bills drawn on persons in any other portion of North America, or within any portion of the West India Islands, twelve and a half per cent.; if drawn upon any person in any other part of the world, fifteen per cent., besides the charges incidental thereto, and lawful interest until payment. Code of Laws, 1912, § 2531.

South Dakota: Same as North Dakota, *supra*. See Comp. L. 1910, §§ 2271-2273.

Tennessee: The Negotiable Instruments Act as adopted in this state in 1899 contains no repeal clause. The revisor of 1904, however, dropped from the statutes the law theretofore covering this subject (Code, 1896, §§ 3511-3513). In a note at page 605, Sup. to Code, 1904, he says: that the new law "operates to repeal by implication all statutes inconsistent with and repugnant to it, insofar as they conflict with it." The law thus declared repealed provided as follows: Damages on protested bills drawn on persons out of the state but within the United States, three per cent.; drawn on any person in any other state or place in North America bordering on the Gulf of Mexico, or in any of the West India Islands, fifteen per cent.; drawn on any person in any other part of the world, twenty per cent. These damages were in lieu of interest and all other charges except charges of protest to the time when the notice of protest and demand of payment should have been given; but interest was to be computed from that time on the aggregate of principal, damages and charges of protest.

Texas: Damages on protested bills drawn by a merchant within the state upon his agent or factor, living beyond its limits, are ten per cent. on the amount of the bill, with interest and costs of suit. *Vernon's Sayle's Civ. Stats.*, 1914, § 592.

Utah: In 1898 this state adopted a form of the Negotiable Instruments Act. No repealing clause was included, so that the status of R. S. 1898, §§ 1653-1657, is now in doubt. These provisions do not appear in Comp. L. 1907, in which the new act is included as ch. 9-11. The

have no extraterritorial effect,⁷⁹ and are not to be extended by construction so as to include parties not within their terms. Guarantors are not entitled to the statutory damages if the act is limited to drawers, indorsers, makers and obligors.⁸⁰ A local bank check indorsed by the payee is the equivalent of an inland bill of exchange within the meaning of the statutes of Nebraska, and the fees for protesting it may be recovered from the drawer and drawee.⁸¹

§ 564. Stipulations for attorneys' fees and costs; effect on negotiability; amount recoverable. Notes are not unfrequently drawn to include not only an increased rate of interest, in case of default at maturity, but also attorney fees. These stip-

omitted law provided as follows: As full compensation for interest accrued before notice of dishonor, re-exchange, expenses and all other damages in favor of holders for value only, if drawn upon a person in the state, one per cent.; if upon a person elsewhere within the United States, two and one-half per cent.; if upon a person in a foreign country, five per cent. Interest could be recovered upon the principal sum and the damages from the time of notice of dishonor and demand of payment. If the amount of the bill was expressed in United States money damages were estimated upon it without regard to the rate of exchange; if in foreign money, upon the value of a similar bill at the time of protest in the place nearest to that where the bill was negotiated and where such bills were currently sold.

Virginia: Code, 1887, § 2851, providing for damages, was repealed by a section of the Negotiable Instruments Act now in force in this state (Code 1904, § 2851).

Washington: Pierce's Code, 1912, Tit. 357, the form of the Negotiable Instruments Act adopted in Wash-

ington, carries with it a general repeal clause which seems to include the prior law on this subject.

West Virginia: The Negotiable Instruments Act (Code, 1914, § 4368), repealed the statute previously in force providing for damages on protested bills.

Wisconsin: On bills drawn or indorsed within the state and payable without the limits of the United States, the bill at the current rate of exchange, at the time of demand, and damages at the rate of five per cent. upon the contents, together with interest upon the contents from the date of protest; on bills drawn upon any person or corporation out of the state, but within some state or territory of the United States, the bill, with legal interest "according to its tenor," and five per cent. damages, together with costs and charges of protest. Stats., 1915, §§ 1682-1683.

⁷⁹ *Fieske v. Foster*, 10 Metc. (Mass.) 597, 43 Am. Dec. 450.

⁸⁰ *Woolley v. Van Volkenburgh*, 16 Kan. 20.

⁸¹ *German Nat. Bank v. National Bank*, 63 Neb. 246, and cases in other jurisdictions cited.

ulations in notes, as well as in mortgages, have been the subject of some judicial discussion and conflict of decision. In Illinois it is held that a stipulation to pay a specified sum as an attorney fee, if the note be not paid *without suit*, is not recoverable in the suit on the note because not due until after suit is commenced.⁸² But it is held there to be recoverable if payable on default at maturity instead of on the event of bringing suit.⁸³ A note payable with eight per cent. interest per annum after maturity, and, if suit is brought on it, ten per cent. on the amount due as an attorney's fee, to be recovered as part of it or by separate suit, is not usurious because of the conditions as to the fee, it not being shown that ten per cent. was an unreasonable proportion. The right to recover such fee passes to the assignee of the note as an incident to the main debt. Such condition does not affect the negotiability of the note because it is inoperative until after the obligation matures.⁸⁴

In Indiana if the note does not specify the amount of the fee the holder of it cannot recover unless he proves what a reasonable fee would be to make the collection, and his recovery will be limited accordingly.⁸⁵ If the complaint claims damages generally in a sum sufficient to cover the amount of the note and the fee proof may be made and recovery had for the damages directly sustained by reason of the nonpayment of the note.⁸⁶ If the note has been placed in the hands of an attorney for collection and is past due the maker is liable for the fee although suit is not brought.⁸⁷ If the amount of the fee is specified, *prima facie*, that is the sum recoverable, but it may be reduced by proof that it is excessive or that the plaintiff has not incurred liability to that extent;⁸⁸ in other words, the agreement is

⁸² Nickerson v. Babcock, 29 Ill. 497; Easter v. Boyd, 79 id. 325.

⁸³ Id.; Dunn v. Rodgers, 43 Ill. 260; Clawson v. Munson, 55 id. 394; Barton v. Farmers' & Merchants' Nat Bank, 122 id. 352.

⁸⁴ Keenan v. Blue, 240 Ill. 177; Dorsey v. Wolff, 142 Ill. 589, 34 Am. St. 99, 18 L.R.A. 428.

⁸⁵ Harvey v. Baldwin, 124 Ind. 59; Kennedy v. Richardson, 70 Ind. 524; Goss v. Bowen, 104 id. 207; Starnes v. Schofield, 5 Ind. App. 4.

⁸⁶ Starnes v. Schofield, *supra*.

⁸⁷ Moore v. Staser, 6 Ind. App. 364; Rouyer v. Miller, 16 Ind. App. 519.

⁸⁸ Rouyer v. Miller, *supra*.

for indemnity only.⁸⁹ The stipulated fee is calculated upon the amount due on the note when suit is brought; subsequent payments are disregarded.⁹⁰ The stipulated sums, although payable in the event of a suit, are recoverable in a suit on the note. They are a part of the damages which the maker has stipulated to pay and may be included therein with the principal and interest of the note; they are incident to the main debt and cannot be sued for in a separate action.⁹¹ In Georgia the view that the agreement is for indemnity only does not prevail. Where the stipulation was to pay all cost of collection, including attorneys' fees, the plaintiff recovered such fees although the contract between him and his attorney provided that the latter's compensation should be limited to what might be recovered from the defendant.⁹² In Minnesota the stipulated fees are not a part of the original debt; the right to them does not accrue until the payee of the note incurs liability, and then only to the extent of the reasonable value of the attorney's services actually performed, or to be performed, which must be proved.⁹³ If the note stipulates the amount of the fee it is presumed, nothing being shown to the contrary, that the reasonable value of the services rendered corresponded therewith.⁹⁴

⁸⁹ *Koppe v. Groginsky* (Tex. Civ. App.), 132 S. W. 984; *Harvey v. Baldwin*, *supra*; *Young v. State Bank*, 54 Tex. Civ. App. 206; *Bolton v. Gifford*, 45 Tex. Civ. App. 140; *Tuberville v. Simpson*, 94 Miss. 154; *O'Connell v. Rugely*, 48 Tex. Civ. App. 456.

⁹⁰ *Walker v. Tomlinson*, 44 Tex. Civ. App. 446.

⁹¹ *Smiley v. Meir*, 47 Ind. 559; *Roberts v. Comer*, 41 id. 475, 13 Am. Rep. 346; *Wyant v. Pottorff*, 37 Ind. 512; *Johnson v. Crossland*, 34 id. 334; *Matthews v. Norman*, 42 id. 176; *First Nat. Bank v. Indianapolis P. Mfg. Co.*, 45 id. 5; *Garver v. Pontious*, 66 id. 191; *Smock v. Ripley*, 62 id. 814; *Tuley v. McClung*, 67 id. 10; *Reisterer v. Car-*

penter, 124 id. 30; *Vipond v. Townsend*, 88 Wis. 285.

⁹² *Ray v. Pease*, 97 Ga. 618. See *Pattillo v. Alexander*, 96 Ga. 60, 29 L.R.A. 616.

Liability for the fee is not avoided by a tender on the last return day of the term of court specified in the statutory notice of intention to bring suit, the suit having been brought. *Holland v. Mutual F. Co.*, 8 Ga. App. 714.

⁹³ *Pinney v. Jorgenson*, 27 Minn. 26; *Johnston H. Co. v. Clark*, 30 Minn. 308; *Campbell v. Worman*, 58 Minn. 561. See *Texas L. & L. Co. v. Robertson*, 38 Tex. Civ. App. 521.

⁹⁴ *Exchange Bank v. Tuttle*, 5 N. M. 427, 24 L.R.A. 445; *Dashiell v.*

Under a statute providing that a fee may be allowed when specially contracted to be paid in any amount so contracted, the right to the designated sum exists although the court may deem it excessive.⁹⁵ This rule applies to stipulations made before the taking effect of a statute permitting the court to fix such sum as it may deem reasonable.⁹⁶ In Alabama the contracting parties may fix the amount of the fee, and it is not necessary to make proof of the employment of the attorney and the value of his services.⁹⁷ The fee stipulated for may be collected notwithstanding the payment of the principal and interest on the note after its maturity.⁹⁸

In Texas there may be a recovery of the fee for the sole benefit of the payee and the amount thereof may be properly included in a note given for the original. The contract in question provided for the payment of ten per cent. for attorney's fee if collected by law or placed in the hands of an attorney for collection. It was said: The parties had the legal right to so contract, and upon the happening of the contingency upon which the stipulated attorney's fees were made to depend the obligation became absolute and such additional sum became a part of the sum due. It would not affect the legality of the demand if it were true, as alleged by the defendants, that the provision was inserted in the contract for the sole benefit of the plaintiff and not with any purpose of paying that amount for the service of an attorney. If the plaintiff could and did obtain the service of an attorney free that fact would not relieve the defendants of their obligation.⁹⁹

There is, generally, a noticeable tendency to strictly construe stipulations for the payment of fees. In Iowa fees cannot be recovered under a condition providing therefor "if sued," where judgment is confessed. The filing of a statement for,

Moody, 44 Tex. Civ. App. 87. *Contra*, Camp v. Randle, 81 Ala. 240.

⁹⁵ Exchange Nat. Bank v. Wolverton, 11 Wash. 108.

⁹⁶ Gordon v. Decker, 19 Wash. 188.

⁹⁷ Stephenson v. Allison, 123 Ala. 439.

⁹⁸ Cowan v. Campbell, 131 Ala. 211.

⁹⁹ Sturgis Nat. Bank v. Smith, 9 Tex. Civ. App. 540.

and the entering of, judgment is not an action or suit.¹ Nor does the placing of a note in the hands of an attorney for the sole purpose of procuring a sale under a deed of trust entitle the payee to stipulated attorney's fees for collection.² In Mississippi the novation of a debt is not a collection of it so as to entitle the payee to an attorney's fee.³ "Legal proceedings are instituted" by proving up a claim for the money due on a note and presenting it to an administrator.⁴ Statutory conditions governing liability for attorney's fees must be strictly met. Equity will relieve from their payment if there has been an attempt to mislead the debtor and he has in good faith endeavored to meet his obligation.⁵

Agreements to pay attorneys' fees are sustained in Iowa, Dakota, Minnesota, Pennsylvania, New Mexico, Louisiana, Maryland, Texas, Oregon, Mississippi, California, Georgia, Missouri, Washington (by statute), Alabama, Wisconsin, Illinois, Indian Territory, Montana, Utah, Indiana, Tennessee, and some of the federal courts, the latter following the local law.⁶

¹ Dullard v. Phelan, 83 Iowa 471.

² Gunter v. Merchant, — Tex. Civ. App. —, 172 S. W. 191.

³ Davis v. Cochran, 76 Miss. 439.

⁴ Simmons v. Terrell, 75 Tex. 275; Morrill v. Hoyt, 83 Tex. 59, 29 Am. St. 630; Graves v. Neeves, 183 Ill. App. 235.

⁵ Loftis v. Alexander, 139 Ga. 346.

⁶ Lock v. Citizens' Nat. Bank, — Tex. Civ. App. —, 165 S. W. 536; Chestertown Bank v. Walker, 163 Fed. 510, 90 C. C. A. 140 (Md.); Harris v. Powers, 129 Ga. 74 (they may be recovered from the maker's estate); Livingston v. Salter, 6 Ga. App. 377; Harris v. Pate, 7 Ind. Ty. 493; Bank v. Brittain, 92 Miss. 545; German-Am. Bank v. Martin, 129 Mo. App. 484; Morrison v. Ornbau, 30 Mont. 111; Farmers' Nat. Bank v. McCall, 25 Okla. 600, 26 L.R.A.(N.S.) 217; O'Connell v. Rugely, 48 Tex. Civ. App. 456; McCormick v. Swem, 36 Utah 6; Hill-

man v. Stanley, 56 Wash. 320; Davis v. Hibbs, 73 Wash. 315; Campbell v. Worman, 58 Minn. 561; Brahan v. First Nat. Bank, 72 Miss. 266; Millsaps v. Chapman, 76 Miss. 942, 71 Am. St. 549; Benn v. Kutzchan, 24 Ore. 29; Laning v. Iron City Nat. Bank, 89 Tex. 601; Mason v. Luce, 116 Cal. 232; Dé Jarnatt v. Marquez, 127 Cal. 558, 78 Am. St. 90 (the fees are in the nature of special damage under the contract); Hall v. Pratt, 103 Ga. 255; Jones v. Crawford, 107 Ga. 318, 45 L.R.A. 105; North Atchison Bank v. Gay, 114 Mo. 203; Yakima Nat. Bank v. Knipe, 6 Wash. 348; Hardy v. Hohl, 11 Wash. 1; Vipond v. Townsend, 88 Wis. 285; Stephenson v. Allison, 123 Ala. 439, and local cases cited; Williams v. Meeker, 29 Iowa 292; Nelson v. Everett, id. 184 (see Miller v. Gardner, 49 id. 234; Davidson v. Vorse, 52 id. 384); Farmers' Nat. Bank v. Rassmussen, 1 Dak.

In Tennessee the condition is valid where suit is necessary and is brought in good faith⁷ if the stipulation is not a device to cover up and collect usury. The right to recover the fee is forfeited if the holder of the note refuses to credit the maker upon the principal with usurious payments.⁸ In Oregon a provision for a stipulated sum is of no effect if it is unreasonable. The court will not modify it and then enforce it, except so far as the defendant may consent thereto,⁹ and a stipulation to pay a specified percentage as attorney's fee is void and no fee will be allowed.¹⁰ In the absence of evidence as to the reasonableness of the fee only the sum fixed by the statute may be recovered.¹¹ In Texas if default in payment of the note results from the wrongful act of the payee, as where it is caused by levying an attachment upon the goods of the former before the note matures, and the debtor recovers damages therefor in excess of the amount due on the note there cannot be a recovery of the fee.¹² If liability for the fee is conditioned upon placing the note in the hands of an attorney for collection it must be alleged in the complaint in the action to recover on the note that this had been done, otherwise a judgment by default for the stipulated fee will not be sustained.¹³ Under such a condition the fee may be recovered on the bringing of an attachment before the maturity of the note.¹⁴ The necessity of resorting to a suit

60; *Johnston H. Co. v. Clark*, 30 Minn. 308 (upon proof of value of the attorney's services and plaintiff's liability therefor); *Imler v. Imler*, 94 Pa. 372; *Daily v. Maitland*, 88 id. 384, 32 Am. Rep. 457; *Exchange Bank v. Tuttle*, 5 N. M. 427, 7 L.R.A. 445; *Siegel v. Drumm*, 21 La. Ann. 8; *Bowie v. Hall*, 69 Md. 433, 1 L.R.A. 346, 9 Am. St. 433; *Miner v. Paris Exch. Bank*, 53 Tex. 559; *Hamilton G. & M. Co. v. Sinker*, 74 id. 51; *Peyser v. Cole*, 11 Ore. 38; *Eyrich v. Capital State Bank*, 67 Miss. 60; *Wilson S. M. Co. v. Moreno*, 7 Fed. 806 (Deady, J.); *Bank v. Ellis*, 2 id. 44 (holding accommodation indorsers liable for the stipulated fee).

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The stipulated fee may be recovered though the plaintiff fails to show that such amount was paid by him to his attorney. *Rushing v. Citizens' Nat. Bank of Plainview*, — Tex. Civ. App. —, 162 S. W. 460.

⁷ *Haynes v. Halverton*, 51 Tex. Civ. App. 228.

⁸ *Tyler v. Walker*, 101 Tenn. 306.

⁹ *Kimball v. Moir*, 15 Ore. 427.

¹⁰ *Levens v. Briggs*, 21 Ore. 333, 14 L.R.A. 188.

¹¹ *Lassas v. McCarty*, 47 Ore. 474.

¹² *Laning v. Iron City Nat. Bank*, 89 Tex. 601.

¹³ *Jones v. Smith*, 4 Tex. Civ. App. 353.

¹⁴ *Smith v. Pickham*, 8 Tex. Civ. App. 326.

must be shown, the note being so conditioned.¹⁵ Under a condition for the payment of a fee in case of suit to collect the note or any portion thereof, the fee is collectible only when the note is dishonored and not in a suit to collect an instalment of interest due;¹⁶ nor in a collateral proceeding for the protection of collateral security.¹⁷ Liability under a stipulation to pay "attorneys' fees" is limited to such fees in the trial court.¹⁸ What is "a reasonable fee" must be determined by the jury,¹⁹ or the court,²⁰ which may take judicial notice of what constitutes such a fee.²¹ The fee is recoverable whether the note is paid in cash, or a new note is executed in lieu thereof.²²

In Ohio, Michigan, Nebraska, Kentucky, North Carolina, Arkansas and Virginia stipulations in notes for the payment of attorneys' fees are held to be against public policy and therefore void.²³ The same rule is held in the federal circuit court of Arkansas.²⁴ A note providing for such fees, although made in a state in which such a stipulation is valid, will not be enforced

The exercise of the option to declare a note due on the failure to pay an instalment of interest is a ground for the recovery of the stipulated fee. *Linam v. Anderson*, 12 Ga. App. 735.

¹⁵ *Clark v. Jones*, 93 Tenn. 638; *First Nat. Bank v. Miller*, 139 Wis. 126, 131 Am. St. 1040.

¹⁶ *Merrill v. Muzzy*, 11 Wash. 16.

¹⁷ *German-Am. Bank v. Martin*, 129 Mo. App. 484.

¹⁸ *McCormick v. Falls City Bank*, 57 Fed. Rep. 107.

¹⁹ *Cox v. Alexander*, 30 Ore. 438; *First Nat. Bank v. Mack*, 35 Ore. 122.

²⁰ *Bell v. Camm*, 10 Cal. App. 338.

²¹ *Warnock v. Itawis*, 38 Wash. 144.

The court may in the absence of evidence as to the value of attorneys' fees fix the amount from the pleading and his knowledge of the

case. *Crutcher v. Sims*, 184 Mo. App. 488.

²² *Williams v. Dockweller*, 19 N. M. 623.

²³ *Arden L. Co. v. Henderson I. Works & S. Co.*, 83 Ark. 240; *Fields v. Fields*, 105 Va. 714; *Dow v. Updike*, 11 Neb. 95; *State v. Taylor*, 10 Ohio 378; *Shelton v. Gill*, 11 id. 417; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Wright v. Traver*, 73 Mich. 493, 3 L.R.A. 50; *Witherspoon v. Musselman*, 14 Bush 214; *Security Co. v. Eyer*, 36 Neb. 507, 38 Am. St. 735 (statute allowing such fees repealed in 1879); *Tinsley v. Hoskins*, 111 N. C. 340, 32 Am. St. 801; *Exchange Bank v. Apalachian L. & L. Co.*, 128 N. C. 193; *Rixey v. Pearre*, 89 Va. 113.

²⁴ *Merchants' Nat. Bank v. Sevier*, 14 Fed. 662.

in Kentucky. It has been said that comity should not, nor does it, require a contract made in one state to be enforced by the courts of another state that treat a similar one as absolutely void because it is an agreement to pay a penalty, tends to oppress the debtor and encourage litigation.²⁵ In Michigan such a note is not negotiable, if made there and payable there; but if payable in another state its quality as to negotiability will be determined by the laws thereof.²⁶ In Nebraska the reasonable view is taken that such stipulation relates to the remedy and is therefore not binding beyond the jurisdiction in which it was made.²⁷ And so in North Carolina²⁸ and Maine.²⁹ In the District of Columbia the law of the place of contract will determine the negotiability of a note with a promise to pay attorneys' fees.³⁰

In Illinois, where an attorney fee of ten per cent. was stipulated to be paid as liquidated damages, in addition to principal and interest in case of collection "by suit at law or otherwise," it was held that the stipulation did not affect the liability of an indorser; the measure of damages as to him, as has been stated, is the amount paid by the indorsee and interest.³¹ But the more generally approved rule holds an indorser liable for the fee.³² One who assumes the payment of a note is not liable for the attorney's fee stipulated for although he does not pay until after suit is brought.³³ An action by the guarantor of a note to recover money paid upon it is not upon the note, and there cannot be a recovery of the fee stipulated for.³⁴ An accommodation maker having paid a note may recover from his co-maker

²⁵ Arden L. Co. v. Henderson I. Works & S. Co., 83 Ark. 240; Clark v. Tanner, 100 Ky. 275; Rogers v. Rains, 100 Ky. 295.

²⁶ Strawberry Point Bank v. Lee, 117 Mich. 122; Clark v. Porter, 90 Mo. App. 143.

²⁷ Hallam v. Telleren, 55 Neb. 255.

²⁸ Exchange Bank v. Apalachian L. & L. Co., *supra*.

²⁹ Roads v. Webb, 91 Me. 406, 412, 64 Am. St. 246.

³⁰ Lockwood v. Lindsey, 6 D. C. App. Cas. 396.

³¹ Short v. Coffeen, 76 Ill. 245.

³² Benn v. Kutzchan, 24 Ore. 28; Jones v. Smith, 4 Tex. Civ. App. 353; Smith v. Pickham, 8 Tex. Civ. App. 326; Riverside Milling & Power Co. v. Bank of Cartersville, 141 Ga. 578.

³³ Galvin v. Mac M. & M. Co., 14 Mont. 508.

³⁴ Austin v. Hamilton, 7 Wash. 382.

stipulated attorney's fees to which the original payee would have been entitled.³⁵

The effect of such a stipulation upon the negotiability of a note is a question on which the authorities are in hopeless conflict, though this conflict will probably be lessened by the negotiable instruments act which has become the law of several states and which expresses that a note is negotiable although it provides for the payment of an attorney's fee or costs of collection in case payment shall not be made at maturity.³⁶ On the ground that the stipulation only becomes operative after default in payment of the note some courts have held that its negotiability is not thereby affected;³⁷ others hold the contrary.³⁸ In Kentucky such a stipulation was originally treated

³⁵ Pease v. Syler, 78 Wash. 24.

³⁶ Crawford's Neg. Inst. Law (2d ed.), p. 10.

³⁷ Cudahy P. Co. v. State Nat. Bank, 134 Fed. 538, 67 C. C. A. 662 (Mo.); First Nat. Bank v. Badham, 86 S. C. 170, 138 Am. St. 1043; O'Connell v. Rugely, 48 Tex. Civ. App. 456; McCormick v. Swem, 36 Utah 6 (former rule changed by statute); First Nat. Bank v. Miller, 139 Wis. 126, 131 Am. St. 1040 (rule changed by the Negotiable Instruments Act); Dorsey v. Wolff, 142 Ill. 589, 34 Am. St. 99, 18 L.R.A. 428; Clifton v. Bank, 75 Miss. 929; Benn v. Kutzchan, 24 Ore. 29; Oppenheimer v. Bank, 97 Tenn. 19, 56 Am. St. 778, 33 L.R.A. 767; Farmers' Nat. Bank v. Sutton Mfg. Co., 3 C. C. A. 1, 52 Fed. 191, 17 L.R.A. 595; Gaar v. Louisville B. Co., 11 Bush 180; Sperry v. Horr, 32 Iowa 184; Seaton v. Scovill, 18 Kan. 433, 26 Am. Rep. 779; Schlesinger v. Arline, 31 Fed. 684 (fixed per cent. as fees); Howenstein v. Barnes, 5 Dill. 482; Adams v. Addington, 16 Fed. 89 (fixed per cent.); Heard v. Dubuque County Bank, 8 Neb. 10, 30

Am. Rep. 811; Trader v. Chidester, 41 Ark. 242 (stipulated fee); Roberts v. Snow, 27 Neb. 425, 43 Am. Rep. 38; Hamilton G. & M. Co. v. Sinker, 74 Tex. 51.

³⁸ Strawberry Point Bank v. Lee, 117 Mich. 122; Lippincott v. Rich, 22 Utah 196 (reasonable attorney's fee and cost of collection); Mason v. Luce, 116 Cal. 232; Roads v. Webb, 91 Me. 406, 64 Am. St. 246; Carroll County Sav. Bank v. Strother, 28 S. C. 504 ("all counsel fees and expenses in collecting"); Altman v. Rittershofer, 68 Mich. 287, 13 Am. St. 341 (stipulation to pay "attorneys' fees"); Altman v. Fowler, 70 Mich. 57; Garretson v. Purdy, 3 Dak. 178 (reasonable attorney's fee); Jones v. Radatz, 27 Minn. 240; Hardin v. Olson, 14 Fed. 705; Chase v. Whitmore, 68 Cal. 545; First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604 (*semble*); First Nat. Bank v. Jacobs, 73 Mo. 35, and other cases in that state there cited; Adams v. Seaman, 82 Cal. 636, 7 L.R.A. 224; Woods v. North, 84 Pa. 407, 24 Am. Rep. 201; First Nat. Bank v. Larsen, 60 Wis. 206, 50 Am. Rep. 365 (in the

as a penalty, and although recoverable under appropriate pleading when judgment went by default, yet if resisted by invoking the equitable jurisdiction of the court, relief might be had against it;³⁹ but later such stipulations in that state have been held to be against public policy and void.⁴⁰ Separate suits may be brought at the same time by an indorsee against the maker and indorsers and recoveries had against each. And in that case payment of the debt in one case with the costs of the same will not discharge the other judgments; but the costs of each action must be also paid.⁴¹

The maker's liability for the fee is not affected because he has been garnished in respect to the debt if he fails to avail himself of the privilege of paying the money into court as it fell due and suggesting the fact of the negotiation of the note if it was known to him.⁴² A stipulation to pay all costs of collection, including attorneys' fees, covers such fees for services rendered to the payee in defending equitable petitions sued out by the maker to restrain the collection of the note, the only result of these being to delay the obtaining of judgment on the note. The maker of the note could not recoup against such fees expenses incurred by him in an unsuccessful litigation in which

two last cases the per cent. to be recovered as a fee was fixed); Maryland F. & Mfg. Co. v. Newman, 60 Md. 584, 45 Am. Rep. 750.

³⁹ Gaar v. Louisville B. Co., 11 Bush 180; Thomassen v. Townsend, 10 id. 114.

⁴⁰ Witherspoon v. Musselman, 14 Bush 214.

⁴¹ In Wattles v. Laird, 9 Johns. 326, it appears that separate suits had been brought by the indorsee of a promissory note against the indorser and maker. In the suit against the former, A. became special bail. The plaintiff recovered judgment in both actions. Afterwards a *fi. fa.* issued against the maker and was returned satisfied. A *ca. sa.* was issued against the

indorser and after return of the execution in the other action was returned *non est*. In an action of debt on the recognizance of bail his bail pleaded payment and set-off of the amount paid by the maker as money paid to his use. It was held that the recognizance being forfeited, the matters pleaded by the defendant could not be set up in bar of the suit on the recognizance, in which a judgment must be given for the penalty; but the defendant might show the payment by the maker in mitigation, so that the damages should be assessed for costs only of the suit against the principals.

⁴² Braham v. First Nat. Bank, 72 Miss. 266.

he attempted to establish a failure of consideration for the note.⁴³ Under a statute providing that there may be recovered on contracts stipulating for attorneys' fees a graduated per cent. of the amount of the note, if judgment is entered on several notes declared on in separate counts of a petition and executed at different times the fee may be computed on each note separately, rather than on the total amount of all the notes, although the result is to increase the recovery.⁴⁴ In estimating the amount due as attorneys' fees under a note conditioned to pay all costs of collection, including ten per cent. attorneys' fees, the computation is to be based on the principal and interest due.⁴⁵ Where the promise in the note was to pay attorneys' fees to the extent of ten per cent. of the amount due at time of suit and a bond conditioned for the payment of the note according to its tenor, true intent and meaning was given, the language of the note and bond prevailed over that of a mortgage given to secure their payment, which expressed that attorneys' fees were payable on the amount for which foreclosure may be had. The fee was computable on the sum due when action was begun, and not on the sum for which foreclosure was adjudged, payments having been made intermediate these events.⁴⁶ In California a stipulation in a note secured by a mortgage for the payment of five per cent. of the sum due and unpaid as attorneys' fees may be enforced in an action to foreclose the mortgage although the latter secures only the principal and interest of the note; a personal judgment may be rendered against the mortgagor for the stipulated fee.⁴⁷ If a note is given for the purchase price of machinery which is proven to be defective the fees should not be estimated upon the sum expressed in the note, but for such sum less the amount recovered by the maker as damages.⁴⁸

⁴³ Ray v. Pease, 97 Ga. 618.

⁴⁴ Bankers' Iowa State Bank v. Jordan, 111 Iowa 324; Reinking v. Goodell, 161 Iowa 404.

⁴⁵ Morgan v. Kiser, 105 Ga. 104; McCormick v. Blum, 4 Tex. Civ. App. 9; Hopkins v. Halliburton, 6 Tex. Civ. App. 451; Carver v. May-

field L. Co., 68 S. W. 711 (Tex. Ct. of App.).

⁴⁶ Montague v. Stelts, 37 S. C. 200, 34 Am. St. 736.

⁴⁷ Mason v. Luce, 116 Cal. 232.

⁴⁸ Tompkins Co. v. Galveston St. R. Co., 4 Tex. Civ. App. 1.

If the blank provided for the stipulation as to the amount or basis of the fee is not filled in a reasonable sum may be recovered.⁴⁹ The amount recovered as attorney's fee bears interest at the rate stipulated.⁵⁰

An indorser who has been compelled to pay a bill or note by suit against him cannot recover the costs thereof from prior parties.⁵¹ But an accommodation party who has been compelled by suit to pay may, doubtless, recover the costs, as well as the face of the paper, from the party whose legal duty it was to provide for and pay it.⁵² After the dishonor of a bill by the acceptor's nonpayment the holder cannot charge the drawer or indorser commissions and expenses paid an agent for subsequently collecting a part of it from the acceptor.⁵³

§ 565. Value of notes and bills. Notes against solvent parties, or those able and willing to pay them at maturity, possess a value which approximates to the sum they call for, according to the credit and responsibility of the parties liable on them. In Kentucky, Tennessee and some other states a class of contracts has existed in the form of notes payable in cash-notes of third persons, generally designated as cash-notes of good solvent men—indicating that such notes were in circulation, in some sort a substitute for money as a medium of exchange. Contracts so payable have generally been construed as promises to pay the amount specified in notes of the description mentioned at par value. And for failure to make such payment the measure of damages recoverable in legal currency is the actual value of the cash-notes when they should have been paid over;⁵⁴ not the rate at which shavers purchase them, nor their par value. The expense of collecting is to be considered; and the difference made in every-day transactions between them and money in the

⁴⁹ *McCormick v. Swem*, 36 Utah 6, following *Bonesteel v. Bonesteel*, 128 Cal. 511, and other California cases.

⁵⁰ *Llano I. & F. Co. v. Eubanks*, 5 Tex. Civ. App. 108.

⁵¹ *Dawson v. Morgan*, 9 B. & C. 618; *Simpson v. Griffin*, 9 Johns. 131; *Roach v. Thompson*, 4 C. & P.

194; *Steele v. Sawyer*, 2 McCord 459; *Fenn v. Dugdale*, 31 Mo. 580.

⁵² 1 Parsons on N. & B. 662.

⁵³ *Bangor Bank v. Hook*, 5 Me. 174.

⁵⁴ *Gholson v. Brown*, 4 Yerg. 496; *Murray v. McMackin*, id. 41; *Ward v. Latimer*, 12 Tex. 438.

sale of property is the true criterion of value.⁵⁶ The court said such commodities as individual promissory notes have no fixed value ascribed to them by law. Money, alone, being the legal standard of values, that alone is, in judgment of law, necessarily equivalent to its actual denominations.⁵⁶ In the absence of any other proof the jury may infer from the terms *good notes then due* that they were to be equal to money and a verdict so found will stand; for the court cannot judicially know that the assessed value was too high.⁵⁷ And a promise to pay a given amount in the note or other pecuniary obligation of the promisor is valued at the sum which would be payable by such note or obligation.⁵⁸

A party having, as agent, pledgee, borrower, or otherwise, the possession of a note or bill belonging to another, and bound

⁵⁵ Williams v. Brasfield, 9 Yerg. 270; Younger v. Givens, 6 Dana 1.

⁵⁶ Id.

In Murray v. Pate, 6 Dana 335, upon a verbal agreement for the sale of land by P. to T. at the price of \$500, the latter placed in the hands of M., the defendant, a single bank note for \$500, upon a southern bank, to be delivered to the plaintiff upon his making a deed for the land, provided another person designated should say that the plaintiff's title was good; the person so designated having pronounced the title good, a deed was executed by the plaintiff, and tendered, but refused by both the purchaser and the defendant. T. told the defendant not to pay the money to the plaintiff. The defendant delivered up the money on the purchaser's order and indemnity. The action was for money had and received, and the court instructed the jury "that if the \$500 was received in bank paper, but was considered as money, and received as money, and had been used by M., then he is liable in this action for it as money." The court

of appeals, by Judge Marshall, said: "To the instruction given there are several objections. First. There is no evidence conducing to prove that the bank note was received as so much money; or that it was used, in any proper sense of that term, by M. himself; and he being a mere depository or stakeholder of the specific article could not be liable for more than its value for failing to deliver it to the person for whose use he held it. Second. The note not having been received *expressly* as money by M., nor expressly agreed to be so received by P., neither its nominal amount nor its value could have been recoverable in this action for money had and received." 1 Chitty, Pl. 385.

⁵⁷ Sirlott v. Tandy, 3 Dana 142.

⁵⁸ Deering v. Johnson, 86 Minn. 172; Kelly v. Pierce, 16 N. D. 234, 12 L.R.A. (N.S.) 180. See § 644.

In Memphis, etc. R. Co. v. Walker, 2 Head 437, a set-off was offered of the following obligation: "Six months from date, or sooner if practicable, the M. & L. R. R. Co. promise to pay to the order of H. & A.

to diligence in collecting it or to take the proper steps to charge indorsers or other secondary parties, and who is guilty of negligence in the performance of that duty by which the paper becomes worthless is, *prima facie*, liable for its amount. His liability is to compensate the actual loss; and it devolves on him to show, if he can, that the paper would be, with the diligence he was bound to exercise, worth less than its face.⁵⁹ Thus, if A. loan the note of a third person to B. the latter must use due diligence to recover the amount due upon it; and if the debt be lost by the insolvency of the maker and by B.'s want of diligence he must pay the amount of the note to A.⁶⁰ And the same rule applies in assessing damages for the wrongful conversion of a note; that is to say, the face of the note is *prima facie* recoverable; but the defendant may show it was worth less.⁶¹

It devolves on the plaintiff suing for want of diligence to show that the primary party is insolvent, or in other words, that by the negligence of the defendant the paper is of no value.⁶² A recovery may be had for the full amount of the paper if a pledgee converts it to his own use unless he shows that the promisor is unable to pay it.⁶³ The same rule of damages applies in favor of a purchaser to whom the defendant has fraudulently sold a note which had been paid. The measure of damages is *prima facie* its amount. The ability of the

\$5,000 in the bonds of said company, *at par*; of equal character with any bonds issued by said company; to bear interest, etc., in part payment of the award made," etc. It was held that on default in paying the obligation the measure of damages was the nominal value, \$5,000, not the value at which the bonds might be rated in the market.

A general deposit of bills of the bank receiving them must be repaid at the nominal amount although current at half their amount at the time of the deposit. *Bank v. Wister*, 2 Pet. 318, 7 L. ed. 437.

⁵⁹ *First Nat. Bank v. Henry*, 159 Ala. 367; *Crowell v. Northwestern*

Nat. L. Ins. Co., 99 Minn. 214; *Wasser v. Western L. & S. Co.*, 97 Minn. 460; *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485; *Downer v. Madison County Bank*, 6 Hill 648.

⁶⁰ *Higbee v. Hopkins*, 1 Wash. C. C. 230.

⁶¹ *Hoff v. Parmelee*, 140 Ill. App. 458; *McPeters v. Phillips*, 46 Ala. 496; *Anderson v. First Nat. Bank*, 6 N. D. 497. See sec. 1132.

Unearned interest is not to be regarded in computing the value of a note. *Robertson v. Moses*, 15 N. D. 351.

⁶² *Hough v. Hunt*, 1 Ohio 504.

⁶³ *Thomas v. Waterman*, 7 Met 227; *Latham v. Brown*, 16 Iowa 118.

maker to pay will be presumed until the contrary is shown.⁶⁴ But the damages for breach of an agreement to return to the maker a paid or released note, already past due, cannot be its full amount unless it be shown that in consequence of the breach the plaintiff has been, by force of the *prima facie* import of the paper and its apparent negotiability, compelled to pay it to some subsequent holder in spite of a diligent endeavor to prove the facts which, if proved, would constitute a complete defense.⁶⁵

⁶⁴ Myrick v. Purcell, 95 Minn. 133; Neff v. Clute, 12 Barb. 466.

⁶⁵ Barmon v. Lithauer, 4 Keyes 317.

CHAPTER XIII.

VENDOR AND PURCHASER — REAL PROPERTY.

§ 566. Damages for breach of contracts for sale of realty.

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§ 566. Damages for breach of contracts for sale of realty.

Under this general head it will be convenient and appropriate to present consecutively the law of damages applicable to contracts of sale and purchase of both realty and personalty, as well as the obligations for assuring quality, quantity and title. Those which relate to lands require separate treatment and will be first considered; then those which relate to things of a personal nature.

The sense and aim of the law in respect to contracts generally are well expressed by Hosmer, C. J.: "The rule of damages on the breach of an express contract has long been established; and whether it relate to real or personal estate it must necessarily be the same. Whenever a person for a legal consideration agrees to do a certain act and, in the event of his not doing it, the damages are not stipulated by the parties, the law, on the ground of reason and natural justice, implies that the person in default shall pay the damages accruing from the non-performance. The object of the parties ought to be attained as nearly as possible; and that is that the specific act agreed to be done should be performed. If the party omits to do what he stipulated, it is just, as a reasonable substitute, that he should pay the precise value of the thing which he contracted to do, and such value to be estimated at the time when the act in question should have been executed."¹ These principles, for the most part, apply to contracts relating to real estate. But an exceptional rule of damages to some extent has been applied by which, instead of allowing the purchaser, as the injured party, damages equal to the benefit he would derive from performance, the amount allowed him has been fixed on the standard of rescission. This rule does not gainsay the principle of compensation,

¹ Wells v. Abernethy, 5 Conn. 222; Warren v. Chandler, 98 Iowa 237.

but is based on considerations of policy; and in this country is treated as an exception.

SECTION 1.

VENDOR AGAINST PURCHASER.

§ 567. Seller entitled to purchase price and interest; abatement of price. The utmost pecuniary redress which a vendor may claim against a vendee in respect of a contract of purchase is the agreed price and interest upon it from the time it became due.² Collection thereof accomplishes specific performance. Where the promises to convey and to pay are to be performed simultaneously and are, therefore, mutually dependent, a court of equity will not decree performance against the vendee by requiring him to pay except upon the terms of the vendor doing equity on his part by making effectual conveyance of the title according to the contract.³ Where land is conveyed by mistake and the vendee conveys to an innocent purchaser before the discovery of the mistake the original owner may recover of his grantee the value of it up to at least the sum received for it.⁴

The obligation of the purchaser to pay a stipulated sum survives the delivery of the deed unless he has discharged it by

² *Harrell v. Neill*, 56 Ind. App. 547; *Webster v. Snider*, 45 Can. Sup. Ct. 296. See *Eisleben v. Brooks*, 179 Fed. 86, 102 C. C. A. 380.

The liability of the purchaser is not affected because the vendor had given an option to a third party on the land, the terms of which were known to him and the advantage of which he was to receive. *Shue-maker v. Nissley*, 225 Pa. 430.

Under a contract for the sale of land and a house to be erected thereon, which provided that the house was to be completed, payment made and title passed on a fixed

day, and that the purchaser should pay any increase in the cost of the house caused by alterations he was not liable for interest which accrued on a mortgage or taxes previously assessed, but which, by delay of the tax officials, became payable during an extension of the time for passing title caused by making alterations. *Woolley v. Friedlander*, 67 Hun 321, affirmed without opinion, 143 N. Y. 626.

³ *Gaines v. Bryant*, 4 Dana 395; *Davis v. Barada-G. R. E. Co.*, 115 Mo. App. 327.

⁴ *Southern Pac. R. Co. v. United States*, 200 U. S. 341, 50 L. ed. 507.

compliance with the contract or has been released from it, and payment of the consideration specified in the deed is not conclusive. The rule that the contract is superseded by or merged in the deed has no application in such a case.⁵ Although a purchaser of land acquires the right to the bed of streets adjoining it, if they should be vacated, yet if he buys by the acre and the contract describes the land as bounded by the street line the purchaser is liable only for so much land as he is put in possession.⁶ Where quantity does not enter into the essence of the contract and there has not been any deceit, the contract providing for the purchase of a described property consisting of a number of feet, more or less, in frontage and depth, there can be no abatement of the price because of a shortage in the quantity.⁷ The taxes paid by a vendee in possession who has been relieved of the interest charge may not be applied in reduction of the purchase price.⁸ A vendor may waive the right to declare a forfeiture of the contract of sale because of the default of the purchaser in making payments; such waiver does not rescind the contract or affect the right to enforce payment of the purchase price.⁹

A vendor who has not faithfully performed his contract and who sues on equitable grounds to recover the purchase-money due may be held for the entire costs of a reference and of the litigation, which would have been unnecessary but for his default.¹⁰

§ 568. The legal remedy. The theory of the legal remedy on the contract is not that of specific performance, but the

⁵ *Wilson v. Pearl*, 12 Pa. Super. Ct. 66; *Schotte v. Meredith*, 192 Pa. 159; *Buckley's App.*, 48 Pa. 491, 88 Am. Dec. 468; *Close v. Zell*, 141 Pa. 390.

⁶ *Firmstone v. Spaeter*, 1 Pa. Dist. 39; *Rust v. Carpenter*, 158 Ky. 672.

⁷ *Cohen v. Numsen*, 104 Md. 676; *Phifer v. Steenburg*, 66 Fla. 555; *Cummings v. Hamrick*, 74 W. Va. 406.

⁸ *Wood v. Deskins*, 141 Fed. 500,

72 C. C. A. 558; *Marrowbone Coal & Coke Co. v. Coleman*, 156 Ky. 425.

⁹ *Bohart v. Republic I. Co.*, 49 Kan. 94; *Barrett v. Dean*, 21 Iowa 423; *Nile v. Phinney*, 90 Me. 122; *Canfield v. Westcott*, 5 Cow. 270; *Folts v. Huntley*, 7 Wend. 210; *Barbour v. Brookie*, 3 J. J. Marsh. 511; *Mason v. Caldwell*, 10 Ill. 196, 48 Am. Dec. 330; *Wilcoxson v. Stitt*, 65 Cal. 596, 52 Am. Rep. 310; *Meagher v. Hoyle*, 173 Mass. 577.

¹⁰ *Gates v. Parmly*, 93 Wis. 294.

recovery of damages commensurate with the injury resulting from non-performance. There are a few cases in England and this country in which, on the mere tender of a conveyance not accepted, recovery at law has been permitted or countenanced of the entire purchase-money.¹¹ An election to sell

¹¹ Gray v. Meek, 199 Ill. 136, 101 Ill. App. 463; Curran v. Rogers, 35 Mich. 221; Waters v. Pearson, 163 Iowa 391; Murray v. Ellis, 112 Pa. 485; Fore v. Gipe, 2 Pa. Dist. 822; Hawkins v. Kemp, 3 East 410.

There is an implication in favor of such recovery in *Goodisson v. Nunn*, 4 T. R. 761. In *Glazebrook v. Woodrow*, 8 id. 366, it was decided that no action for the purchase-money could be maintained by the vendor without averring that he had conveyed or *tendered a conveyance*. *Alna v. Plummer*, 4 Me. 258; *Garrard v. Dollar*, 4 Jones 175; *Samborn v. Chamberlin*, 101 Mass. 409; *Worthy v. Jones*, 11 Gray 168, 71 Am. Dec. 696; *Franchot v. Leach*, 5 Cow. 506; *Tripp v. Bishop*, 56 Pa. 424. See *Hansbrough v. Peck*, 5 Wall. 497, 18 L. ed. 520.

In *Richards v. Edick*, 17 Barb. 260, Gridley, J., expressed disapproval of this rule, but regarding it as settled in New York, allowed recovery accordingly. He says: "It is insisted by counsel for the defendant that the measure of damages assumed in the first count, viz., the purchase price of the land, is not the true one. He argues that the title to the land does not pass by the tender of a deed to the defendant and the plaintiff's continued readiness to deliver it, and that the true measure of damages is the excess of the contract price over the actual value of the land; and that inasmuch as there is no averment of such excess of the purchase price and no other damage claimed, the

\$100 which the plaintiff admits to have been paid more than balances the nominal damages arising on a breach of the contract by the defendant. The counsel is certainly sustained in his position as to the true measure of damages by the decision of the court in *Laird v. Pim*, 7 M. & W. 474. It also seems to me, that were it a new question in this state, there would be reason for adopting the principle which is now held to be law in the English courts. Because what is sought to be recovered is damages for the violation of the defendant's contract, by which the plaintiff has suffered loss. But in the case of an agreement for land the title does not pass by tender of the deed; nor does it pass by operation of law on the recovery of a judgment for the purchase price, as is sometimes true of personal property. It is a case, therefore, where the plaintiff holds the title to the land and recovers its full value expressed in the contract; and after judgment, when the defendant seeks to obtain the land, a court of law is without the power of affording him any relief. * * * The English rule would therefore seem to be more in accordance with general principles, and more in analogy to the action for not accepting personal property, as wheat, or other commodity, which the defendant has purchased and contracted to receive and pay for. There is no necessity for the exercise of this jurisdiction, for the court of chancery is competent to order a specific performance

land on a given day for a price offered entitles the owner to recover that price regardless of the value of the land when the election was made.¹²

§ 569. **Measure of damages.** In a contract providing for concurrent execution by the parties it and its consideration are mutually executory, and neither party is bound absolutely to fulfill without performance on the other side; and each, on general principles, has the legal right to violate his contract on the usual terms of compensating the other for the damages which the law allows, and subject to the jurisdiction of equity to decree specific performance.¹³ If either can obtain in a court of law a judgment which enforces literal performance by the other on a mere proffer of the act which is the consideration, he obtains for himself specific performance without subjecting himself to a jurisdiction which courts of equity exercise in such cases to render the relief reciprocally just and equal. A judgment for the purchase-money on a mere tender of a conveyance, in a legal sense, is founded on the erroneous assumption that the tender of a deed is equivalent to a transfer of the property and that the purchaser from the time it is made owes the agreed price. Such tender does not pass the title, though followed by recovery and collection of the stipulated consideration; and hence, the vendor would have both the purchase-money and the legal seizin of the land sold. If he has not received a deed, taken or surrendered the possession he should not be subjected to the payment of the purchase price.¹⁴ In an English case¹⁵ the court say the plaintiff cannot have

of the agreement, and, at the same time, to see that a valid deed conveying the title is delivered on the payment of the contract price." See *Bement v. Smith*, 15 Wend. 493; *Shannon v. Comstock*, 21 id. 457.

In *Bensinger v. Erhardt*, 74 App. Div. (N. Y.) 169, and in *Schmaltz v. Weed*, 27 App. Div. (N. Y.) 309, a rule opposed to that declared in *Richards v. Edick*, *supra*, is applied.

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¹² *Goodpaster v. Porter*, 11 Iowa 160.

¹³ *Clark v. Marsiglia*, 1 Denio 317, 43 Am. Dec. 670.

¹⁴ *Scudder v. Waddingham*, 8 Mo. App. 26; *Carner v. Peters*, 9 Pa. Super. 29; *Hellings v. Heydenfeldt*, 107 Cal. 577; *Evans v. Jacobitz*, 67 Kan. 249; *Brandenburg v. Phillips*, 18 N. D. 200. See *Prichard v. Mulhall*, 127 Iowa 545, citing the text.

¹⁵ *Laird v. Pim*, 7 M. & W. 474.

the land and the value too. A tender of performance will perfect a right of action; but it is not equivalent to performance for the recovery of damages.¹⁶ In some cases the whole purchase-money has been recovered where the deed, after tender, has been recorded¹⁷ or brought into court to be delivered to the defendant.

In a case in Maine¹⁸ the defendant gave his bond in a penalty of \$15,000, conditioned to pay for land according to the recited terms, which were one-third part of the purchase-money for one thousand two hundred and eighty acres at \$6 per acre in thirty days, and two notes payable in one and two years, with good security, for the other two-thirds, the obligee being ready and willing to make the conveyance. An action of debt was brought on the bond without being preceded by even the tender of a deed. Emery, J., said: "This contract decidedly throws on the defendant the obligation of *first tendering the money* and the two notes with good security; for without this he could not expect to find the plaintiff ready and willing to make the deed of conveyance free from all incumbrances. But this does not impose on the defendant the duty of parting with his money without receiving the deed of conveyance, provided he takes the precaution of demanding it, and the jury ought not to have withdrawn from them the question whether the plaintiff on his part was ready to perform."¹⁹ * * * When

¹⁶ *Eastern Counties R. Co. v. Hawkes*, 5 H. of L. Cas. 331, 336; *Wilson v. Martin*, 1 Denio 602; *Spencer v. Halstead*, id. 606; *Shannon v. Comstock*, 21 Wend. 457; *Hecksher v. McCrea*, 24 id. 304; *Boardman v. Keeler*, 21 Vt. 77; *Clark v. Mayor*, 4 N. Y. 338, 53 Am. Dec. 379; *Derby v. Johnson*, 21 Vt. 17; *Philadelphia R. Co. v. Howard*, 13 How. 307, 14 L. ed. 157; *Pitkin v. Frink*, 2 Metc. (Mass.) 12; *Donaldson v. Fuller*, 8 S. & R. 505; *Jewell v. Blandford*, 7 Dana 473; *Davis v. Ayers*, 9 Ala. 292; *Rankin*

v. Darnell, 11 B. Mon. 30, 52 Am. Dec. 557.

A tender of performance is not necessary where the purchaser has given the vendor advance notice that he will not perform; the right of actions accrues at once, but the vendor must show that he was or could be prepared to perform the conditions assumed by his contract. *Armstrong v. Dunn*, 163 Mo. App. 701.

¹⁷ *Sanborn v. Chamberlin*, 101 Mass. 409, 1 Am. Rep. 125.

¹⁸ *Robinson v. Heard*, 15 Me. 296.

¹⁹ *Waters v. Pearson*, 163 Iowa 391.

a contract is made to sell and convey on one side, and on the other to purchase and pay for land, on a breach of the agreement each party has an election to seek for damages in a suit at law or proceed in equity for a specific performance. It is rather unusual for the same party to pursue both remedies. If the seller commence his suit at law it is supposed that he is contented to keep the property and pocket the damages which a jury may give him in satisfaction for the injury. Should he wish to get rid of the land he will proceed in equity to compel specific performance, and in that case nothing would be recovered but the money and interest which were to be given. * * * The appeal to the jury in this case is to be relieved from the penalty of \$15,000. If that sum had truly and intentionally been adopted and described in the contract as liquidated damages, and not as a penalty on failure of performance, it may be doubted whether a court or a jury could rightfully have changed it. And had the deed been tendered in season and brought into court by the plaintiff and filed to be delivered to the defendant, perhaps the rule of damages prescribed by the judge (the purchase-money) would be correct. It would hold the defendant to pay what he agreed. The plaintiff did not stipulate to receive any part of that sum in land. And the argument, then, that because he holds the land he ought not to recover the price stipulated to be paid by the defendant in money ought not to avail, as it would tend to encourage people to break their contracts, in the hope of escaping with trifling damages by casting the commodity back upon the seller's hands. But under these exceptions no tender of the deed appears to have been made, nor does it appear to have been brought into court. Under such circumstances, to give the plaintiff a perfect indemnity, the rule the court understands to be the difference between the sum which the defendant agreed to give for the land and the sum for which the plaintiff could have sold it on the day when the contract should have been performed. Had the plaintiff put it up and sold it at auction on that or the next day after the refusal to take upon fair notice and obtained a sum of money for it, it would be the duty of the defendant to make up the

deficiency, and those two sums would have been the same as the plaintiff would have received if the defendant had performed. If the plaintiff has not done that nor offered the title to the defendant then he elects to keep the land at what price it might have sold for at that time."

§ 570. **Same subject.** It is evident, however, that the tender of performance and the recording of a deed are irregular expedients to give the judgment at law the effect of specific performance. The importance given to the deposit of a deed in court implies that the sum recovered is not adjudged as damages for failure to perform the contract; but a decree is made for the specific moneys agreed to be paid and decreed in view of such deposit, by which the plaintiff ostensibly keeps good a tender of equitable terms not expressly required or defined by the court. The measure of damages which is more in accord with legal principles and analogies is that laid down in the English case referred to,²⁰ and which has been followed in several late decisions in this country—the difference between the price fixed in the contract and the real value at the time the contract was to be executed. In a Massachusetts case²¹ the court, alluding to the argument for the rule that the purchase-money should be the measure of damages, said: "We apprehend that that rule of damages, however applicable it may be to cases of contracts for the sale of personal property, where, by force and effect of mere delivery, or by judgment at law for the value of an article, the property may become vested in the party paying damages therefor does not apply to real estate, which can only be transferred by deed. In actions against a vendee, on a contract for the purchase of real estate, we had supposed it to be a well settled rule that when a party agrees to purchase real estate at a certain stipulated price and subsequently refuses to perform his contract the loss in the bargain constitutes the measure of damages, and that is the difference between the price fixed in the contract and the sal-

²⁰ *Laird v. Pim*, 7 M. & W. 474. nized in *Hallett v. Taylor*, 177 Mass.

²¹ *Old Colony R. Co. v. Evans*, 6 6.
Gray 25, 66 Am. Dec. 394, recog-

able value of the land at the time the contract was to be executed." Finding some diversity of opinion on the subject, and even some Massachusetts cases not in accord with that rule, the conclusion was reached that "upon more full consideration of the question of the measure of damages in an action at law, where the defendant has refused to receive the deed tendered him, the court are of opinion that the proper rule of damages in such a case is the difference between the price agreed to be paid for the land and the salable value of the land at the time the contract was broken."²² In arriving at the value of the land when the breach occurred it may be shown that there was an unusual demand for it, regardless of the cause thereof; in other words, its value in the market for the most valuable purpose for which it was available was relevant; but original testimony as to its value cannot rest on the results of the

²² *Cowdery v. Greenlee*, 126 Ga. 786, 8 L.R.A.(N.S.) 137; *Cincinnati, etc. R. Co. v. Baker*, 130 Ill. App. 414; *Prichard v. Mulhall*, 127 Iowa 545; *Harmon v. Thompson*, 119 Ky. 528; *Maryland Co. v. Simpers*, 96 Md. 1; *Beach v. American S. G. & V. Mfg. Co.*, 202 Mass. 177; *Norris v. Letchworth*, 140 Mo. App. 19; *Booth v. Milliken*, 127 App. Div. (N. Y.) 522; *Kuntz v. Schnugg*, 99 App. Div. (N. Y.) 191; *Wilson v. Hoy*, 120 Minn. 451; *Baerenklan v. Peerless R. Co.*, 80 N. J. Eq. 26; *Guli v. West*, 65 Hun 1; *Schmaltz v. Weed*, 27 App. Div. (N. Y.) 309; *Bensinger v. Erhardt*, 74 App. Div. (N. Y.) 169; *Smith v. Newell*, 37 Fla. 147; *Farmers' & Citizens' B., etc. Ass'n v. Rector*, 22 Ind. App. 101; *Warren v. Chandler*, 98 Iowa 237, quoting the text; *Williams v. Whitmore*, 1 Tenn. Cas. 239 (1872); *Howison v. Oakley*, 118 Ala. 215, 238; *Sloan v. Baird*, 162 N. Y. 327, 329; *Griswold v. Sabin*, 51 N. H. 167, 12 Am. Rep. 76;

Stewart v. McLaughlin's Est., 126 Mich. 1, 7, citing the text; *Porter v. Travis*, 40 Ind. 556; *Lewis v. Lee*, 15 id. 499; *Wilson v. Holden*, 16 Abb. Pr. 133; *Marcus v. Smith*, 17 Up. Can. C. P. 416; *Adams v. McMillan*, 7 Port. 73; *Wasson v. Palmer*, 17 Neb. 330; *Scudder v. Waddingham*, 7 Mo. App. 26; *Smith v. Lander* (Tex. Civ. App.), 89 S. W. 19, citing the text. See *Dayton, etc. T. Co. v. Coy*, 13 Ohio St. 84; *In re Lafitte & Co.*, 23 Week. Rep. 379; *Miller v. Collyer*, 36 Barb. 250; *Gray v. Case*, 51 Mo. 463; also *Webster v. Hoban*, 7 Cranch 399; *First M. E. Church of Strong City v. North*, 92 Kan. 381, citing the text; *Stinson v. Sneed*, — Tex. Civ. App. —, 163 S. W. 989.

Where a broker employed to sell lots on commission broke his contract to buy those unsold at a given time at an agreed price his liability did not exceed such price. *Gray v. Meek*, 199 Ill. 136.

expenditure of large sums of money in improving it and making it accessible to the public.²³

In Pennsylvania the purchase-money may be and is habitually recovered or its payment enforced at law. There being no court of chancery in that state specific performance, in name, is worked out in various legal actions. It may be done in covenant, debt, *assumpsit* or ejectment.²⁴ When the purchase-money is so recovered by the vendor it is permitted as specific performance. That relief is so commonly granted at law that it is held under the act of 1836, giving jurisdiction in equity for specific relief where damages recoverable at law would be an inadequate remedy, that a suit for specific performance at the instance of a vendor cannot be maintained where he asks merely for the recovery of purchase-money.²⁵ The cases are numerous in that state; they illustrate the flexible character of the practice at law and the facility with which legal actions are used to afford equitable redress. The legal rule of damages there, based on the vendor's repudiation of the contract, if it cannot be specifically enforced, is the difference between the contract price and the real value at the time of the breach.²⁶

Where the purchase-money is recoverable at law it must of course be declared for, and its recovery is an enforcement of the contract.²⁷ Such a recovery in effect compels the vendee to take the property by obliging him to pay for it.²⁸ But it is only in clear cases, where the vendor is ready and willing to perform and has offered to do so, that such a recovery can be had. If he is in default in point of time, or has not title, or his title is not good, he cannot recover.²⁹ There can be only technical

²³ Allison v. Cocke, 112 Ky. 212.

²⁴ Pennock v. Freeman, 1 Watts 401; Stokely v. Trout, 3 id. 163; Dixon v. Oliver, 5 id. 509; Findlay v. Keim, 62 Pa. 112.

²⁵ Kauffman's App., 55 Pa. 383.

²⁶ Lichetti v. Conway, 44 Pa. Super. 71; Meason v. Kaine, 67 Pa. 126; Huber v. Burke, 11 S. & R. 238; Bowser v. Cessna, 62 Pa. 148;

Ellet v. Paxson, 2 W. & S. 418. See Hutton v. Williams, 35 Ala. 503, 76 Am. Dec. 297; Kelly v. Cunningham, 36 Ala. 78.

²⁷ Porter v. Travis, 40 Ind. 556; Bowser v. Cessna, 62 Pa. 148.

²⁸ Id.

²⁹ Booth v. Milliken, 127 App. Div. (N. Y.) 522; Felter v. Weybright, 8 Ohio 168; Kauffman's

objections to such recovery at law. The practical result is the same whether the contract is enforced in one court or another. So long as the right of property in the thing agreed to be sold has not passed to the purchaser the vendor is entitled, in case of the non-completion of the contract, to resell it; and if the resale has taken place within a reasonable period after the breach the difference between the price realized thereon and that agreed to be paid by the purchaser will be the measure of damages which the vendor will be entitled to recover, in addition to the costs, charges and expenses of the resale.³⁰ What is a reasonable time

App., 55 Pa. 383; *Meason v. Kaine*, 67 id. 126; *Negley v. Lindsay*, id. 217, 5 Am. Rep. 427; *Huber v. Burke*, 11 S. & R. 238; *Smith v. McClosky*, 45 Barb. 610; *Walker v. France*, 112 Pa. 203: See *Perrin v. Chidester*, 159 Iowa 31.

In the absence of fraud, insolvency of the vendor or other special circumstance a vendee in possession cannot resist the payment of the purchase-price on the ground of lack of title in the vendor unless he rescinds the contract and restores the possession. *Dunn v. Mills*, 70 Kan. 656; *Harvey v. Morris*, 63 Mo. 475; *Sanderlin v. Willis*, 94 Ga. 171; *Wyatt v. Garlington*, 56 Ala. 576.

³⁰ *Thomas v. Caldwell*, 136 Ala. 518; *Watrous v. Hilliard*, 38 Colo. 255; *Pepper v. Deakyne*, 212 Pa. 181; *Hughes v. Miller*, 205 Pa. 627; *Fifth Blecher B. Ass'n v. Sylvester*, 35 Pa. Super. 62; *Ewing v. Tees*, 1 Bin. 450, 2 Am. Dec. 455; *Irvine v. Bull*, 4 Watts 287, 28 Am. Dec. 708; *Hughes v. Miller*, 186 Pa. 375; *Howison v. Oakley*, 118 Ala. 215; *McBrayer v. Cohen*, 92 Ky. 479; *Kempner v. Heidenheimer*, 65 Tex. 587; *Bowser v. Cessna*, 62 Pa. 148; *Webster v. Hoban*, 7 Cranch 399.

In the last case, upon a sale of land at auction, the terms were that the purchaser should within thirty

days give his notes, with two good indorsers, and, if he should fail to comply within thirty days the lands were to be resold on account of the first purchaser. Held, that the vendor could not maintain an action against the vendee for a breach of the contract until such resale should take place and have ascertained the deficit, although the vendee should instruct an attorney to draw a deed and insert his name as purchaser. *Livingston, J.*: "It might have produced more than on the first sale, in which case the surplus would have belonged to him; or the same price might have been obtained, and then he would have lost nothing; or it might have been sold for less, and then, by paying the difference which would have formed his whole loss, he would not have been exposed, as he must be if this action proceeds, to have damages assessed against him by some uncertain and arbitrary or unsatisfactory rule which might be adopted by a jury. Of these advantages, which were reserved to him by the terms of the auction, the plaintiff had no right to deprive him."

The damages for the breach of a contract for the right to purchase public land are measured by the difference between the stipulated

in which to make a resale is a question of fact. The lapse of such a period as would give opportunity for fluctuations in the market, in the usual order of things, or of such as would authorize the inference that the vendor had elected not to adopt this means of fixing the measure of the vendee's liability, would be unreasonable.³¹ The sale is in some sense a sale of the defendant's property to pay his debt, and he is entitled to notice of it.³² The vendee's liability will not be affected by the resale if it was made under terms more onerous than those of the original sale.³³ This rule applies though the conditions of the

price and the salable value of the right. The vendor must resell his right or show its market value as a basis for recovery. *Telfener v. Russ*, 145 U. S. 522, 36 L. ed. 800; *Russ v. Telfener*, 57 Fed. 973.

It is said in a late case that while the right of the vendor to resell and recover the difference is supported by the Pennsylvania cases cited in this note, it should be noticed that later cases emphasize the doctrine that parol contracts relating to the sale or demise of real estate, when within the statute of frauds, cannot be made a basis upon which to recover damages for the loss of the bargain, or for what may amount equivalently to specific enforcement, in the absence of fraud in the contract or proof of special injury caused by the refusal to perform. It may well be doubted whether, under the trend of the later decisions, a vendor can recover the difference in price on a resale where this amounts, substantially, to all the pecuniary advantage to be derived from specific performance of the contract, in the absence of fraud or of direct loss growing out of the breach. This question was not decided. *Carner v. Peters*, 9 Pa. Super. 29.

In a Tennessee case (1872), the rule laid down in the text is disapproved as to private sales on the grounds that it is arbitrary, might work the gravest injustice, and leaves it in the power of the vendor to make a sale at any time, for there could be no fixed time in which the resale should be made; it might be under the most unfavorable circumstances, and the vendor by his own act thus fix the measure of damages for breach of the contract. It would, furthermore, present great temptation in many cases, where the first purchaser was good, to reckless sales, regardless of procuring the best price in which the interest of the party failing to comply with his original contract would have no protection whatever, and would be most likely sacrificed. *Williams v. Whitmore*, 1 Tenn. Cas. 239, 257.

³¹ *Kempner v. Heidenheimer*, 65 Tex. 587.

³² *Id.*; *Green v. Ansley*, 92 Ga. 647, citing the text (but not of the time and place of the intended resale; in accord as to notice of the time and place are *Pollen v. Le Roy*, 30 N. Y. 549; see § 647); *Davis S. O. Co. v. Atlanta G. Co.*, 109 Ga. 607; *Bowser v. Cessna*, 62 Pa. 148.

³³ *Guli v. West*, 65 Hun 1.

second sale were prescribed by a court.³⁴ The resale must be made after notice or the defaulting purchaser will not be affected by the price bid thereat;³⁵ unless it was a judicial sale, in which case the purchaser was so far a party to the proceedings that notice was not essential.³⁶

If the second sale is not properly made, or if it is delayed for an unreasonable time, whereby the original purchaser is injured, or is made under less favorable terms than the original sale, he is released from all liability for the deficiency arising from the second sale; for there are no means of ascertaining what the land would have brought at the second sale if it had been sold on the same or equally beneficial terms as the first and within a reasonable time thereafter, and therefore no means of determining the amount to be paid under the implied stipulation.³⁷ Under these circumstances the liability of the first purchaser should be confined to the expenses of the second sale, which his own default made necessary. The fact that the defaulting purchaser at the first sale was also the purchaser at the second sale, held under different terms and after unreasonable delay, should not make the above rule inapplicable. It cannot be said that his injury as the first purchaser, occasioned by the delay and the change in the terms, whereby a reduced price was brought at the second sale, is offset by his gain as the second purchaser in procuring the land at a reduced price and that he was not, therefore, injured; for the second sale, if confirmed, must be presumed to have brought a sum not greatly disproportionate to the real value of the land, considering the terms and time of the sale.³⁸ In order that a vendee may be made liable for the difference between the price he agreed to pay and that realized on a resale his agreement to purchase must have been made on that con-

³⁴ *Weast v. Derrick*, 100 Pa. 509;
Banes v. Gordon, 9 id. 426.

³⁵ *Anderson v. Truitt*, 53 Mo. App.
590.

³⁶ *Watrous v. Hilliard*, 38 Colo.
255.

³⁷ *Pepper v. Deakyne*, 212 Pa.

181; *Hare v. Bedell*, 98 Pa. 485;

Shinn v. Roberts, 20 N. J. L. 435,
43 Am. Dec. 636; *Riggs v. Pursell*,
74 N. Y. 370.

³⁸ *Howison v. Oakley*, 118 Ala.

215, 239,

dition,³⁹ unless the purchase was made at an official sale.⁴⁰ In Rhode Island an administrator's sale is not an official sale so as to subject the purchaser thereat to this measure of liability.⁴¹ In Alabama the sale of a decedent's land under the decree of the probate court is a judicial sale. The right to resell and hold the bidder at the first sale liable for the difference in the price realized at the sales is an implied term in every order of sale and a part of every bid.⁴² The result of this is that the bidder is bound for such measure of liability as if he had entered into a formal agreement stipulating that such should be the measure of damages. "If, therefore," it is said in a late case, "the loss occasioned by the resale is in the nature of stipulated damages this loss, and this alone, constitutes the measure of recovery, and if for any reason it be not recoverable in a particular case the plaintiff, when there has been in fact a resale, cannot waive the stipulation and, falling back on the ordinary measure of damages for the breach of a contract for the purchase of real estate, recover the actual damages sustained, that is, the difference between the amount agreed to be paid and the market value of the land at the time of the breach. By the stipulation for the liquidated damages he has waived all right to claim actual damages measured by the ordinary legal standard." But if there has been no resale the implied agreement to measure the damages caused by the purchaser's default by the loss occasioned by the resale is no longer binding, and there may be a recovery of the damages according to the rule stated.⁴³ In Kentucky one who purchases land at a public auction and repudiates his contract is liable for the difference between his bid and the price realized at a subsequent resale made in the same way,

³⁹ *McGuinness v. Whalen*, 16 R. I. 558; *Adams v. McMillan*, 7 Port. 73; *Robinson v. Garth*, 6 Ala. 204, 41 Am. Dec. 47.

⁴⁰ *Cowdery v. Greenlee*, 126 Ga. 786, 8 L.R.A.(N.S.) 137, quoting the text; *Lamkin v. Crawford*, 8

Ala. 153; *Hutton v. Williams*, 35 id. 503, 76 Am. Dec. 297.

⁴¹ *McGuinness v. Whalen*, 16 R. I. 558.

⁴² *Thomas v. Caldwell*, 136 Ala. 518.

⁴³ *Howison v. Oakley*, 118 Ala. 215, 238.

and the costs of such resale. The court do not make the distinction that the original purchase must be made subject to the risk of a resale, nor that either sale must be official.⁴⁴ And this is true of cases in other courts. In such cases the difference in the price between the two sales is generally not conclusive, but may be taken as a criterion of the damages actually sustained.⁴⁵ In the absence of any other evidence of value than the resale that will be conclusive.⁴⁶

If the vendor does not resell the estate or, in case of sale, does not sell it conformably to the rules stated he will then be entitled to recover the difference between the agreed price and the presumed marketable value of the property⁴⁷ together with his costs, charges and expenses. Amongst these costs and charges may be included the expense of making out the title; for although that is, by custom and usage, defrayed by the vendor, yet it is done upon the understanding that the contract will be duly fulfilled by the purchaser.⁴⁸ If the land has enhanced in value and its value at the time of the breach exceeds the purchase price the recovery cannot exceed nominal damages.⁴⁹ If after a partial performance the vendee repudiates the agreement the rule of liability for lessened value is applicable, or, in a proper case, the vendor might recover the full value of the land, but in neither case the value of the partial performance must be deducted therefrom.⁵⁰ Where the conditions of sale provide for the payment of a deposit by the purchaser and

⁴⁴ *McBrayer v. Cohen*, 92 Ky. 479.

⁴⁵ *Bernard v. Duncan*, 38 Mo. 184; *Gardner v. Armstrong*, 31 Mo. 536; *Adams v. McMillan*, 7 Port. 88; *Girard v. Taggard*, 5 S. & R. 19, 9 Am. Dec. 327; *Anderson v. Truitt*, 53 Mo. App. 590.

⁴⁶ *Engel v. Fitch*, 10 B. & S. 753; *Perrin v. Chidester*, 159 Iowa, 31.

⁴⁷ *Anderson v. Truitt*, 52 Mo. App. 590 (not the actual cash value); *Gilbert v. Cherry*, 57 Ga. 128; *Griswold v. Sabin*, 51 N. H. 167; *Porter v. Travis*, 40 Ind. 556; *Whiteside v. Jennings*, 19 Ala.

791; *Wells v. Abernethy*, 5 Conn. 227; *Findlay v. Keim*, 62 Pa. 112; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. 257; *Fears v. Merrill*, 9 Ark. 559, 50 Am. Dec. 226; *Muenchow v. Roberts*, 77 Wis. 520; *Wasson v. Palmer*, 17 Neb. 330; *Kempner v. Heidenheimer*, 65 Tex. 587.

⁴⁸ *Addison on Cont.*, § 528.

⁴⁹ *Evrit v. Bancroft*, 22 Ohio St. 172.

⁵⁰ *Day v. New York Cent. R. Co.*, 51 N. Y. 583; *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332; *Drew v. Pedlar*, *supra*.

for its forfeiture in case of his failure to comply with the conditions, the deposit must, nevertheless, be brought into account by the vendor if he seeks to recover the deficiency on a resale of the property.⁵¹ A vendor who does not own the land he has contracted to sell cannot recover more than the difference between what it would cost him to acquire it and what the defendant agreed to pay, not exceeding the difference between the fair market value and the contract price.⁵²

A grantee who accepts a deed in pursuance of an oral contract for the purchase of land and refuses to execute the note and mortgage which he agreed to give for the deferred payments is liable for the consideration agreed upon and interest thereon; the whole amount may be recovered if it was due before the trial,⁵³ and for the sum expended in purchasing an unmatured mortgage upon the premises,⁵⁴ and the difference between the value of the land and the agreed price for it, and such other loss sustained by the vendor as could have been reasonably anticipated;⁵⁵ as where the vendor was compelled to borrow money to pay a mortgage upon the premises, the commissions paid for securing it and attorney's fees and disbursements connected therewith.⁵⁶ If the vendor, pending a suit to recover the purchase price, has paid the taxes on the land charged against him as the holder of the title he may, in a separate suit, recover the amount thereof.⁵⁷ It is said in a recent case that it may not be easy to determine what damages can be recovered on a contract to purchase real estate when it has been terminated by a forfeiture. It is certain, however, that the purchaser is not liable for the amount paid by the vendor to his own agent for negotiating the sale; and if the vendor can sell the property so as to entirely recoup the loss the damage would not be substantial. But the loss, whatever

⁵¹ *Okenden v. Henly*, El., Bl. & El. 485.

⁵² *Booth v. Milliken*, 127 App. Div. (N. Y.) 522; *Lathrop v. O'Brien*, 44 Minn. 15.

⁵³ *Niland v. Murphy*, 73 Wis. 326.

⁵⁴ *Kelley v. West*, 36 Minn. 520.

⁵⁵ *Hurd v. Dunsmore*, 63 N. H. 171.

⁵⁶ *Cogswell v. Boehm*. See *Empire Realty Co. v. Sayre*, 107 App. Div. (N. Y.) 415.

⁵⁷ *Mangold v. Isabella F. Co.*, 31 Pa. Super. 275.

it is, if not confined to rent, must depend upon what the defendant should have paid.⁵⁸ A purchaser who has had possession under an executory contract is liable for the value of the use and occupation after a forfeiture of his rights.⁵⁹ But where on failure of the plaintiff to pass a clear title both parties treated the contract as rescinded, the defendant remaining in possession, the plaintiff, who had conveyed title to a third party and later taken a reconveyance thereof, cannot recover of the defendant mesne profits during the time he did not hold title.⁶⁰ A contract to make an offer of a specified sum for land at a given time does not bind the maker to pay such sum, and its breach does not make him liable for it. The liability is determined by the difference between such sum and the value of the land at the time designated.⁶¹

§ 571. Same subject; where notes are given for the price; assumption of mortgage. Where promissory notes are made for the purchase-money the rule applicable where the contract is disaffirmed can have no application. It would be no defense to an action on such a note that its consideration was an agreement to convey lands; that the consideration had failed wholly or in part because, though the vendor had tendered the deed, the maker of the note had refused it and declined to consummate the purchase.⁶² Giving notes for the purchase-money so

⁵⁸ Hubbard v. Epworth, 69 Mich. 92.

⁵⁹ Abbott v. Kellogg, 18 Cal. App. 429.

⁶⁰ Strater v. Flynn, — N. J. Eq. —, 91 Atl. 591.

⁶¹ Richards v. Gee (Tex. Civ. App.), 107 S. W. 61.

⁶² Luckenbach v. Thomas, — Tex. Civ. App. —, 166 S. W. 99; Kennedy v. Smith, 14 Ga. App. 644; Shelton v. Wallace, 41 Okla. 325.

In White v. Beard, 5 Port. 94, 30 Am. Dec. 552, A. sold lands by parol and put his vendee in possession. After the vendor's death the vendee executed his note to the vendor's administrator and took his

bond for conveyance on payment of the purchase-money. It was held that the administrator could recover, and the defense of a failure of consideration could not be made though he was not able to convey the land. As the intestate made the verbal sale and put the purchaser in possession the contract was partly performed, so as to be capable of specific execution in equity, and, as the intestate had thus manifested an intention to convert the land into money, it belonged to the administrator and the right of the heirs was subject to their disposition. Lynch v. Baxter, 4 Tex. 431, 51 Am. Dec. 735; Carter v. Carter,

far executes the contract to buy that the seller may sue on them without alleging the sale, and recover unless the maker is able

1 Bailey 217; Patton v. England, 15 Ala. 69.

In *Lewis v. McMillen*, 41 Barb. 420, an action was brought on a note given for \$1,000 by McMillen as principal and two others as sureties. These are the facts: On the 21st of April, 1857, the plaintiff entered into a contract with McMillen to sell him a farm of about ninety-six acres at \$34.50 per acre. McMillen agreed to pay \$300 May 15, 1857, \$200 on the 1st of November, 1857, and \$1,000 May 1, 1858, upon which payment and his giving a bond and mortgage for the residue of the purchase-money the plaintiffs were to convey in fee by a good and sufficient deed. The payment of the money was declared by the contract to be a condition precedent to the execution of a deed. The note was given at the execution of the contract for the \$1,000 instalment. The defendant offered to prove, and the rejection of the evidence was the question to be decided, on motion for a new trial, among other things, that the defendant paid the \$300 and the \$200, and tendered amount of the note and interest when due and demanded conveyance, but the plaintiff not having title except to four-fifths could not, and refused to, convey; that the defendant required a rescission of the contract and repayment of what had been paid and offered to relinquish possession, but the plaintiff refused to accede to the offer. Johnson, J., said: "This action is not upon the contract, nor between the parties to it. The action is upon a separate and independent promise by the purchaser and other parties to pay the plain-

tiffs the sum specified at a particular day. The consideration of this promise, it is true, is the agreement of the plaintiffs with McMillen. But before the defendants can defeat the action *entirely* they must show either fraud in the transaction in which the note has its inception, or an entire want or failure of consideration. A partial want or failure of consideration cannot be alleged in bar; and no fraud is shown. It is quite manifest that here is not an *entire* failure of consideration. The plaintiffs have not refused to convey the entire premises and they insist upon their right to the whole, and this right to the largest portion by far is conceded. But even if the plaintiffs had refused to convey, the contract being still executory on their part, the cases are abundant to show that such refusal is no bar to an action upon a separate note given to secure one or more of the payments. The party must pay the note and take his remedy upon the contract to recover damages for the breach. In such case the payment of the note and the conveyance are not concurrent, but independent, acts. The note is in the nature of a condition precedent, and must be paid. This was expressly ruled in *Spiller v. Westlake*, 2 B. & Ad. 155, 22 Eng. C. L. 49. Lord Tenterden, C. J., said: 'I can see no reason why he should have executed a distinct instrument, whereby he promised to pay a part of the purchase-money on a particular day, unless it was intended that he should pay the money on that day at all events.' Parke, J., was inclined to the opinion that the defense might have

to show some defect of consideration by the fault of the vendor. The contract to convey and the notes for the consideration,

been maintainable if the circumstances had been such that had the defendant paid the money he would have been entitled to recover it back in an action brought by him, which he held could not be done so long as the contract remained open. Here the contract still remains open, neither party having rescinded or attempted to rescind. To the same effect are *Freligh v. Platt*, 5 Cow. 494; *Moggridge v. Jones*, 14 East 486, 3 Camp. 38, and *Chapman v. Eddy*, 13 Vt. 205; 1 Pars. on Bills, 203, note z. * * *

"The contract being, as we have seen, still open and unrescinded, and the defendant, *McMillen*, being in the full enjoyment of the benefit of the consideration of the note, 'is in no situation to resist payment. *Parsons*, in his book on Bills and Notes, at page 203, notices a distinction between the failure of the consideration of the note and the failure of a benefit resulting from it. As where one party promises another to do a certain thing, and the other gives his note to the promisor in consideration of such promise, the latter cannot defend against the note on the ground of a failure of the consideration so long as he retains the promise made to him, or if it be of such a nature that the other party is permanently held upon it. Before he can defeat the note he must cancel the promise. And in *Wright v. Delafield*, 23 Barb. 498, it was held that a purchaser of land could not keep the land and refuse to pay for it, whether the title was good or bad. That if it was bad he must elect to take it as it was, or as the vendor could make it, and pay for it, or else give it up. And that as

the purchaser did not elect to give up the land he must pay for it according to his agreement. This is only stating, in another form, a very familiar and elementary rule of law, that where one obtains a right to the possession of land, and to the use and profits thereof by virtue of an agreement, he cannot, while thus holding the land, dispute the title of him from whom he obtained it, and refuse to perform his agreement under which he entered and continued to hold. Before he can do this he must surrender the possession and place the party *in statu quo*. In other words, he must rescind *in toto* by restoring what he received. The action here is upon a separate promise, executed in part by persons who are not parties to the contract, and which contract is still open, neither party having put an end to it on account of the default of the other, but each retaining everything acquired under it. How can the court say that the plaintiffs shall not have the benefit of the contract on their side, to recover according to its terms the value of the property which the defendant *McMillen* obtained from them by means of it, and which he still keeps and enjoys, and holds from them only. It was in consideration of his promise that he obtained possession of these premises, and has so long enjoyed their use, and so long as he elects to keep the consideration and the benefits resulting from it the law must hold him to his promise, and allow the other party to enforce it. Before the court can have any right to absolve him from his promise, he must do works meet for such absolution, which he has not yet

though separate instruments, are to be construed together and are parts of one contract;⁶³ and if they provide for payment on one side and conveyance on the other, to take place at the same time, they are concurrent acts and in their nature reciprocally dependent in the matter of performance. The vendor is not obliged to convey unless the purchase-money is paid; nor can he be put in default if he is able to fulfill except by its payment or tender.⁶⁴ But if he is unable to make title, or on demand and offer of the purchase-money refuses to convey, that fact will entitle the purchaser to rescind; and it will avail to support an action on the contract to sell or as a defense to the vendor's action either on the contract of purchase or on notes given for the purchase-money.⁶⁵ A grantee who takes under and subject to a mortgage debt assumes a liability co-extensive with the obligation of his grantor.⁶⁶ If the mortgage, the payment of which is assumed, covers other land of the grantor than that conveyed the purchaser must respond to the extent of the payments made by the grantor.⁶⁷ If mortgaged land is lost to the vendor because of the purchaser's neglect to make payments as they

done. It would be monstrous injustice, as it seems to me, in the court to drive the plaintiffs to rescind the contract, and seek some other remedy outside of it, in order to wrest the property from the tenacious grasp of the purchaser." See *Hulshizer v. Lanoreux*, 58 Ill. 72, and *Mallard v. Allred*, 106 Ga. 503, holding that a purchaser in possession under a bond for titles cannot have relief in equity against his contract to pay on the mere ground of a defect in title unless he shows the insolvency of his vendor, or that he is a non-resident, or some other fact which would make it inequitable for the vendor to enforce payment of the purchase-money.

⁶³ *Bailey v. Cromwell*, 4 Ill. 71; *Duncan v. Charles*, 5 id. 561; *Davis v. McVickers*, 11 id. 322, 50 Am.

Dec. 460; *Berryhill v. Byington*, 10 Iowa 223; *School Dist. v. Rogers*, 8 id. 316.

⁶⁴ *Id.*; *Carman v. Pultz*, 21 N. Y. 547; *Leaird v. Smith*, 44 N. Y. 618; *Darrow v. Cornell*, 30 App. Div. (N. Y.) 115; *Gray v. Meek*, 199 Ill. 136.

⁶⁵ *Poulson v. Markus*, 34 S. D. 428; *Lewis v. McMillen*, 31 Barb. 395. But see s. c., 41 Barb. 420; *Cooper v. Singleton*, 19 Tex. 260, 70 Am. Dec. 333; *Baldrige v. Cook*, 27 Tex. 565; *Taylor v. Fulmore*, 1 Rich. 52; *Taylor v. Johnston*, 19 Tex. 351; *Lawrence v. Simonton*, 13 id. 220; *Clute v. Robison*, 2 Johns. 595; *Lewis v. Bibb*, 4 Port. 84; *Hunter v. Bradford*, 3 Fla. 269. Compare *Spiller v. Westlake*, 2 B. & Ad. 155; *Howard v. Witham*, 2 Me. 390.

⁶⁶ *May's Est.*, In re, 218 Pa. 64.

⁶⁷ *Lewis v. Bailey*, 62 Wash. 296.

became due he must answer for the value thereof at the time of the trial, and interest thereon.⁶⁸

§ 572. Seller must convey perfect title; effect of condemnation proceedings. Unless the contract specifies some exception or can be construed to intend the contrary,⁶⁹ it binds the vendor to convey a perfect unincumbered title.⁷⁰ And in actions at law time is generally held to be of the essence of the contract, and it is strictly so if the parties have so stipulated.⁷¹ In equity

⁶⁸ *Green v. Gregory* (Tex. Civ. App.) 142 S. W. 999. See § 77.

⁶⁹ See *Corbitt v. Berryhill*, 29 Iowa 157.

⁷⁰ *Brady v. Bank of Commerce of Coweta*, 41 Okla. 473; *Whittier v. Gormley*, 3 Cal. App. 489; *Cowan v. Kane*, 211 Ill. 572; *Denser v. Gunn*, 74 Kan. 748; *Howe v. Coates*, 97 Minn. 385, 4 L.R.A. (N.S.) 1170, 114 Am. St. 723; *Empire Realty Co. v. Sayre*, 107 App. Div. (N. Y.) 415; *Greer v. International Stock Yards*, 43 Tex. Civ. App. 370; *Jackson v. Martin*, 37 Tex. Civ. App. 593; *Glassman v. Condon*, 27 Utah 463; *Crosby v. Wynkoop*, 56 Wash. 475; *Davis v. Lee*, 52 Wash. 330; *Stein v. Waddell*, 37 Wash. 634; *Gottschalk v. Meisenheimer*, 62 Wash. 209, citing *Setiner v. Zwickey*, 41 Minn. 448; *Bigler v. Morgan*, 77 N. Y. 312; *James v. Burchell*, 82 id. 108; *Vought v. Williams*, 120 N. Y. 253, 17 Am. St. 634, 8 L.R.A. 591; *Heller v. Cohen*, 154 N. Y. 299; *Brokaw v. Duffy*, 165 N. Y. 391; *Griffith v. Maxfield*, 63 Ark. 548; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Swayne v. Lyon*, 67 Pa. 433; *Gill v. Wells*, 59 Md. 492; *Close v. Stuyvesant*, 132 Ill. 607, 3 L.R.A. 161; *Butts v. Andrews*, 136 Mass. 221; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, citing the text; *Durham v. Hadley*, 47 Kan. 73; *Frazier v. Boggs*, 37 Fla. 307;

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Gates v. Parmly, 93 Wis. 294; *Roberts v. McFaddin* (Tex. Civ. App.); *Cullum v. Branch Bank*, 4 Ala. 21, 37 Am. Dec. 725; *Goddin v. Vaughn*, 14 Gratt. 102; *Souter v. Drake*, 5 B. & Ad. 992; *Doe v. Stanion*, 1 M. & W. 695; *Burwell v. Jackson*, 9 N. Y. 535; *Shreck v. Pierce*, 3 Iowa, 360; *Creigh v. Shatto*, 9 W. & S. 82; *In re Hunter*, 1 Edw. Ch. 1; *Hall v. Betty*, 4 M. & G. 410; *Purvis v. Rayer*, 9 Price, 488; *Beyer v. Marks*, 2 Sweeny, 715; *Pomeroy v. Drury*, 14 Barb. 418; *Hunter v. O'Neil*, 12 Ala. 37; *Greenwood v. Ligon*, 10 Sm. & M. 615, 48 Am. Dec. 775; *Traver v. Halsted*, 23 Wend. 66; *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Andrews v. Word*, 17 B. Mon. 518; *Fleming v. Harrison*, 2 Bibb, 171, 4 Am. Dec. 691; *Vanada v. Hopkins*, 1 J. J. Marsh. 293; *Hedges v. Kerr*, 4 B. Mon. 526; *Davis v. Dycus*, 7 Bush 4; *Hatcher v. Andrews*, 5 id. 561; *Guynet v. Mantel*, 4 Duer, 94; *Grimes v. Ballard*, 8 B. Mon. 625; *Atkins v. Bahrett*, 19 Barb. 639; *Witter v. Biscoe*, 13 Ark. 422.

⁷¹ *Frazier v. Boggs*, 37 Fla. 307; *Seibel v. Purchase*, 134 Fed. 484; *Stein v. Waddell*, *supra*; *Carrabine v. Cox*, 136 Mo. App. 370. See *Davis v. Barada-G. Real Estate Co.*, 116 Mo. App. 327; *Janulewycz v. Quagliano*, 88 Conn. 60.

if time is not made of the essence of the contract a vendor may be allowed to tender an abstract showing good title at the trial of an action subsequently brought by him for specific performance.⁷² If the purchaser has been let into possession he cannot rescind for the default of the vendor unless he surrenders such possession;⁷³ but where the obligation is concurrent to convey a good title at the time of receiving payment the purchaser is not precluded by his possession from setting up a defect of the vendor's title or his refusal to convey as a defense to an action on purchase-money notes, or a contract of purchase.⁷⁴ Mere technical objections to the title will not be sufficient to relieve the purchaser from the performance of his contract.⁷⁵

The authorities as to the rights of vendor and purchaser under an executory contract where, before the time for conveying the land a part or all of it is taken by right of eminent domain, are not numerous and are not in harmony. In Illinois and Kansas the purchaser is not thereby relieved. It is said that the condemnation of the land is a forced sale of it by the purchaser, for which the law secures to him, and he is supposed to receive, full compensation. It is in the nature of a forced sale, it is true, but the responsibility is not upon the vendor. All persons hold their lands subject to the exercise of this right of eminent domain, and it is difficult to see why one holding land under a contract of purchase and obliged to yield part of

⁷² *Gates v. Parmly*, 93 Wis. 294; *Wright v. Bott*, — Tex. Civ. App. —, 163 S. W. 360.

⁷³ *Reed v. Davis*, 4 Ala. 83; *Jackson v. McGinnis*, 14 Pa. 331; *Gans v. Renshaw*, 2 id. 34, 44 Am. Dec. 152. See *Giles v. Williams*, 3 Ala. 316, 37 Am. Dec. 692; *Janulewycz v. Quagliano*, 88 Conn. 60.

⁷⁴ *Lewis v. White*, 16 Ohio St. 444; *Lewis v. McMillen*, 31 Barb. 395; *Baldrige v. Cook*, 27 Tex. 565; *Davis v. McVicker*, 11 Ill. 327. But see *Lewis v. McMillen*, 41 Barb. 420.

In *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 91, a bond was giv-

en by the vendor for a deed, to be made at a specified time, provided the obligee should pay \$400 on or before that date. An action was brought by the vendor to foreclose the contract, the complaint containing the allegation that the plaintiff had tendered a deed. The answer set up, and on the trial it was proved, that the plaintiff's title was defective. It was held that the vendee, being in possession, could not resist the payment of purchase-money on that ground.

⁷⁵ *Moot v. Business Men's Ass'n*, 157 N. Y. 201, 45 L.R.A. 666.

it by this forced sale to the state or to persons clothed with the authority of the state for full compensation, should have any more claim against his vendor on the covenants in a deed subsequently made than he would have if he had made a private voluntary sale. If he has himself received the damages, without objection on the part of the vendor, it would seem simply preposterous in him to claim, after he receives his deed, that his vendor should also respond to him upon the covenants for the purchase-money of the same land. If, on the other hand, his vendor has received the damages and refuses to account for them the purchaser could certainly hold him responsible for them, or probably might, in the event of such refusal, have his option between an action for the damages, as money had and received for his use, or on the covenants in his deed. If at the condemnation the damages are not paid in money but in special benefits to the land there would be the same reason why the vendor should not be subjected to a suit; after he has made his deed, that there would have been if the purchaser had received for his own use the damages in money. In both cases he has received the consideration for the forced sale and should not be permitted to demand it twice.⁷⁶ In Massachusetts where the contract was entire and a part of the land covered by it was taken under the power of eminent domain, the court said that there had been at least a partial failure of consideration, and that the purchaser might elect to take what the vendor could convey, and hold him answerable in damages as to the rest or, when the parties may be put in *statu quo*, he may rescind the contract and recover the money paid.⁷⁷ In New York the purchaser of land, part of which has been condemned, is entitled to the award afterward made as his measure of damages.⁷⁸

⁷⁶ *Stevenson v. Loehr*, 57 Ill. 509, 11 Am. Rep. 36; *Kuhn v. Freeman*, 15 Kan. 423; *Gammon v. Blaisdell*, 45 Kan. 221. See *Nixon v. Marr*, 190 Fed. 913, 36 L.R.A.(N.S.) 1067, C. C. A. In re Twelfth Ave. South, 74 Wash. 132.

⁷⁷ *Kares v. Covell*, 180 Mass. 206; *Miller v. Phillips*, 44 Wash. 226.

⁷⁸ *Magee v. Brooklyn*, 144 N. Y. 265; In re *Hamilton St.*, 69 N. Y. Misc. 369.

Unless time be made of the essence of the contract, either by stipulation, the nature or value of the property or the situation of the parties notice should be given the vendor to perform the contract within a reasonable time, and if he does not do so it may be rescinded. A vendee who has acquiesced in or consented to delay cannot deprive the vendor of opportunity to perform without notice. If the purchase-money has been paid and no time specified in which to make the conveyance, the vendor is entitled to a reasonable time, and the vendee should demand a deed and there should be a refusal to deliver it before suit can properly be brought to recover the money.⁷⁹

§ 573. **Recoupment for defect of title and for tort.** Where the obligation to pay is precedent to that of the other party to convey, if the time fixed for conveyance has arrived, the inability of the vendor to make title is available as a defense to an action on notes for the purchase-money on the principle of recoupment. If the defense goes to the whole purchase-money it may accomplish a nullification of the sale, and in the absence of any possession by the vendor there is no obstacle to the defense generally at law.⁸⁰ But if the defendant has taken possession and retains it at the time of the action he affirms the contract and can set up no counter-claim unless he has been damnified; though he may, of course, insist on a precedent condition he cannot insist on a defect of the plaintiff's title unless he has been disturbed in his possession by it, or has extinguished it; nor any incumbrance, unless he has paid it,⁸¹ in which case he can only recoup for the sum actually

⁷⁹ *McNamara v. Pengilly*, 58 Minn. 353. See this case in 64 Minn. 543.

⁸⁰ *American Ass'n v. Short*, 97 Ky. 502; *Comegys v. Davidson*, 154 Pa. 534; *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297; *Tillotson v. Grapes*, 4 N. H. 444; *Dickinson v. Hall*, 14 Pick. 217; *Trask v. Vinson*, 20 id. 110; *Moore v. Ellsworth*, 3 Conn. 483. See § 183; *Sanderlin v. Willis*, *infra*.

⁸¹ *Marsh v. Thompson*, 102 Ind.

272; *Small v. Reeves*, 14 Ind. 163; *Gaar v. Lockridge*, 9 id. 92; *Buell v. Tate*, 7 Blackf. 55; *Wiley v. Howard*, 15 Ind. 169; *Barber v. Kilbourn*, 16 Wis. 486; *Bordeaux v. Cave*, 1 Bailey 250; *Carter v. Carter*, id. 217; *Stone v. Gover*, 1 Ala. 287; *Bates v. Terrell*, 7 id. 129; *Lamkin v. Reese*, id. 170; *Worthington v. McRoberts*, id. 814, 9 Ala. 297; *Wilson v. Jordan*, 3 Stew. & P. 92; *Lee v. White*, 4 id. 178; *George v. Stockton*, 1 Ala. 136;

paid.⁸² Where the purchaser assumes the payment of an indebtedness against the property purchased as a part of the price thereof he cannot purchase an outstanding title and set it up to defeat the incumbrance which he has obligated himself to pay.⁸³ A purchaser in possession may waive his vendor's tort in entering upon the premises and wrongfully appropriating timber or wood thereon, and set off in the action to recover the purchase-money the value of that taken.⁸⁴

§ 574. **Purchaser cannot assail validity of contract.** While in possession under a parol contract of sale the vendee cannot defend against notes for the purchase-money on the ground that the contract is void under the statute of frauds. The contract is not unlawful and while he is in possession and the vendor neither repudiates the contract nor is in default, there is no defect of consideration.⁸⁵ This principle, in the absence of fraud in the sale, applies where a vendee takes possession under a deed containing a general covenant of warranty.⁸⁶

§ 575. **Recovery when contract does not fix price.** The amount a vendor is entitled to recover for land contracted or conveyed may not be fixed by the contract; then it must be ascertained by proof or by such other means as the contract points out. The time of the valuation may be material where the value fluctuates. Doubtless the value should be ascertained as of the date of the sale, when the vendor agrees to part with the land and the purchaser to take it unless they indicate a

Christian v. Scott, 1 Stew. 490, 18 Am. Dec. 68; Peden v. Moore, 1 Stew. & P. 71, 21 Am. Dec. 649; Lynch v. Baxter, 4 Tex. 431; Wood v. Perry, 1 Barb. 114; Galloway v. Finley, 12 Pet. 264, 9 L. ed. 1079; Curran v. Rogers, 35 Mich. 221. See Tompkins v. Hyatt, 28 N. Y. 347.

⁸² Kerley v. Richardson, 17 Ga. 602; Hull v. Harris, 64 id. 309; Herdlicka v. Evans, 165 Iowa 207.

⁸³ Landau v. Cottrill, 159 Mo. 308; Drury v. Holden, 121 Ill. 130, 137 and cases cited.

⁸⁴ Sanderlin v. Willis, 94 Ga. 171.

⁸⁵ Gillespie v. Battle, 15 Ala. 276; Cope v. Williams, 4 id. 362; Johnson v. Hanson, 6 id. 351, 41 Am. Dec. 54; Rhodes v. Storr, 7 Ala. 348. Compare Bates v. Terrell, id. 129.

⁸⁶ Turrell v. Archer, 1 Mart. Ch. 103; Morris v. Ham, 47 Ark. 293, 296, 1 S. W. 519; Noonan v. Lee, 2 Black 499; Peters v. Bowman, 98 U. S. 56, 25 L. ed. 91; Abner v. York, 19 Ky. L. Rep. 643, 41 S. W. 309; Holman v. Maupin, 3 T. B. Mon. 380.

different time. Where there was a covenant to pay for a surplus, if any, in a tract of land, without designating a time, it was held to refer to the time fixed for paying for the rest, and that the value at that time was the criterion of damages, because the agreement provided that the vendor might have more than the price agreed for the rest, if "at the time of payment" he was dissatisfied with that price, and disinterested men should value the land higher.⁸⁷ On the question of value the admission of the purchaser may be considered. Where a party has conveyed land on the parol promise of the grantee to convey to him certain other lands, which such grantee refused to do, the grantor has recovered the value of his conveyance upon an implied promise; and the plaintiff has proven, on the question of value, the worth of the land that the defendant agreed to convey, not as a basis of recovery, but as a declaration on the subject of value.⁸⁸ If the title to land conveyed in part payment of other land fails the damage is the value of such land at the time it was conveyed, with interest. Statements of value made by the defendant during the negotiations and the consideration expressed in the deed are evidence of its value.⁸⁹ Where a party refuses to convey land contracted in exchange he is liable on the contract

⁸⁷ *Keas v. McMillan*, 2 J. J. Marsh. 12; *Means v. Milliken*, 33 Pa. 517.

In the last case a debtor conveyed land to his creditor in satisfaction of his indebtedness, under a verbal agreement that the debtor should have all the profit on a resale within five years, over and above the amount of his debt with interest, etc.; before the expiration of the five years the grantor gave notice to the other party to sell, but the grantee had previously disposed of the property. Held, in an action to recover the difference between the amount of the debt and interest and what the property might have been sold for, that the damages were to be estimated by what it would have

produced at the time notice was given to sell, and not by the highest price that could have been procured at any time during the five years.

⁸⁸ *Bassett v. Bassett*, 55 Me. 127; *Greenwood v. Hoyt*, 41 Minn. 381; *Nugent v. Teachout*, 67 Mich. 571; *Dikeman v. Arnold*, 78 Mich. 455, 468. See *King v. Brown*, 2 Hill 485; *Kneeland v. Fuller*, 51 Me. 518; also, *Basford v. Pearson*, 9 Allen 387, 85 Am. Dec. 764; *Burlingame v. Burlingame*, 7 Cow. 92, 17 Am. Dec. 502.

⁸⁹ *Donlan v. Evans*, 40 Minn. 501.

If the title is decreed to be in a third person its market value at the time the decree is made governs *Stewart v. Jack*, 78 Iowa 154.

for the value at the time of the breach.⁹⁰ If one of the parties has executed and recorded his deed and made a tender of it to the other, who makes no offer to reconvey, but repudiates his contract, the one who has performed may recover the expense to which he was put before such repudiation and the value of the property conveyed. The defendant cannot mitigate the damages by showing that the property was sold on judicial process subsequent to the making of the contract, it having been conveyed subject to the lien pursuant to which the sale was made.⁹¹ There may be a recovery of expense incurred after a breach of the contract in an endeavor to perform it where the party in default had disabled himself from performing prior to entering into the contract to exchange property, the other party not knowing the fact until after the expenses were incurred.⁹² Where the agreement was to exchange unincumbered land for land which was incumbered and the owner of the latter guaranteed, for the benefit of the other party, to sell the land for a specified sum he was bound to sell for such sum over and above

⁹⁰ *Miller v. Walker*, 158 Ill. App. 276; *Holmes v. Seaman*, 72 Neb. 300, citing the text; *Mealey v. Finnegan*, 46 Minn. 507; *Devin v. Himer*, 29 Iowa 297; *Burr v. Todd*, 41 Pa. 206; *Combs v. Scott*, 76 Wis. 662; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Warren v. Chandler*, 98 Iowa 237.

It is said in the case last cited: Had the contract been performed the plaintiff would have received the property which the defendant was to convey to him; and it must have been contemplated by the parties that if the defendant should, without lawful excuse, fail to convey it to the plaintiff the latter would be entitled to its value if he had conveyed to the defendant, but, if not, that he would be entitled to the difference in the values. The plaintiff is not restricted to the increase in the value of the property

he was to receive, but is entitled to the full benefit of his contract.

In *Brigham v. Evans*, 113 Mass. 538, the defendant agreed to exchange land for land and horses owned by the plaintiff. An appraisal was to be made, and either party was to pay the balance found in the other's favor. The horses were appraised in excess of their value, judged by a sale of them subsequently made. On the defendant's refusal to convey the damage was held to be the difference between the value of the property and the sum the plaintiff would have received for it if there had been no breach; the price secured at the sale was not to govern the jury in determining that value, but was to be considered.

⁹¹ *Zimmerman v. Galbraith*, 4 Penny. 297.

⁹² *Warren v. Chandler*, *supra*.

the amount of the incumbrance existing when the exchange was made. Failing to do so, he was liable for the difference between value of the land conveyed to him and the value of that he conveyed to the plaintiff, over and above the incumbrance on the latter, if such difference did not exceed the sum for which the defendant agreed to sell. It was discretionary with the jury to allow interest on such difference from the commencement of the suit.⁹³ If the contract for the exchange fixes the relative value of the lands from which one of the parties has the right to select the value so fixed forms a basis for the recovery of damages in an action for the breach of the contract.⁹⁴

Where the purchaser fails to erect a house, which was to be the consideration for the conveyance of land, the damage is the difference in the value of the house as it was to be built and of the property to be conveyed.⁹⁵ A purchase by the acre of a tract lying on both sides of a river does not bind the purchaser to pay for the land in the river though it passes by the deed.⁹⁶ A grantor who reserves "one-eighth part of all the minerals or oil product produced on or from" the land conveyed is entitled to that proportion of the oil raised to the surface by his grantee without deduction for the cost of getting it there. The measure of damages for its nondelivery is the market value at the time demand was made, with interest from that date. The rule governs when there is a failure to deliver stocks does not apply.⁹⁷ A purchaser who agrees to assign a mortgage which he covenants shall be a valid and substituting first lien on property worth a stated sum does not discharge his obligation by assigning the mortgage without the stipulation as to the value of the property covered by it, or as to its priority as a lien. In an action upon his covenant, the assignment being made to secure the mortgagor's notes which were also assigned, he is entitled to have the value of the notes allowed in diminution of the dam-

⁹³ *Hartman v. Ruby*, 16 D. C. App. Cas. 45.

⁹⁴ *Shirk v. Lingeman*, 26 Ind. App. 630. Compare *Gates v. Parmly*, 93 Wis. 294.

⁹⁵ *Laraway v. Perkins*, 10 N. Y. 371.

⁹⁶ *Daniels v. Cheshire R. Co.*, 20 N. H. 85.

⁹⁷ *Union Oil Co.'s App.* 3 Penny, 504.

ages, such value to be determined by the financial condition of their makers at the time of the trial, not when the assignment was made.⁹⁸

§ 576. **Conveyance in consideration of non-pecuniary covenants.** A covenant by a railroad company, in consideration of the grant of a right of way through land, to erect a flag-station convenient to the grantor's house and to permit him to cultivate all the land granted which was not needed by the grantee, runs with the land and binds the grantee's assignee, who has notice.⁹⁹ The measure of damages for its breach is the difference between the value of the lands when suit is brought and what their value would have been had all the stipulations in the contract been substantially performed; or, in other words, the additional value which would have accrued to the lands but for the breach. The covenant inured to the benefit of the grantor's adjoining land, and if performed would have increased its market value. This appreciation was within the legal, if not the actual, contemplation of the parties. Its loss was the natural and proximate result of the breach of the contract.¹ In a Pennsylvania case there was a breach of the contract to erect a depot, the erection of which was the principal consideration for the release of the right of way through the plaintiff's land. The trial court announced the damages to be the same as would have been awarded the owner if the land had been condemned. The supreme court, by Agnew, J., said: "Instead, then, of the question being the difference in value of the land before and after the building of the road, considering all advantages and disadvantages to the owner, the question

⁹⁸ *Smith v. Holbrook*, 82 N. Y. 562.

⁹⁹ *Gilmer v. Mobile & M. R. Co.*, 79 Ala. 569, 58 Am. Rep. 623; *Mobile & M. R. Co. v. Gilmer*, 85 Ala. 422.

¹ *Atlanta, etc. R. Co. v. Thomas*, 60 Fla. 412 citing the text; *Louisville, etc. R. Co. v. Whipps*, 118 Ky. 121, quoting the text and overruling *Louisville, etc. R. Co. v. Neafus*, 93 Ky. 53, and *Same v.*

Taylor, 96 Ky. 241, in so far as they hold that there could also be a recovery of the value of the land conveyed; *Brooklyn I. Co. v. New York, etc. R. Co.*, 80 App. Div. (N. Y.) 508; *Gaffney v. Wood*, 74 S. C. 323; *Rockwell v. Utz*, 79 N. Y. Misc. 120; *Mobile & M. R. Co. v. Gilmer*, *supra*; *Watterson v. Alleghany Valley R. Co.*, 74 Pa. 208; *Louisville, etc. R. Co. v. Neafus*, *supra*.

would be upon the additional value which would accrue to the plaintiff's land in the event of erecting such a depot as the contract called for. Under the contract, whatever specific advantages would accrue to the land from the adjacent depot and station would have to be added to the plaintiff's claim, for this would be his loss in case of a breach of the contract. While the profits of his business cannot be added to his damages, for these are speculative and uncertain, the business advantages which constitute the characteristics of the land and give it value are not to be thrown out of consideration in determining the value of the land. Clearly, if the depot and station would make the plaintiff's land more valuable as a place of business, by bringing to it business it would not possess without them, they give greater value to the land to the extent of the increase by reason of their being placed there, and therefore fall within the scope of the contract."² The principles laid down in this quotation have been applied in several late cases.³ There is substantial agreement as to the exclusion of evidence of profits the owner might have made by conducting a business on the land if there had not been a breach of the contract.⁴ It has also been ruled that the profits he might have made from the sale of farm land as lots are too remote and speculative.⁵ In an Iowa case the parties exchanged lands, the defendant agreeing as a part of the consideration to make improvements on other lands of his adjoining those conveyed to the plaintiff. In an action to recover on account of the partial failure of the consideration in not making the stipulated improvements it was alleged that by reason thereof there was a difference of \$5,000 in the value of the land conveyed. These damages were actual, not speculative.⁶ The same rule has been applied where a vendor was

² *Watterson v. R. Co.*, *supra*; *Westchester & P. R. v. Broomall* (Pa.).

³ *South Memphis L. Co. v. McLean H. L. Co.*, 179 Fed. 417, 102 C. C. A. 563 (failure to make track connections with railroads); *Louisville, etc. R. Co. v. Whipps*, 118 Ky. 121 quoting the text.

⁴ *Louisville, etc. R. Co. v. Whipps*, *supra*.

⁵ *Cincinnati, etc. R. Co. v. Baker*, 130 Ill. App. 414.

⁶ *Wilson v. Yocum*, 77 Iowa 569; *Iowa-M. L. Co. v. Conner*, 136 Iowa 674, applying the rule to the breach of a contract to erect a building on

prevented from performing his contract to connect the premises sold with a water supply system, rather than the cost of installing a private system.⁷ In a suit to reform a deed on the ground that the quantity of land was less than it called for if it appears that the estimate of value was made for trading purposes and there was an exchange of properties, the recovery for the shortage will be on the basis of a *quantum meruit*.⁸

A covenant by the grantee in a deed of the right of way through a tract of land that the water on one side of the road should be made to run on the same side instead of through cattle-guards, runs with the land; and in an action for its breach the damages are not restricted to those inflicted on the tract of land described in the deed, but extend to other land then owned as part of the same tract by the grantor.⁹ If a vendee violates his covenant not to erect a tenement house on the granted premises the vendor may recover such damage as he has sustained thereby. The measure is not the difference between the value of the complainant's house as it was affected by the tenement and the value it would have possessed if the lot on which the latter was built had remained vacant, if there is no evidence that he desired to sell. The diminution of the value of the complainant's house for occupation is the standard by which to measure his compensation. In such a case future damages will not be assessed in a suit for an injunction.¹⁰ A vendor who has not accepted structures erected on land as a compliance with consideration specified for its conveyance may recover the sum specified as due on the purchase price, with interest from the date of his deed.¹¹ On the breach of a condition subsequent

the land; *Jewett v. Lawrenceburgh, etc. R. Co.*, 10 Ind. 539.

The damages for the breach of a contract to buy land, the consideration being the construction and operation of a street-car line, cannot be estimated from proof of the difference between the contract price and the market value of the land when the breach occurred. *Coddington v. Hoblit*, 49 Ill. App. 66.

⁷ *Pollock v. Queens L. & T. Co.*, 147 App. Div. (N. Y.) 571.

⁸ *Fisher v. Trumbauer*, 160 Iowa 255.

⁹ *Peden v. Chicago, etc. R. Co.*, 78 Iowa 131, 4 L.R.A. 401, 73 Iowa 328, 5 Am. St. 680.

¹⁰ *Amerman v. Deane*, 57 N. Y. Super. 175.

¹¹ *Braddy v. Elliott*, 146 N. C. 578, 16 L.R.A. (N.S.) 1121, 125 Am. St. 523.

the grantor may recover the value of the land and the rents from the time of instituting suit, but not anterior thereto unless he has previously re-entered.¹² If the grantor has judgment of title in him the damages incidental to his demand for the grantee's continued holding of the possession after breach of the condition subsequent include the rents or profits, or the value of the use and occupation of the land.¹³ Such value is a fair measure of the damages, and it may be recovered regardless of the actual use the defendant made of the property.¹⁴ If the grantee has met the public charges on the land or it was not subject thereto in its possession the recovery will be lessened to the extent thereof.¹⁵ If there is a failure to deliver property which was to be accepted as part of the consideration for land the damages are measured by its value at the time specified for its delivery, with interest from that date less the amount due on the purchase price.¹⁶ The values fixed in the contract may be taken as evidence of the value of the land the vendee has refused to convey, in the absence of other evidence.¹⁷

Contracts for support during life are generally regarded as entire, and the party injured by the breach of such a contract may sue for the recovery of all the damages he will sustain

¹² *Gulf, etc. R. Co. v. Dunman*, 74 Tex. 265.

¹³ *Clason v. Baldwin*, 129 N. Y. 183; *Danziger v. Boyd*, 120 N. Y. 628.

¹⁴ *Wallace v. Berdell*, 101 N. Y. 13, 16; *Trustees of Union College v. City of New York*, 65 App. Div. (N. Y.) 553.

¹⁵ *Trustees of College v. New York*, *supra*.

¹⁶ *Rayner v. Jones*, 90 Cal. 78.

The vendor of land was to place upon it, by a date named, a saw mill owned by him and was to saw logs and receive one-half the lumber for doing so, and was to receive enough of the other half of the lumber to pay for the land. Before such date he sold the mill to

the purchaser, who agreed to move it to the land, saw the logs for one-half the lumber, leaving the remainder for the vendor to the extent that it might be necessary to pay him the purchase price of the land. The mill was not moved as agreed, and the vendor sued for the purchase-money. The right to recover was denied because time was not of the essence of the contract; the vendor might procure another mill to do the sawing and thus get his pay, and the expense of doing so was the measure of his recovery. *King v. Mercer*, 7 Ky. L. Rep. 590 (Ky. Super. Ct.)

¹⁷ *Humphreys v. Shellenberger*, 89 Minn. 327.

thereby, although he is not bound to do so, but may bring successive actions.¹⁸ This rule is not, apparently, recognized in Arkansas where the grantor in a deed executed to secure support sues for the failure to obtain it. He can only recover the amount required to support him during the time he had supported himself prior to the bringing of suit. The grantor's remedy was either to sue at law for the amount of the consideration as it should become due or to treat the contract as void and sue in equity to cancel it.¹⁹

§ 577. **Interest on purchase-money.** If the vendee is in possession under his purchase he will generally be charged with interest on the purchase-money after it has become due, even where the completion of the sale is delayed in pursuance of the contract on account of the title, or by the acquiescence of the vendee,²⁰ unless he keeps the money in hand idle, to be paid when the vendor becomes entitled to it,²¹ and gives notice of his readiness to pay.²² In Canada the purchaser in possession cannot be exonerated from his contract to pay interest by a court of equity unless the vendor is in wilful default and deposits the purchase-money, not to his general current account, but to a separate account, so that he can show he was losing the use of it.²³ Circumstances sometimes impose liability for interest although the purchase-money is not demandable, as where the vendee is in possession of the property and receipt of the rents and profits, the contract being silent as to possession or interest.²⁴ But this is not everywhere recognized. In a Dela-

¹⁸ § 127.

¹⁹ *Salyers v. Smith*, 67 Ark. 526; *Bronson v. Leibold*, 87 Conn. 293.

²⁰ *Rankin v. Rankin*, 216 Ill. 132; *Witmer v. Delone*, 225 Pa. 452; *Minard v. Beans*, 64 Pa. 411; *Hershey's Est.*, 213 Pa. 601; *Brockenbrough v. Blythe*, 3 Leigh 619; *Jourolomon v. Ewing*, 26 C. C. A. 23, 80 Fed. 604; *Krepp v. St. Louis, etc. R. Co.* 99 Mo. App. 94.; *Reynolds v. Burr*, 104 App. Div. (N. Y.) 431; *Stinson v. Sneed*, — Tex. Civ. App. —, 163 S. W. 989.

²¹ *Id.*; *Hampton v. Egleberger*, 2 Bailey 520.

²² *Hoard v. Railroad Co.*, 59 W. Va. 91.

²³ *Stevenson v. Davis*, 23 Can. Sup. Ct. 629.

²⁴ *Atchison, etc. R. Co. v. Chicago, etc. R. Co.*, 162 Ill. 632, 35 L.R.A. 187; *Powell v. Martyr*, 8 Ves. 146; *Simonds v. Essex P. R. Co.*, 57 N. J. Eq. 349; *Carey v. Taylor*, 28 Ohio. C. C. 667. See § 328.

ware case²⁵ the purchaser took possession before paying the purchase-money and it was sought to hold him liable for interest on the ground that it was equitable for him to pay it. The answer was: Consider the nature and effect of the contract. The defendant became the owner. He had the equitable title. The complainant, if he retained the title, would have been a trustee for the defendant and accountable to him for the profits. It is too absurd a principle to be admitted, and is contrary to equity, that, if the defendant took possession of his own property, which it was lawful for him to do, such an act should make him liable to pay a larger sum for the land than he had agreed to pay. A vendor in default may not recover interest from a vendee in possession of land incapable of beneficial use to the extent of the taxes upon it. The vendee's position should not be made pecuniarily worse because of his possession, nor the vendor's condition improved because of his default.²⁶

The right of a vendor to interest from the vendee in possession, the contract being silent respecting it, does not pass with a judgment sale of the land; hence the purchaser at such sale can enforce an equitable claim for interest only from the date of his purchase; the vendor may recover interest for the time anterior thereto.²⁷ The liability for interest does not exist if the contract is silent respecting it, although possession is taken under it, if the vendor unexcusedly refuses to perform the conditions precedent which entitle him to the purchase-money.²⁸ One who agrees to assume the vendor's debt as a part of the consideration for the land conveyed is liable for the amount of the debt then due. If that bore the conventional rate of interest the

²⁵ *Lofland v. Maull*, 1 Del. Ch. 359, 12 Am. Dec. 106; *Nettleton v. Caryl*, 14 Pa. Super. 443.

²⁶ *Wood v. Deskins*, 141 Fed. 500, 72 C. C. A. 558.

²⁷ *Simonds v. Essex P. R. Co.*, *supra*.

²⁸ *Bradford v. Smith*, 123 Iowa 41; *Atchison, etc. R. Co. v. Chicago, etc. R. Co.*, *supra*.

Under a contract binding the vendor to give a deed clear of in-

cumbrances and immediate possession of the land, nothing being said as to interest, the vendee is not liable for it until the removal of the incumbrance. *Howell's Est.*, 224 Pa. 415.

Interest on the money expended in purchasing land will not be considered in fixing its price if the contract is silent respecting it. *Guthrie v. Baton*, 227 Pa. 339.

vendee is liable for only the legal rate, his obligation to pay not being expressed in an instrument signed by him, but embraced in the deed.²⁹ The refusal of the purchase-money bars the right to interest prior to the tender of a deed in conformity with a decree for specific performance.³⁰

A purchaser who contracted to pay the purchase-money at a future named day, or as soon thereafter as incumbrances are removed, is not bound, without an express stipulation, to see to their removal; but if he takes possession and remains in the uninterrupted enjoyment of the land he is liable for interest after the day appointed for payment although the incumbrances have not been removed, unless it appears that he had laid by the money which remained unemployed and unprofitable in order to meet the payment when they should be removed.³¹ If a vendee

²⁹ *Colvin v. Newell*, 8 Ky. L. Rep. 959 (Ky. Super. Ct.).

³⁰ *Hughes v. Antill*, 23 Pa. Super. 290.

³¹ *Kearney v. Kane*, 32 Pa. Super. 236; *Brockenbrough v. Blythe*, 3 Leigh 619; 2 Addison on Cont. § 527. The court say: "The case of *Rutledge v. Smith*, 1 McCord Ch. 403, will serve as an illustration of the principle, whilst its application points out an exception founded on the principle itself. There the defendant purchased a house and lot at auction for cash, and placed the money in the hands of an agent to pay the whole amount; but the agent, finding that there were, as in this case, legal incumbrances upon it, retained a part of the same until they should be removed; and that not having been done a considerable time after, he returned this balance to the defendant, who had taken possession of the house immediately after the purchase. And it was held that she was liable for interest on this balance from the time she received it from the agent, but not whilst it remained in his

hands, because she was ignorant that it so remained there, and could have derived no profit from it. And if it had been shown in this case that *Eigleberger* laid by the amount due to the plaintiff to meet the demand when the incumbrances should have been removed, he would doubtless have been exempted from the payment of interest. But that is not pretended. It was insisted by counsel for the motion that until the plaintiff had discharged the incumbrances, which he considered as a condition precedent, she was not entitled to receive the principal, and hence it was concluded that she was not entitled to interest on what the defendant had a right to retain. This argument has been already sufficiently answered. His liability arises out of the profit which he derived from the use and occupation of the lands and the consequent loss to the plaintiff."

The grantees of certain lands had covenanted with the grantor, since deceased, that the land, except as to the entrance to be made by them towards an intended new road,

wrongfully kept out of possession by the vendor recovers damages the latter may recover interest on the unpaid purchase-money for the same period.³² A vendor in possession is not entitled to interest until he tenders a deed and offers to surrender possession.³³ Under a condition imposing liability for interest if the purchaser is in default such liability does not arise where the delay is due to the state of the vendor's title.³⁴ Interest will not be allowed anterior to judgment if the purchaser had reasonable cause for resisting the action.³⁵

The contract for the sale of land provided for the payment of \$5,000 at the time of its execution; \$45,000 was to be paid at the time of the conveyance and the balance on or before five years, for which a note drawing interest and secured by mortgage was to be given. The vendee was allowed thirty days to examine the title and complete the contract; if the title proved

should be kept inclosed on all the sides abutting on the land of the grantor with a brick wall seven feet high. The grantees not having erected the wall in pursuance of the covenant, an action was brought against them by the executors and devisees of the grantor for damages for its breach. It appeared that, in the events that had happened, the value of the adjoining land of the plaintiff was not decreased by the nonerection of the wall to anything like the amount which it would have cost to build the wall; held, that the true measure of damages being the pecuniary amount of the difference between the position of the plaintiffs upon the breach of the contract and what it would have been if the contract had been performed, under the circumstances of the case, the amount that it would cost to build the wall was not the correct measure of damages. *Wigsell v. School for Indigent Blind*, 8 Q. B. Div. 357.

In *Fowler v. Harts*, 149 Ill. 592, there was a sale of land for \$8,000,

subject to an incumbrance, the amount of which was in dispute, and which the purchaser agreed to pay. There was no agreement to pay interest. The amount of the incumbrance as claimed by the creditor of the vendor was materially reduced and left a considerable sum due the latter from the purchaser under the terms of the contract. The vendor was not entitled to interest on such sum.

³² *Abrahamson v. Lamberson*, 68 Minn. 454.

³³ *Meagher v. Puckett*, 19 Ky. L. Rep. 879; *Moore v. Beiseker*, 147 Fed. 367, 77 C. C. A. 545; *Consolidated C. Co. v. Findley*, 128 Iowa 696.

³⁴ *Lewis v. Williams*, 41 Tex. Civ. App. 464; *Denning v. Henderson*, 1 DeG. & Sm. 689; *Jones v. Gardiner*, [1902] 1 Ch. 191.

Cases of honest mistake do not constitute "wilful default." *Bennett v. Stone*, [1902] 1 Ch. 226.

³⁵ *Fluker v. DeGrange*, 117 La. 331.

defective he might avoid the contract and receive the money paid. Defects in the title existed, but no action was taken to terminate the contract or to further enforce it. The vendor remained in possession and received the rents and profits, and at the end of six years perfected the title. The vendee brought an action to enforce specific performance. The contract was regarded as providing for a speedy perfecting of the sale and the title. The impossibility of performance for so long a time rendered it impossible for the vendee to observe or the court to enforce the clause providing that the note for the balance of the purchase-money should draw interest from the date designated in it. It is said: Under these circumstances the vendee was not required to treat the transaction as though it were already, or certainly would become, a perfected sale. He could not (as the court found) safely take possession as though he were already the owner or certain to become such. He could not venture to improve the property so as to realize the benefits which an owner may derive from such uses of his property as it may most advantageously be put to. The vendor, recognizing this, did not assume to treat the other party as an absolute purchaser. He remained in possession and continued to receive such rents and profits as the property yielded. In such a case a court of equity will not treat the transaction as though it were an absolute contract of sale, certainly susceptible of specific performance; will not force the possible purchaser remaining out of possession into the position of a trustee for the vendor as respects the purchase-money, which he never became obligated to pay, and charge him with interest thereon, especially where the interest would so greatly exceed the value of the use of the land.³⁶

³⁶ *Lake Phalen L. & I. Co. v. Stees*, 54 Minn. 471, citing *Binks v. Rokeby*, 2 Swanst. 222, 225; *Carrodus v. Sharp*, 20 Beav. 56; *Esdaile v. Stephenson*, 1 Sim. & S. 122; *Jones v. Mudd*, 4 Russ. 118; *Stevenson v. Maxwell*, 2 Sandf. Ch. 273; *Birch v. Joy*, 3 H. of L. Cas. 565. See *Suth. Dam. Vol. II.—46.*

Leviness v. Consolidated G. E. L. & P. Co., 114 Md. 559.

As a matter of equity if the purchaser has reasonable ground for objecting to the title until its sufficiency has been adjudged, interest* will be allowed only from the time of judgment. *Newman v. Gleason*, 132 La. 561.

The purchaser may be liable for interest although not in possession if delay in consummating the transfer of the title is chargeable to him.³⁷ Thus, in a late and well-considered case a letter offering to purchase land provided that the conveyances should be executed within six months thereafter and the price paid at the time of delivery and acceptance of the necessary papers. On the acceptance of the offer drafts of such papers, following a form supplied by the purchaser, were sent him. He waived the submission of executed deeds and delayed for nearly two years to express objections to the drafts, promising from time to time to examine them. Liability for interest at the legal rate attached from the expiration of the six months when the vendor offered to execute the deed.³⁸ A purchaser may be relieved in equity against his promise to pay interest if there shall be delay from any cause whatever, if it be shown that the delay was caused by the wilful default of the vendor.³⁹ Such default does not exist where the delay results because some of the vendors are infants, nor by the vendees' exception to the conveyance tendered, the ground thereof being removed while the paper was in the hands of the vendor's agent as an escrow and before it was delivered.⁴⁰ Under an executory contract by which the vendee assumed payment of an incumbrance on the land and which he might have renewed and extended before

³⁷ *Prichard v. Mulhall*, 140 Iowa 1; *Metropolitan Bank v. Times-D. Pub. Co.*, 121 La. 547; *Tobin v. O'Kelly*, 117 La. 753; *Harmon v. Thompson*, 119 Ky. 528; *McCowen v. Pew*, 18 Cal. App. 482; *Smith v. Lander* (Tex. Civ. App.), 89 S. W. 19.

³⁸ *Latrobe v. Winans*, 89 Md. 636; *Pennsylvania M. Co. v. Smith*, 210 Pa. 49.

Interest on the damages is properly allowed from the time performance of the contract was tendered. *Hampe v. Sage*, 87 Kan. 536.

One who purchases at a partition sale is liable for legal interest from the date of the judgment enforcing

his bid. *Tobin v. United States S. D. & S. Bank*, 115 La. 366.

³⁹ *Hayes v. Elmsley*, 23 Can. Sup. Ct. 623.

⁴⁰ *Stevenson v. Davis*, 23 Can. Sup. Ct. 629. See *De Visme v. De Visme*, 1 MacN. & G. 336, which, the Canadian case cited says, has not been followed.

As to delay and wilful delay in executing a conveyance, see *In re Hettling & M.'s Contract*, [1893] 3 Ch. 269; *In re Mayor of London & T's Contract*, [1894] 2 Ch. 524, and cases referred to; *In re Woods & L's Contract*, [1898] 1 Ch. 433, [1898] 2 Ch. 211.

receiving his deed, the title being vested in him for the purposes indicated, the vendee was bound to provide for the discharge of the incumbrance within a reasonable time (three months under the circumstances), and was liable for interest thereon thereafter.⁴¹ The first instalment of the purchase-money was payable upon the "delivery of a deed clear of incumbrances," with interest on deferred instalments from date of such delivery. Incumbrances existing when the deed was delivered were subsequently gotten rid of by agreement of the parties, which resulted in a sheriff's sale of the land. The liability for interest did not antedate the deed of the sheriff.⁴² A vendor may be liable for interest on the breach of any obligation assumed by him, as where he fails to keep the property sold rented as agreed. In such a case he must pay interest on the difference between the amount of rent received and that he stipulated should be received.⁴³ In addition to being liable for interest a purchaser whose conditional contract becomes absolute by reason of his conduct must bear all the loss and damage occasioned by his delay in making payment, including the taxes paid by the vendor on the property since the contract became absolute.⁴⁴

SECTION 2.

PURCHASER AGAINST VENDOR.

§ 578. **Measure of damages in England.** The rule of damages against a vendor who fails to perform his contract to convey has been subject to some diversity of decision. While the general rule that the law aims to make compensation adequate to the real injury sustained and to place the injured party, so far as money can do it, in the same position he would have occupied if the contract had been fulfilled; is recognized, it is relaxed in some jurisdictions and an exception admitted in favor of a vendor who makes a contract to sell and convey in

⁴¹ Watt v. Hunter, 20 Tex. Civ. App. 76.

⁴² Robbins v. Westmoreland C. Co., 193 Pa. 301. It seems that the

purchaser was not in possession.

⁴³ Williams v. Arnold, 139 Wis. 177.

⁴⁴ Latrobe v. Winans, *supra*.

good faith, believing himself to be the owner of the property, when he is afterwards incapable of performing by reason of a defect in his title of which he was not aware. The damages in such a case are merely nominal. The vendee can only recover payments made with interest and expenses incurred in the investigation of the title. This exception was first admitted in *Flureau v. Thornhill*,⁴⁵ in which it was said by Chief Justice De Grey: "If the title proves bad and the vendor is, without fraud, incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." Blackstone, J., said: "These [contracts of sale] are merely upon condition, frequently expressed but always implied, that the vendor has a good title; if he has not, the return of the deposit with interest and costs is all that can be expected." This case has been followed in many cases in England and this country. These subsequent cases define more precisely, but not always consistently, the scope of the exception. The mild and exceptional rule, as supported by the weight of authority, it is believed, is that above stated; it is confined to cases of inability to perform arising from a discovery after the contract of a previously unsuspected defect in the vendor's title.

In England the cases indicate that the doctrine and measure of damages in *Flureau v. Thornhill* is accepted as the rule, and any departure by allowing a recovery under a more liberal standard for the vendee is exceptional if, indeed, they do not tend to the conclusion that it is the exclusive rule and put a vendee to his action for deceit if he seeks enhanced damages on the ground of fraud. It cannot be said that the courts there have reached that point, but the following observations of Lord Chelmsford in *Bain v. Fothergill*⁴⁶ show the tendency in that direction: "I fully agree in the doubt expressed by Mr. Justice Blackburn in *Sikes v. Wild*⁴⁷ as to the soundness of the exception in *Hopkins v. Grazebrook*⁴⁸ and in the observations which follow the expression of that doubt. The judge said: 'I

⁴⁵ 2 W. Bl. 1078.

⁴⁶ L. R. 7 Eng. & Ir. App. 158.

⁴⁷ 1 B. & S. 587.

⁴⁸ 6 B. & C. 31.

do not see how the existence of misconduct can alter the rule by which damages for the breach of a contract are to be assessed; it may render the contract voidable on the ground of fraud, or give a cause of action for deceit; but surely it cannot alter the effect of the contract itself.' * * * Upon a review of all the decisions on the subject I think that the case of *Hopkins v. Grazebrook*⁴⁹ ought not any longer to be regarded as an authority. Entertaining this opinion, I can have no doubt that the judgment of the court of exchequer in the present case is right, whether it falls within the rule established by *Flureau v. Thornhill* or is to be considered as involving circumstances which have been regarded as removing cases from the influence of that rule; because I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate, knowing that he has no title to it nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit." *Bain v. Fothergill* was decided in the house of lords in 1874, and the opinions contain a thorough analysis and comparison of all the English cases on the point under consideration. F. was in possession, under a written agreement, of a mining royalty for a lease of which he had taken an assignment. One of the stipulations was that H. (the person with whom the agreement was originally made) should not assign without the consent of the lessors. They were ready to consent to the assignment to F., provided he would execute a duplicate of the agreement containing this stipulation. Though repeatedly communicated with on the subject, he delayed doing so. F. entered into a contract with B. to sell his interest in the royalty, but it was afterwards found that the lessors absolutely refused their assent to the transfer, and F. was unable to perform his contract with B.; B. brought an action against F. for its non-performance, and it was held that he could recover only the expenses he

⁴⁹ 6 B. & C. 31.

had incurred.⁵⁰ The general rule there being to give no more than nominal damages and the expenses of investigating the title, except in a clear case of bad faith on the part of the vendor, there is the anomaly of aggravating the damages in an action upon contract on the ground of fraud. The anomaly, however, goes no farther than to secure to the vendee full compensation for the injury he sustains according to the standard on other contracts of sale, namely, the value of the bargain. The cases are not numerous in England in which the increased damages have been allowed. The first was decided in 1826, and those which followed were based upon it. The original case has been overruled, and as a consequence the authority of the subsequent cases is shaken.⁵¹

⁵⁰ Mr. Justice Denman dissented, and thus stated the facts on which the dissent was placed: "It appears that when the contract of the 17th of October, 1867, was signed, the defendant, Fothergill, knew that the consent of Hill's lessors was required before Hill's executors could assign their interest to the defendants, and also that the like consent was necessary before the defendants could effectually assign their interest to the plaintiffs. The plaintiffs were not informed either of the necessity or of the non-existence of such consent. It further appears that before the contract was signed the defendants had had notice, through their solicitor, that the consent of the lessors of Hill to the assignment of his agreement with them was dependent upon the defendants doing an act which they were being pressed to do as far back as October, 1865, and which had not yet been done, and that such notice was not communicated to the plaintiff, nor the difficulty which might obviously arise in consequence pointed out. It appears to me that under the circumstances

it was so clearly the duty of Mr. Fothergill to have put the plaintiffs in possession of these facts before he allowed them to sign a contract for the purchase of the royalty, that it is impossible for the defendants to rely upon the rule in *Flureau v. Thornhill*, 2 W. Bl. 1078. I think that the contract in this case did not go off through the *discovery* by the defendants that they could not make a good title, but by reason of the over-sanguine expectation on the part of Mr. Fothergill that an obstacle which he *knew* to exist, and over which he had no control, would somehow or other cease to exist before the completion of the purchase. In such a case I am of opinion that the case of *Flureau v. Thornhill* does not apply."

⁵¹ *Hopkins v. Grazebrook*, 6 B. & C. 31, is the case which introduced the exception to the rule of damages laid down in *Flureau v. Thornhill*, and *Bain v. Fothergill*. Lord Chelmsford thus criticises it and the cases which followed: "The decision itself in *Hopkins v. Grazebrook* cannot be supported. The

There is a seeming inclination on the part of some of the English judges not to extend, but rather to limit, the doctrine of *Bain v. Fothergill*. In a recent case *Lindley*, Master of the Rolls, delivering judgment on behalf of himself and *Rigby*, L.

seller in that case had undoubtedly an equitable estate in respect of which he had a right to contract. Therefore the language of Chief Justice Abbot, that 'the defendant had entered into a contract to sell without the power to confer even the shadow of a title,' is not warranted by the circumstances of the case, as the defendant could certainly have assigned his equitable estate; and thus the sole ground upon which he held him responsible for damages entirely failed. But although the facts in *Hopkins v. Grazebrook* did not justify the decision, yet the case has always been treated as having introduced an exception to the rule in *Flureau v. Thornhill*, and as having withdrawn from its operation a class of cases where a person knowing that he has no title to real estate enters into a contract for the sale of it. It is not correct to say, with Lord St. Leonard in his *Vendors and Purchasers* (14th ed., p. 359), that *Hopkins v. Grazebrook* has not been followed. It has been recognized in several cases since, and in one, to which I shall presently refer, it has been expressly followed. In *Robinson v. Harman*, 1 Ex. 850, already mentioned as having sanctioned the decision in *Flureau v. Thornhill*, Baron Parke said: 'The present case comes within the rule of the common law, and I cannot distinguish it from *Hopkins v. Grazebrook*.' And Baron Alderson and Baron Platt expressed the same opinion. In *Pounsett v. Fuller*, 17 C. B. 660,

Hopkins v. Grazebrook was treated as a valid authority by all the judges, the question which they considered being whether the case fell within *Flureau v. Thornhill*, or the exception in *Hopkins v. Grazebrook*, and they decided that it was within the former case. But in the case of *Engel v. Fitch* the court of queen's bench, L. R. 3 Q. B. 314, and afterwards in the exchequer chamber, L. R. 4 Q. B. 659, 664, proceeded expressly on the cases of *Hopkins v. Grazebrook* and *Robinson v. Harman*, the chief baron quoting the very words of the lord chief justice, and relying on those cases. In that case the mortgagees of a house sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on the completion of the purchase. The purchaser resold the house at an advance in the price to a person who wanted it for immediate occupation. The mortgagor refused to give up the possession. The mortgagee could have ousted him by ejectment, but refused to do so on the ground of expense. The purchaser brought an action upon the contract of sale, and it was held that, as the breach of contract arose not from inability of the defendants to make a good title but from their refusal to take the necessary steps to give the plaintiff possession pursuant to the contract, he could recover not only the deposit and expenses of investigating the title, but damages for the loss of his bargain; and that the measure of such damages was

J. (Sir F. H. Jeune, dissenting), said: The question raised by this appeal is whether a purchaser of leasehold property which the vendor cannot assign without a license from his lessor is entitled to damages (beyond the return of the deposit with

the profit which it was shown he would have made upon a resale. It was after this decision in *Engel v. Fitch* that the plaintiff in error declined to argue the present case in the exchequer chamber, as the authorities on the subject could only be freely reviewed by a higher tribunal. Notwithstanding the repeated recognition of the authority of *Hopkins v. Grazebrook*, I cannot, after careful consideration, acquiesce in the propriety of that decision. I speak, of course, of the exception which it introduced to the rule established by *Flureau v. Thornhill* with respect to damages upon the breach of a contract for the sale of a real estate; for as to the case itself not falling within the exception to the rule (if any such exists), I suppose no doubt can now be entertained. The exception which the court in *Hopkins v. Grazebrook* engrafted upon the rule in *Flureau v. Thornhill* has always been taken to be this: that in an action for breach of a contract for the sale of a real estate, if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain."

Mr. Baron Pollock said: "In *Robinson v. Harman*, 1 Ex. 850, the defendant agreed to grant a valid lease when he well knew that he had no power to do so. In *Engel v. Fitch*, in which there was given an elaborate and exhaustive judgment of the court of queen's bench, confirmed by the exchequer cham-

ber, the defendants, who were mortgagees of a lease but not in possession, sold it to the plaintiff, undertaking by the particulars of sale that possession should be given on completion of the purchase, and on the faith of this the plaintiff resold at a profit. The title was good, but on the plaintiff requiring possession it was found that the mortgagor was in possession and refused to give it up; and farther, that the defendants could have ousted him by ejectment, but refused to incur the necessary expenses. Under these circumstances the judges in the queen's bench held that the plaintiff was entitled to recover, not merely the deposit and expense of investigating the title, but also the damages for the loss of his bargain; and in giving the grounds for their judgment on the particular case said that 'the rule in *Flureau v. Thornhill* can have no application where the failure either to make out a title or to give possession arises not from inability of the vendor, but from his unwillingness either to remedy a defect in the title, or to obtain possession on the score of expense.' It was urged by the learned counsel for the plaintiffs in error that the rule laid down in *Flureau v. Thornhill* was anomalous, and differed from that which is usually applied to the assessment of damages where there has been a breach of a contract for the delivery of goods, and therefore that it ought not to be upheld. It is scarcely correct to say the rule is anomalous; that it differs from

interest and expenses) by reason of the vendor's omission to do his best to procure such license. * * * Having regard to this circumstance, we do not think that *Bain v. Fothergill* covers this case. There the vendors did all they could to obtain the

that applicable to a contract for the sale of goods is true, but the subject-matter to which it is applied differs also. It is observable, in following the history of the rule in question, that when it was first laid down in *Flureau v. Thornhill* the whole question of the proper measure of damages had not received from our courts the attention which it has done in later years. Moreover, at that time, although it had never been expressly decided, it was commonly supposed that upon the sale of a chattel, in the absence of any warranty of title, the rule of *caveat emptor*, as laid down in *Co. Litt.*, p. 102*a*, and by *Noy*, in his maxim, c. 42, applied; but assuming that the difference exists, as it now undoubtedly does, there are two marked distinctions affecting the present question between a contract for the sale of personal and real property.

"In the first place, a man, who sells goods must be taken to know whether they are his or not. Secondly, he must be aware that, in the majority of cases, the goods he is selling are intended for resale, or to be used by the buyer for the purpose of construction or manufacture, so that both the title of the vendor and the probable result of its deficiency may fairly be presumed to be in the minds of the contracting parties. With real estate the case differs in both these respects. First, no layman can be supposed to know what is the exact nature of his title to real property, or whether it be good against all

the world or not; hence, as was said by the court in *Engel v. Fitch* (L. R. 3 Q. B. 314, id. 4 Q. B. 659), the undoubted owner of an estate often finds, unexpectedly, a difficulty in making out a title which he cannot overcome. Assuming that the vendor acts *bona fide*, the difficulty must be equally known to the vendee as to the vendor." [In the particular case the vendor knew the difficulty, and did not communicate it to the vendee; his good faith could therefore only have been inferred from the fact that he forgot to mention it, or omitted to do so by under-estimating its importance.]

"Secondly, to enter into a contract for the purchase of land in order immediately to resell it before the title is examined is unusual." [When a vendor contracts to sell in this unusual way, however, he is exempt from damages, if it happens unexpectedly that his vendor will not confer the power to fulfill. See *Hopkins v. Grazebrook*, which was held to be incorrectly decided. *Sikes v. Wild*, 1 B. & S. 587, 4 id. 421; *Walker v. Moore*, 10 B. & C. 416.] "It seems, therefore, more reasonable to treat the mere contract for the conveyance of land not as based upon an implied warranty that the vendor has power to convey, but as involving the condition that the vendor has a good title; and that if, on examination of the abstract, this turns out not to be so, the vendee cannot ask to be put in as good a position as if a conveyance with the

lessors' consent to the assignment, and they failed to obtain it. The first question submitted to the judges shows that what was being considered was the rule as to damages on the sale of real estate where a vendor *without his default* is unable to make a

usual covenants had been executed, but can only recover the expenses to which he has been put. All that has been hitherto said leads to the conclusion that the case of *Flureau v. Thornhill* was rightly decided, at the time it was decided, on sufficient legal principles; but if it was a decision to which at the time I could not have acceded, I should, nevertheless, think that a contract of purchase and sale, made on the footing of that decision, was correct."

Lord Hatherley, also favoring the judgment which was pronounced, said: "The reasons given for the judgment in *Flureau v. Thornhill* were certainly not altogether satisfactory, because the lord chief justice is said, upon that occasion, to have stated *simpliciter*, without alleging any ground whatever for the decision, that upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain; to which Mr. Justice Blackstone added, that 'these contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title.' That is scarcely a correct representation of the case, because if the vendor's contract with his vendee was on the condition that he had a good title, then in the event of the title failing, there would be no action for damages whatever, and there would be no power in the vendee to do that

which he is always entitled in equity to do, namely, to insist upon having the title good or bad, if he should be so minded; if the title is defective, and if it is so stated, the vendee is always allowed to have the benefit of the contract" [and, it may be added, compensation for any defect of title. *Mestaer v. Gillespie*, 11 Ves. 621-640; *Mortlock v. Buller*, 10 id. 292; *Wood v. Griffith*, 1 Swanst. 54; *Miligan v. Cooke*, 16 Ves. 1; *Seaman v. Vawdrey*, id. 390; *Painter v. Newby*, 11 Hare 26; *Woodbury v. Luddy*, 14 Allen 1]. "Therefore the reason is, not that the contract is made upon that condition, but the foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estate, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have been put to in investigating the matter. He has a right also to take the estate and

good title. Lord Chelmsford's speech is addressed to that question; and his observations on fraud are a part of his comment on *Hopkins v. Grazebrook*,⁵² which had decided that the exceptional rule laid down in *Flureau v. Thornhill*⁵³ did not apply where the vendor knew that he had not a good title although he believed he could get one, and had in fact an equitable title. Neither Lord Chelmsford's speech nor Lord Hatherley's is an authority for the application of that exceptional rule to the case of a vendor who can make good title but will not, or will not do what he can do and ought to do in order to obtain one. Such a case is, however, covered by *Engel v. Fitch*,⁵⁴ which was to a certain extent based on *Hopkins v. Grazebrook*,⁵⁵ and was much commented on in, but not overruled by, *Bain v. Fothergill*. These observations do not, however, dispose of this case. They render it necessary to consider another difficulty, which is this. If the defendant's representatives had tried to obtain the lessors' consent and had failed the plaintiff could have obtained no more damages than the return of the deposit, with interest and expenses. The damage to him is occasioned by his not obtaining what he was entitled to by his contract; and so far as damages are concerned the reason why he fails to obtain what he bargained for is immaterial. The damage is the same whatever that reason may be. Why, then, should he obtain more damages if no attempt is made to obtain the lessors' consent than he would be entitled to if a proper effort to obtain

complete the purchase with that defective title, if he thinks proper so to do; but he is held to have bargained with the vendor upon the footing that he (the vendee) shall not be entitled, under all circumstances, to have that contract completed, and therefore he is not put in a position under such a contract to make a resale before the matter has been fully investigated, and before it is ascertained whether or not the title of his vendor is a good one."

Bain v. Fothergill was followed

in *Rowe v. School Board*, 36 Ch. Div. 619, where it was ruled that there is no distinction between a contract to grant a right of way and make a road and sewers and a contract to sell real estate. It has been applied where there is a failure of title to an interest in land. *Morgan v. Russell* (1909), 1 K. B. 357.

⁵² 6 B. & C. 31.

⁵³ 2 W. Bl. 1078.

⁵⁴ L. R. 3 Q. B. 314, 4 id. 659.

⁵⁵ 6 B. & C. 31.

such consent had been made and had failed? The only reason which can be assigned for deciding that he is entitled to more is that the rule which limits his damages in the first case is itself an anomalous rule based upon and justified by difficulties in showing a good title to real property in this country, but one which ought not to be extended to cases in which the reasons on which it is based do not apply. This answer to the question with which we are dealing appears to us sufficient and satisfactory. The answer may possibly be difficult to reconcile with some of Lord Chelmsford's observations in *Bain v. Fothergill*, but the answer is, in our opinion, quite consistent with the decision in that case and it has the merit of preventing the rule there upheld from leading to grievous injustice. The plaintiff was entitled to recover for the loss of his bargain.⁵⁶ Substantially the same view is announced by the supreme court of Victoria: the rule of *Flureau v. Thornhill* and *Bain v. Fothergill* is limited to cases where the breach arises from the inability of the vendor to make a good title, and does not apply where the breach arises from some other source than want of title.⁵⁷

§ 579. Conflict of American decisions on measure of damages; what law governs. The doctrine of the American courts has been less liberal to the vendor. The general rule is that usually applied, adequate compensation for the actual injury or, as it is briefly expressed, damages for the loss of the bargain. In some jurisdictions there is no deviation from this rule on account of good faith and inability to perform resulting from an unsuspected defect in the vendor's title; there the symmetry of the law relating to sales is preserved.⁵⁸ In case of delay in making the conveyance, which is ultimately accepted, the vendee is entitled to recover the difference between the value when the transfer

⁵⁶ *Day v. Singleton*, [1899] 2 Ch. 320. See *Jones v. Gardiner*, [1902] 1 Ch. 191.

⁵⁷ *Ross v. Robinson*, 12 Vict. L. R. 764 (1886).

⁵⁸ *Spaulding v. Smith*, — Tex. Civ. App. —, 169 S. W. 627; *Bowen v. Speer*, — Tex. Civ. App. —, 166 S. W. 1183; *Atwood v. Walker*, 179

Mass. 514; *Roche v. Smith*, 176 Mass. 595, 51 L.R.A. 510; *Dady v. Condit*, 188 Ill. 234; *Fleckten v. Spicer*, 63 Minn. 454, quoting the text; *Scheerschmidt v. Smith*, 74 Minn. 224; *Turner v. Brooks*, 2 Tex. Civ. App. 451; *Johnson v. McMullin*, 3 Wyo. 237, 4 L.R.A. 670; *Hamaker v. Coons*, 117 Ala. 603;

should have been made and when it was made, and if he has been kept out of possession the rental value of the property should be added.⁵⁹

The New Jersey court of errors and appeals has recently reconsidered the question under discussion and overruled *Drake v. Baker*,⁶⁰ which followed the English cases making an exception to the rule of *Flureau v. Thornhill*,⁶¹ which was decided before *Bain v. Fothergill*.⁶² The principal consideration given

Brooks v. Miller, 103 Ga. 712; *Warren v. Chandler*, 98 Iowa 237; *Plum v. Mitchell*, 16 Ky. L. Rep. 162; *Clagett v. Easterday*, 42 Md. 617; *Matheny v. Stewart*, 108 Mo. 73, 78; *Hartzell v. Crumb*, 90 Mo. 629; *Krepp v. St. Louis, etc. R. Co. (St. Louis Ct. of App.)*; *Bierer v. Fretz*, 32 Kan. 329; *Tracy v. Gunn*, 29 Kan. 508, intimating a disapproval of *Lister v. Batson*, 6 id. 420; *Muenchow v. Roberts*, 77 Wis. 520; *Wells v. Abernethy*, 5 Conn. 222; *Hopkins v. Lee*, 6 Wheat. 109, 5 L. ed. 218; *McKee v. Brandon*, 3 Ill. 339; *Buckmaster v. Grundy*, 2 Ill. 310; *Gale v. Dean*, 20 Ill. 320; *Cannell v. McClean*, 6 Har. & J. 297; *Bryant v. Hambrick*, 9 Ga. 133; *Hill v. Hobart*, 16 Me. 164; *Warren v. Wheeler*, 21 Me. 484; *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677; *Hopkins v. Yowell*, 5 Yerg. 305; *Shaw v. Wilkins*, 8 Humph. 647; *Barbour v. Nichols*, 3 R. I. 187; *Nichols v. Freeman*, 11 Ired. 99; *Lee v. Russell*, 8 id. 526, 49 Am. Dec. 692; *Spruell v. Davenport*, 5 Humph. 145; *Jenkins v. Hamilton*, 153 Ky. 163; *Rowley v. Hager*, 63 Ore. 246; *Dean v. Hawes*, 21 Cal. App. 350 (the value of the land to the plaintiff is not the test). See *Bender v. Barton*, 182 Ala. 181. There cannot be a recovery according to this rule unless the contract has been rescinded or the vendee

evicted. *Nolde v. Gray*, 73 Neb. 373; *Hampton S. Co. v. Gardner*, 154 Fed. 805, 83 C. C. A. 521; *Mobley v. Lott*, 127 Ga. 572, citing the text; *Dady v. Condit*, 209 Ill. 488; *White v. Kiggins*, 130 Ill. App. 404; *Goodwine v. Kelley*, 33 Ind. App. 57; *Linscott v. Moseman*, 84 Kan. 541; *Finnes v. Selover*, 108 Minn. 331; *Vallentyne v. Immigration L. Co.*, 95 Minn. 195; *Beck v. Staats*, 80 Neb. 482, 16 L.R.A. (N.S.) 768, quoting the text and overruling *Reed v. Beardsley*, 6 Neb. 493; *Seaver v. Hall*, 50 Neb. 878; *Maxon v. Gates*, 136 Wis. 270. See *Webb v. Wheeler*, 80 Neb. 438, 17 L.R.A. (N.S.) 1178; *Fuller v. Reed*, 38 Cal. 99.

In *Hallett v. Taylor*, 177 Mass. 6, there was a breach of a contract covering land and personalty. The damages were measured by the difference between the value of the property at the time the plaintiff was entitled to a conveyance and the price he was then to pay; in estimating the damages it was proper for the jury to consider the sum paid and that due.

⁵⁹ *Violet v. Rose*, 39 Neb. 660; *Nikkel v. Conaway*, 27 Okla. 406.

⁶⁰ 34 N. J. L. 358.

⁶¹ 2 W. Bl. 1078.

⁶² L. R. 7 Eng. & Ir. App. Cas. 158.

in support of the change of position is that there is no substantial difference in the injury resulting, where there is an ouster after conveyance with warranty and where there is a refusal of conveyance in pursuance of the contract to convey, when the vendor is unable to make title, which can reasonably support a rule for damages in the former case wholly different from that which prevails in the latter case. The injury in both cases is the same—the loss of the property, the loss of such profit as would have been incident to increased value; the loss in both cases arises from the breach of the vendor's covenant on account of the defect in his title.⁶³ If fraud or deceit enters into the transaction the vendee should be left to his action for deceit to recover for the loss he may sustain thereby.⁶⁴

In Nebraska there are decisions on both sides of the question. A recent case has departed from all the previous rulings and announced that there is no ground for distinction because the vendor did not act in good faith. "It may well be doubted whether, in a state where exemplary damages are not permitted, the measure of recovery should depend on the good faith of the vendor. The object of the law is to afford compensation, and not to punish, in civil cases, and the actual damage is the same regardless of the motive of the vendor. We think, however, the cases can be reconciled on a more logical basis. The vendor should not be permitted to speculate on his contract. If either rule of damages should be enforced to the exclusion of the other he would be permitted to do so. If the rule of nominal damages alone prevails, then if the land arises in value the vendor may obtain the benefit of the increase by breaking his own contract and by putting it out of his power to fulfill it. If the rule of substantial damages alone applies the vendor, when the property has fallen in value, may keep the purchase-money and the land by repaying only the value of the land. The law will not permit a party to so speculate and reap a profit by violating his

⁶³ *Madden v. Caldwell L. Co.*, 16 Idaho 59, 21 L.R.A.(N.S.) 332, quoting the text.

⁶⁴ *Gerbert v. Trustees*, 59 N. J. L. 160, 180, 69 L.R.A. 764, 59 Am.

St. 578; *Fairchild v. Llewellyn Realty Co.*, 82 N. J. L. 423. See *Roberts v. McFadden*, 32 Tex. Civ. App. 47.

contract. We think the true rule to be that the law reposes in the innocent vendee an election either to treat the contract as rescinded and recover what he has paid, or to ask damages for the breach.”⁶⁵

It has been given as a reason for departing from the English rule of damages that titles to real estate in this country are as a general thing less complicated, more readily investigated, and, by our jurisprudence, depend on rules which are less refined and abstruse than those which surround the questions which arise on an English title. The reasoning upon which the damages have been made merely nominal against a defaulting vendor who has acted in good faith and been prevented from performing by unforeseen causes has not been entirely satisfactory even to judges who have applied that rule in consequence of the supposed weight of general or local authority. The difficulty of ascertaining the state of the title, either in England or in this country, may well make both of the parties cautious, but it is a difficulty which they must surmount; and whether the loss is made to fall on one or the other, the state of the title is involved in every sale and at some stage of the negotiation or of the steps taken with a view to performance is examined and ascertained. The vendor has the means of ascertaining his title, and where he undertakes absolutely to convey a particular estate it is more consistent with the responsibility which the law attaches to all other undertakings to impose the obligation which it imports and the liability to make full compensation on default.⁶⁶ The reasons which govern the measure of damages on breach of the covenants for title in deeds have but slight application, considering the brief period during which executory contracts of sale operate.

On the breach of an agreement to convey land situated in

⁶⁵ *Janulewycz v. Quagliano*, 88 Conn. 60; *Seaver v. Hall*, 50 Neb. 878. See *Eaton v. Redick*, 1 Neb. 305; *Reed v. Beardsley*, 6 Neb. 493; *McPherson v. Wiswell*, 19 Neb. 117, holding that the vendee may recover the purchase-money although he was in default; *Was-*

son v. Palmer, 13 Neb. 376; *Carver v. Taylor*, 35 Neb. 429 and *Violet v. Rose*, 39 Neb. 660, held in favor of substantial damages. See later cases cited in first note to this section.

⁶⁶ *Cullumber v. Winter*, 154 Iowa 263, quoting the text.

another state than that in which a contract is made and was to be performed by payment of the purchase price and delivery of the deed, the damages are to be measured by the law of the state in which the contract was made.⁶⁷ A distinction exists between a conveyance of land and a covenant therefor in this respect.⁶⁸

§ 580. **Same subject.** In an action in Maine, the law of damages was thus pointedly discussed by Peters, J.:⁶⁹ "The general rule of damages in this form of action is well settled. If the plaintiff has paid nothing down and the land was worth, at the date of the breach, more than he was to give for it, the difference would be his profit, and he could recover that amount. If there was no difference between the contract price and the value of the land when it should have been conveyed and nothing was paid, then his damages could be nominal only; or if, in such case, the land was worth less than the contract price he would then have nominal damages for the technical breach. So, if the plaintiff had paid the contract price in full he could recover the value of the land at the time it should have been conveyed to him, whether the value was then more or less than the contract price. And so it logically follows, there being a part payment and the land worth less than the contract price at the time a conveyance should have been made, that the damages would be what the land was then worth, less the amount of the price for it that remained unpaid. By paying the full price the vendor is entitled to the land or its value, whatever the value may be. The recovery of damages according to these rules puts him in as good condition as if the contract had been performed. He gets exact indemnity."⁷⁰ Referring to the English rule, he says: "Many of the American state courts have adopted it. It prevails in New York, although much doubt of its correctness has been expressed by the individual members of the courts of

⁶⁷ *Atwood v. Walker*, 179 Mass. 514.

⁶⁸ *Id.*; *Polson v. Stewart*, 167 Mass. 211, 36 L.R.A. 771.

⁶⁹ *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677.

⁷⁰ *Warren v. Wheeler*, 21 Me. 484; *Hill v. Hobart*, 16 Me. 164; *Robinson v. Heard*, 15 Me. 296; *Russell v. Copeland*, 30 Me. 332; *Lawrence v. Chase*, 54 Me. 196.

that state. * * * The supreme court of the United States does not sustain the doctrine.⁷¹ * * * We do not discover that the precise point, namely, whether the measure of damages depends at all upon the cause of the failure to convey, has ever been noticed in any reported case in our own state. Still, it can hardly be regarded here as a new question. We think it is virtually settled by decisions in analogous cases. In the case of personal property the measure of damages has uniformly been based, in this state, upon the value of the articles when they should have been delivered, and not upon the consideration paid therefor.⁷² The reason assigned in the New York cases (and in cases elsewhere) for the adoption of the rule there adopted is the analogy that is claimed to exist between actions for the breach of a covenant to convey land and actions for the breach of a covenant for the quiet enjoyment of land and for warranty of title.⁷³ But that can be no argument for the doctrine here, but conclusive argument against it, inasmuch as, while the rule of damages in those courts, under the covenants of quiet enjoyment and warranty of title, is the consideration paid for the land and interest, the measure in this state is the value of the land at the time of the eviction.⁷⁴ Still, it is not to be admitted that a complete similitude exists between the two classes of covenants in their legal bearing and effect. There is less harshness in applying our rule to contracts to convey than to the case of covenants in deeds. Improvements are not so likely to be made upon the land in the former as in the latter case by the person in possession. The correctness of the comparison is questioned in the opinion of the majority of the court in *Pumpelly v. Phelps*.⁷⁵ We think that the rule that we are disposed to adhere to, as adapted to all cases, a reasonable one. The pecuniary damages are the same to the vendee whether the motive of the

⁷¹ *Hopkins v. Lee*, 6 Wheat. 109, 5 L. ed. 218.

⁷² *Smith v. Berry*, 18 Me. 122; *Furlong v. Polleys*, 30 Me. 491, 50 Am. Dec. 635; *Berry v. Dwinel*, 44 Me. 255; *Bush v. Holmes*, 53 Me. 417; *Stevenson v. Fuller*, 75 Me. 324.

⁷³ *Baldwin v. Munn*, 2 Wend. 399, 20 Am. Dec. 627; *Peters v. McKean*, 4 Denio 546.

⁷⁴ *Hardy v. Nelson*, 27 Me. 525; *Elder v. True*, 32 Me. 104, and cases there cited; *Moore v. Fredericks*, 24 Cal. App. 536.

⁷⁵ 40 N. Y. 59, 100 Am. Dec. 463.

vendor in refusing to convey is good or bad. It is a difficult thing to ascertain whether or not a vendor is actuated by good faith in his refusal to convey. There can easily be frauds and deceits about it. The vendor is strongly tempted to avoid his agreement where there has been a rise in the value of the property. The vendee, by making this contract, may lose other opportunities of making profitable investments. The vendor knows, when he contracts, his ability to convey a title, and the vendee ordinarily does not. The vendor can provide in his contract against such a contingency as an unexpected inability to convey. He can also liquidate the damages by agreement. The measure of relief afforded by our rule is a fixed and definite thing. The other rule is not easily applied to all cases, and the books are burdened with discussions and refinements in relation to the modifications and restrictions and qualifications which, in different jurisdictions, have been annexed to it." However, the principle on which damages were exceptionally reduced in *Flureau v. Thornhill* has been adopted as settled law in many of the states. Where this is the case the liability is not, perhaps, as much restricted as it is in England.⁷⁶ On the failure of title

⁷⁶ *Ohio Valley Trust Co. v. Allison*, 243 Pa. 201; *Vaughn v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.), 126 S. W. 690; *Hahl v. West* (Tex. Civ. App.), 129 S. W. 876; *Stanton v. Miller*, 14 Hun 383; *Seymour v. Jaffe*, 78 Wash. 1; *Phelan v. Tomblin*, 164 Ala. 383; *Horner v. Beasley*, 105 Md. 193; *Larson v. O'Hara*, 98 Minn. 71, 116 Am. St. 342; *Empire Realty Co. v. Sayre*, 107 App. Div. (N. Y.) 415; *Fuller v. Mulholland*, 40 Pa. Super. 257; *Dobson v. Zimmerman*, 55 Tex. Civ. App. 394; *Clifton v. Charles*, 53 Tex. Civ. App. 448; *Hall v. Huffhines*, 47 Tex. Civ. App. 276; *Crosby v. Wynkoop*, 56 Wash. 475; *Morgan v. Bell*, 3 Wash. 554, 582, 16 L.R.A. 614; *West Coast Mfg. & I. Co. v. West Coast I. Co.*, 31 Wash. 610; *Gerbert v. Trustees*, 59

N. J. L. 160, 69 L.R.A. 764, 59 Am. St. 578; *Sears v. Stinson*, 3 Wash. 615; *Brokaw v. Duffy*, 165 N. Y. 391; *Place v. Dudley*, 41 App. Div. (N. Y.) 540; *Marsh v. Cavanaugh*, 15 Wash. 282; *Hartsock v. Mort*, 76 Md. 281; *Rineer v. Collins*, 156 Pa. 342; *Snodgrass v. Reynolds*, 79 Ala. 452; *Baltimore B. & L. Soc. v. Smith*, 54 Md. 187, 39 Am. Rep. 374; *Northridge v. Moore*, 118 N. Y. 419; *McCafferty v. Griswold*, 99 Pa. 270; *Allison v. Montgomery*, 107 id. 455; *Baldwin v. Munn*, 2 Wend. 399, 20 Am. Dec. 627; *Peters v. McKean*, 4 Denio 546; *Conger v. Weaver*, 20 N. Y. 140; *Allen v. Anderson*, 2 Bibb 415; *Goff v. Hawks*, 5 J. J. Marsh. 341; *Combs v. Tarlton*, 2 Dana 464; *Seamore v. Harlan*, 3 id. 410; *Herndon v. Venable*, 7 id. 371; *Foley v. Mc-*

to part of the land, no other damage being shown, there will be a proportionate abatement of the price.⁷⁷ The rule stated has no application where the purchaser elects to sue on a contract providing for the resale of the land in consideration of the receipt of a stated sum in excess of the price paid for it; his recovery is the sum agreed to be paid in such contract.⁷⁸ If the contract between the parties cannot be executed because of a statute, and was entered into without knowledge thereof, the purchaser cannot recover the money paid nor the expenses incurred under the contract in an action for its breach; his

Keegan, 4 Iowa 1, 66 Am. Dec. 107; Sawyer v. Warner, 36 Iowa 333; Sweem v. Steele, 5 Iowa 352; Thompson v. Guthrie, 9 Leigh 101, 33 Am. Dec. 225; Bitner v. Brough, 11 Pa. 127; McClowry v. Chrogan, 31 id. 22; McDowell v. Oyer, 21 id. 417; Hertzog v. Hertzog, 34 id. 418; McNair v. Compton, 35 id. 23; Saulters v. Victory, 35 Vt. 351; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Hall v. York, 22 Tex. 641; Margraf v. Muir, 57 N. Y. 155; Drake v. Baker, 34 N. J. L. 358; Wheeler v. Styles, 28 Tex. 240; Stuart v. Pennis, 100 Va. 612; Conrad v. Effinger, 87 Va. 59, 24 Am. St. 646; Roberts v. McFaddin (Tex. Civ. App.). See Combs v. Scott, 76 Wis. 662, 670; Dunnic v. Sharp, 7 Mo. 71.

Section 3306 of the California Civil Code provides: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon, but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the ex-

penses properly incurred in preparing to enter upon the land." See Yates v. James, 89 Cal. 474; Smith v. Bangham, 156 Cal. 359, 28 L.R.A.(N.S.) 522.

The expense of condemning land is not an element of damage against a vendor who has refused to convey to the condemnor. Cape Girardeau & C. R. Co. v. Wingerter, 124 Mo. App. 426.

⁷⁷ Drake v. Eubanks, 61 Ark. 120; Sears v. Stinson, 3 Wash. 615; Lloyd v. Sandusky, 203 Ill. 621.

Where there was a sale of a certain acreage of coal, a portion of which had been mined, the court said: The relative value which the part taken away bears to the whole determines the extent of the plaintiff's injury, and this is to be estimated with regard to the price paid by the parties for the whole. It is, of course, competent to prove that the part to which the title has failed was of greater or less value than the part actually conveyed, and the correct measure of damages is the value of the part taken in proportion to the value of the part which the vendee gets, the computation being on the basis of the purchase money. Fuller v. Mulhollan, 40 Pa. Super. 257.

⁷⁸ Gremillion v. Roy, 125 La. 524.

remedy is in an action for money had and received.⁷⁹ In the absence of a warranty the vendor must make restitution of the money received, he is not liable for the fee of the attorney who defended the suit and made him a party thereto.⁸⁰ On the breach of a covenant to give a deed to such land as the covenantee may select from any land owned by a certain person, the covenantee may recover the value of such land as he might have selected; he was not limited to the selection of land in a single tract if he did not divide more than one tract in making his selection, nor bound to make it in time to give the obligor opportunity to repurchase land sold since the date of the contract; all that was required of him in this respect was to select the land before the expiration of the stipulated period as would give the covenantor time to prepare the conveyance within it.⁸¹

§ 581. **English rule, when not applied.** If the person selling is in default,—if he knew or should have known that he could not comply with his undertaking; if he, being an agent, contracted in his own name, depending on his principal to fulfill his contract merely because he had power to negotiate a sale; if he has only a contract of the owner to convey, or a bond for a deed; if his contract to sell requires the signature of his wife to bar an inchoate right of dower, or the consent of a third person to render his deed effectual; if he makes his contract without title in the expectation of subsequently being able to acquire it and is unable to fulfill by reason of causes so known, as the want of concurrence of other persons; or if he has title and refuses to convey, or disables himself from doing so by conveyance to another person,—in all such cases he is beyond the reach of the principle of *Flureau v. Thornhill* and is liable to full compensatory damages, including those for the loss of the bargain.⁸²

⁷⁹ *Rowley v. Hager*, 63 Ore. 246.

⁸⁰ *Hanover B. Co. v. Jacobs*, 78 N. Y. Misc. 410.

⁸¹ *Loomis v. Wadhams*, 8 Gray 557.

⁸² *Ohio Valley Trust Co. v. Allison*, 243 Pa. 201; *Bowen v. Speer*, — Tex. Civ. App. —, 166 S. W.

1183; *Thompson v. Shepler*, 72 Pa. 160; *Rineer v. Collins*, 156 Pa. 342; *Lyles v. Perrin*, 134 Cal. 417; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 296, citing the text; *Warren v. Chandler*, 98 Iowa, 237; *McMurtry v. Blake*, 45 Neb. 213; *Boyd v. DeLancey*, 91 Hun 542; *Ross v.*

This rule applies where the grantor expressly agrees to make a

Robinson, 12 Vict. L. R. 764; Colonial I. & A. Co. v. Cobain, 14 id. 740 (the vendor knew he had no title); Mailer v. Clayton, 1 West Aust. L. R. 3 (the rule applied was the expense of investigating the title, the vendor knowing he had no title; but for his omission to pay money or remove the obstacle to a title he was liable for the loss of the purchaser's bargain on a resale, which was estimated by the value of the land at the time of a bona fide offer to purchase from him); Tracy v. Gunn, 29 Kan. 508; Dikeman v. Arnold, 71 Mich. 656, 78 Mich. 455; Skaaras v. Finnegan, 31 Minn. 48; Hartzell v. Crumb, 90 Mo. 629; Brigham v. Evans, 113 Mass. 538; Sanford v. Cloud, 17 Fla. 532, 554; Plummer v. Rigdon, 78 Ill. 222, 20 Am. Rep. 261; Dunshie v. Geohagan, 7 Utah 113; Cade v. Brown, 1 Wash. 401; Chartier v. Marshall, 56 N. H. 478; Irwin v. Askew, 74 Ga. 581; Snodgrass v. Reynolds, 79 Ala. 642; Taylor v. Barnes, 69 N. Y. 430; Phillips v. Herndon, 78 Tex. 378, 22 Am. St. 59; Muenchow v. Roberts, 77 Wis. 520; Carver v. Taylor, 35 Neb. 429; Allen v. Atkinson, 21 Mich. 351; Dustin v. Newcomer, 8 Ohio 49; Trull v. Granger, 8 N. Y. 115; Engel v. Fitch, L. R. 3 Q. B. 314, 4 id. 659; Martin v. Wright, 21 Ga. 504; Cox v. Henry, 32 Pa. 18; Burr v. Todd, 41 id. 206; Grissom v. Sorrell, 8 Humph. 372; Foley v. McKeegan, 4 Iowa 1, 66 Am. Dec. 107; Sweem v. Steele, 5 Iowa 352; Pumpelly v. Phelps, 40 N. Y. 59, 100 Am. Dec. 463; Brinckerhoff v. Phelps, 24 Barb. 100; Hopkins v. Lee, 6 Wheat. 109, 5 L. ed. 218; Drake v. Baker, 34 N. J. L. 358; Driggs v. Dwight, 17 Wend. 71, 31 Am. Dec. 283; McNair v. Compton, 35 Pa. 23; Wilson v. Spencer, 11 Leigh, 261; Graham v. Hackwith, 1 A. K. Marsh. 423; Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343 (sale by auctioneer who was not authorized); Burwell v. Jackson, 9 id. 535; Dean v. Roesler, 1 Hilt. 420; Lewis v. Lee, 15 Ind. 499; White v. Madison, 26 N. Y. 124, 84 Am. Dec. 343; Roberts v. McFaddin (Tex. Civ. App.); Stephenson v. Harrison, 3 Litt. 170; Kirkpatrick v. Downing, 58 Mo. 32; Pringle v. Spaulding, 53 Barb. 17; Gibbs v. Champion, 3 Ohio 335; Scott v. Reikel, 15 Up. Can. C. P. 200; Plummer v. Simonton, 10 Up. Can. Q. B. 220; Vallier v. Walsh, 6 Up. Can. C. P. 459; McConnell v. Dunlop, Hardin, 41, 3 Am. Dec. 723; Gerault v. Anderson, 2 Bibb. 543; Davis v. Lewis, 4 id. 456; Morgan v. Stearns, 40 Cal. 434; Bartram v. Hering, 18 Pa. Super. 395, applying the same rule to a lessor who acted in bad faith; Lyon v. Katten, 80 Conn. 718; Cartin v. Hammond, 10 Mont. 1, citing the text; Mobley v. Lott, 127 Ga. 572, citing the text; Kiger v. McCarthy, Co., 10 Cal. App. 308; Harten v. Loffler, 212 U. S. 397, 53 L. ed. 568; Phelan v. Tomlin, 164 Ala. 383; Fleckten v. Spicer, 63 Minn. 454, proof of fraud is not essential to the application of this rule, disapproving a remark in Erickson v. Bennet, 39 Minn. 326; Krepp v. St. Louis, etc. R. Co., 99 Mo. App. 94; Leroy v. Jacobosky, 136 N. C. 443, 67 L.R.A. 977; Margraf v. Muir, 57 N. Y. 155; Millikan v. Hunter, 180 Ind. 149; McIntyre v. Stockdale, 27 Ont. L. R. 460; Maneer v. San-

good title;⁸³ but not in an action at law where the invalidity of the contract sued upon is made a defense.⁸⁴ In a recent case a vendor was subjected to the severer measure of damages for delay in completing the transfer of the property, that being occasioned by his lack of reasonable diligence in performing the contract, and not because of any lack of, or defect in, title.⁸⁵ Where there was a breach by a vendor of a covenant to furnish an abstract of title pursuant to a contract granting an option to purchase land the same measure of damages was applied; the court said it was not material that there should be either allegation or proof that the vendee would have taken and paid for the land if the abstract had been furnished. "It is said that the damages for the breach should be limited to the cost of a cor-

ford, 15 Manitoba 181; Madden v. Caldwell L. Co., 16 Idaho 59, 21 L.R.A.(N.S.) 332; Dubois v. Bowles, 30 Colo. 44 (applying the principle to a trustee who failed to convey to a third party according to his contract with the *cestui que trust*); Buck v. Duvall, 9 Ga. App. 656; Conner v. Baxter, 124 Iowa 219; Boyden v. Hill, 198 Mass. 477; Vernam v. Wilson, 31 Pa. Super. 257; Huey v. Starr, 79 Kan. 781; Horner v. Beasley, 105 Md. 193; Herbert v. Hillman, 50 Wash. 83; Munson v. McGregor, 49 Wash. 276; Balkwill v. Spencer, 45 Wash. 600; Mullen v. Cook, 69 W. Va. 456; Brink v. Mitchell, 135 Wis. 416; Arentsen v. Moreland, 122 Wis. 167, 65 L.R.A. 973, quoting the text; Brown v. Honnis, 70 N. J. L. 260; Marsh v. Johnston, 125 App. Div. (N. Y.) 97; Goodman v. Wolf, 95 App. Div. (N. Y.) 522; Nepach v. Oregon & C. R. Co., 46 Ore. 374, citing the text; Clerque v. McKay, 6 Ont. L. R. 51; Cullumber v. Winter, 154 Iowa 263. See Watkins v. American Nat. Bank, 134 Fed. 36, 67 C. C. A. 110; and Hilligas v. Kuns, 86 Neb. 68, 26 L.R.A.(N.S.)

284, and Nebraska cases cited in second note to sec. 584. The cited case was against a vendor who subsequently conveyed to a third person who purchased bona fide, and paid for a deed. That payment was provable in mitigation of damages, but did not bar the action.

Where the disability to convey is caused by the loss of title it is immaterial whether that loss resulted from the vendor's voluntary act or whether it was caused by operation of law. Nichols v. Freeman, 11 Ired. L. 99.

The refusal to convey land purchased for another is attended with liability for its value when payment was tendered and for interest from that date, less any depreciation in its value caused by the purchaser. Kean v. Landrum, 72 S. C. 556.

⁸³ Wall v. City of London R. P. Co., L. R. 9 Q. B. 249; Taylor v. Barnes, 69 N. Y. 430.

⁸⁴ Matthews v. Matthews, 133 N. Y. 679; Rineer v. Collins, 156 Pa. 342.

⁸⁵ Jones v. Gardiner, [1902] 1 Ch. 191.

rect abstract, and that in any event evidence that the vendee would not have taken the property was material in determining the amount of damages. But the vendee's right to purchase was limited by the contract to sixty days. He had paid \$1,000 for this option, and it was a valuable one. The vendor had covenanted to deliver to him a correct abstract within a reasonable time, and the vendee had the right to rely upon the performance of this covenant by the vendor and to stake his option upon it. He was not required to presume that the vendor would violate his agreement and to act and to procure an abstract for himself upon that assumption. Nor was the cost of such an abstract the probable effect of the vendor's failure to furnish one. The measure of damages for its breach of this covenant in the contract was the natural and probable loss which the vendee would sustain on account of that breach, and that was the value of the option, the difference between the value and the contract price of the land, and the vendor could not lawfully take advantage of its own wrong by proof that the vendee would not have realized this value if it had performed its covenant."⁸⁶ In a case in New York,⁸⁷ Mason, J., thus discusses this rule of damages: "There has never seemed to me to have been any very good foundation for the rule which excuses a party from the performance of his contract to sell and convey lands because he had not the title which he had agreed to convey. There seems to have been considerable diversity of opinion in the courts as to the grounds upon which the rule is placed. In England the rule seems to have been sustained upon the ground of an implied understanding of the parties, that the parties must have contemplated the difficulties attendant upon the conveyance. In the leading case upon this subject,⁸⁸ Blackstone, J., said: 'There contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title,' while in this country the rule is based upon the analogy between this class of cases and actions for the breach of covenant of

⁸⁶ Hampton S. Co. v. Gardner, 154 Y. 59, 100 Am. Dec. 463.
Fed. 805, 83 C. C. A. 421.

⁸⁸ Flureau v. Thornhill, 2 W. Bl.

⁸⁷ Pumpelly v. Phelps, 40 N. 1078.

warranty of title.⁸⁹ The rule of damages in an action for a breach of covenant of warranty of title is settled to be the consideration paid and the interest; and yet this is an arbitrary rule, and works great injustice many times, and the courts meet with great embarrassment in settling it. These difficulties were considered and well expressed in the leading case in this state,⁹⁰ in which the court said: 'To find a rule of damages in a case like this is a work of difficulty. None will be entirely free from objection, or will not, at times, work injustice. To refund the consideration, even with the interest, may be a very inadequate compensation when the property is greatly enhanced in value and when the money might have been laid out to equal advantage elsewhere. Yet, to make this increased value the criterion, where there has been no fraud, may be attended with injustice, if not ruin. A piece of land is bought solely for the purpose of agriculture, and, by some unforeseen turn of fortune, it becomes the site of a populous city; after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which the value of the property might rise by causes unforeseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee?' There is still another class of cases where the rule of simply refunding the purchase-money and the interest operates with great hardship and injustice upon the purchaser. A. purchases of B. a city lot for the purpose of building himself a dwelling or buildings upon it and takes from B. a full covenant deed of the premises, covenanting to assure, or warrant and defend the title. The buildings are constructed at the cost of thousands of dollars, and then B. is evicted by a paramount title ascertained to be in some one else. The recovery of the money and six years' interest is not a very just or rea-

⁸⁹ *Baldwin v. Munn*, 2 Wend. 399, 20 Am. Dec. 627; *Peters v. McKean*, 4 Denio 546. ⁹⁰ *Staats v. Ten Eyck*, 3 Cai. 111, 2 Am. Dec. 254.

sonable return in damages for the law to give one who holds a covenant to make good and to defend the title. The reasons assigned for this rule, in actions for breach of covenant of warranty of title, can scarcely apply to these preliminary contracts to sell and convey title at a future time. In the latter case the vendee knows he has not got the title and that perhaps he may never get it; and, if he will go on and make expenditures under such circumstances, it is his own fault; and, besides, these preliminary contracts to convey generally have but a short time to run, and there is seldom any such opportunity for the growth of towns or a large increase of value of the property as there is in these covenants in deeds which run with the land through all time. * * * These views are not presented to induce the court to overrule or repudiate the adjudged cases in our own courts upon this subject. They reach back over a period of more than forty years, and have been too long sanctioned to be now repudiated. I have referred to this matter simply as furnishing an argument against, in any degree, extending the rule and as a reason for limiting it strictly where the already adjudged cases in our own courts have placed it." In this case the party contracting as vendor was a trustee having power to sell with the consent of a third person. He made an absolute contract in his own name; not being able to obtain the necessary consent he was unable to perform and was liable for the difference between the value of the land and the price to be paid for it. .

A similar case was determined in New Jersey,⁹¹ and notwithstanding it has been overruled⁹² there, its doctrine is applicable in jurisdictions in which the English rule is not applied in its strictness. The vendor was not able to perform because the consent and concurrence of his wife was necessary. Beasley, C. J., said: "The defendant in this suit knew when he agreed to make a perfect title to this property that it was altogether uncertain whether he would be able to do so, for his ability to discharge his contract was dependent upon the con-

⁹¹ *Drake v. Baker*, 34 N. J. L. 358. L. 160, 69 L.R.A. 764, 59 Am. St.

⁹² *Gerbert v. Trustees*, 59 N. J. 578.

sent of his wife. With a full knowledge of his power of performance being contingent, he entered into this absolute stipulation, and I think this circumstance should take this case out of the rule adopted in *Flureau v. Thornhill*. It may be quite reasonable that an implicit understanding should grow up between vendors and vendees of real estate that a vendor should not be responsible for secret flaws in the title of the property and that such understanding should assume the form of a rule of law. But there seems no rational ground for the hypothesis that a similar relaxation of the general law exists in those cases in which a man agrees, in an absolute form, to do some act which he knows he has not the power to do without the assent of a third party. In the former class of cases there is a semblance of good sense and public convenience in favor of the application of the rule excluding the liability in question, but in the latter class there is apparently none whatever.⁹³

This view is not acquiesced in by the Pennsylvania, California, Washington and Iowa courts. In the former state a wife will not be indirectly coerced into a conveyance of her interest in land by awarding exemplary damages—that is, damages in excess of such as are compensatory under the English rule—against her husband for the breach of his contract; and his delay in notifying the intending purchaser of her refusal to join in a conveyance is not evidence of fraud; it was important only in determining the actual damage he sustained.⁹⁴ It is ruled in Washington that a party who contracts with a husband

⁹³ *Beck v. Staats*, 80 Neb. 482, 16 L.R.A.(N.S.) 768; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 296; *Plum v. Mitchell*, 16 Ky. L. Rep. 162.

A vendor who has contracted to sell land in forgetfulness that one-half of it is owned by his wife may not prove his bodily and mental condition as bearing merely upon the question of his mistake and good faith in forgetting that she was part owner of it. *Boyden v. Hill*, 198 Mass. 477.

⁹⁴ *Burk v. Serrill*, 80 Pa. 413, 21 Am. Rep. 105; *Donner v. Redenbaugh*, 61 Iowa 269; *Yates v. James*, 89 Cal. 474; *Stephens v. Barnes*, 30 Pa. Super. 127; *Eggert v. Pratt*, 126 Iowa 727 (the purchaser of the interest of a minor who knows of the fact and the necessity of an order of court for the conveyance thereof cannot, after refusal to make the order, recover substantial damages).

to purchase community property, knowing it to be such, does so with knowledge that the law forbids the latter to enter into a valid contract for its sale unless his wife join him, and that damages cannot be recovered for its breach.⁹⁵ In some courts the knowledge of the purchaser concerning the absence of title in the vendor does not affect the right to recover for the loss of his bargain.⁹⁶

The exemption of the vendor from the severer rule of damages does not extend beyond his inability to perform his contract by reason of a defect in his title which was unknown to him at the time he made his engagement to sell. This rule will exclude all defaults that are wilful or which arise from contingencies known to the vendor and of which he consciously assumed the risk.⁹⁷ In cases of this latter kind the contract is either made or violated in bad faith or is speculative.⁹⁸ An agreement for the exchange of lands, performed on one side, is like a purchase after the consideration has been paid; and the

⁹⁵ *Holyoke v. Jackson*, 3 Wash. Ty. 235; *Seymour v. Jaffe*, 78 Wash. 1.

⁹⁶ *Arentsen v. Moreland*, 122 Wis. 167, 65 L.R.A. 973; *Fletcher v. Brewer*, 88 Neb. 196. These cases are not necessarily in conflict with those which hold otherwise where the relation of husband and wife exists between the parties who must execute the conveyance. Public policy may require that the act of the wife shall be unconstrained. In other cases there seems to be no good reason why the vendor who assumes to convey should be relieved of full liability because the purchaser knew he was without title. See *Bitner v. Brough*, 11 Pa. 127.

The knowledge of the purchaser that a conveyance can be made only with judicial approval which has been denied, is cause for limiting the recovery to a nominal sum. *Eggert v. Pratt*, 126 Iowa 727.

⁹⁷ *Drake v. Baker*, 34 N. J. L. 358; *Crosby v. Wynkoop*, 56 Wash. 475.

⁹⁸ *Mullen v. Cook*, 69 W. Va. 456; *Bryant v. Booth*, 30 Ala. 311, 68 Am. Dec. 117; *Clark v. Yocum*, 116 Cal. 515; *Hartssock v. Mort*, 76 Md. 281. See *Gale v. Dean*, 20 Ill. 320; *Dyer v. Dorsey*, 1 Gill & J. 440; *Pinkston v. Huie*, 9 Ala. 252; *Gibbs v. Jamison*, 12 id. 820; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Thouvenin v. Lea*, 26 Tex. 612; *Taylor v. Rowland*, id. 293.

In *Stuart v. Pennis*, the Virginia court applied the milder rule of damages notwithstanding the vendor broke his contract in order that a better price might be obtained. This appears to be a departure from earlier cases in that court. See *Wilson v. Spencer*, 11 Leigh 261; *Newbrough v. Walker*, 8 Gratt. 16, 56 Am. Dec. 127.

In *Sawyer v. Warner*, 36 Iowa 333, the milder measure of liability

value of the land agreed to be conveyed in exchange, at the time when the conveyance should have been made, is the measure of damages.⁹⁹ With interest to the time of the trial.¹ Where the relative values of the lands to be exchanged have been agreed upon they are a basis upon which a recovery may be had.² In Pennsylvania the severer measure of damages is applied only in case of fraud in the origin of the contract; where there is no fraud the recovery is controlled by the money paid and the expenses incurred in reliance on the contract.³ A purchaser under a sealed contract not made for his benefit, but, as disclosed by it, for the benefit of a third party, may recover to the extent of his liability to such a party arising from the inability of the vendor to convey; on the other hand, if he gave such party the benefit of the contract their relation was of a fiduciary character, and may recover in his own name, for the benefit of that party, the same damages the latter could have recovered if it had been a party to the contract.⁴ The purchaser of an equity may recover the value of it, less the amount of the liens he assumed responsibility for.⁵

§ 582. Elements of damage under the milder rule. Where only nominal damages can be recovered for the loss of the bargain the vendee is entitled to recover his deposit, any payments he may have made on the contract of purchase with interest,

was favored where the defendant undertook to procure title from a third party. In *Yokom v. McBride*, 56 id. 139, the severer rule was held applicable, at the election of the purchaser, he having paid for the land to which title was to be obtained; in lieu of that measure of recovery, the consideration paid might be recovered.

⁹⁹ *Wells v. Abernethy*, 5 Conn. 222; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Greenwood v. Hoyt*, 41 Minn. 381; *Warren v. Chandler*, 98 Iowa 237; *Bierer v. Fretz*, 32 Kan. 329; *Dikeman v. Arnold*, 71 Mich. 656; *Burr v. Todd*, 41 Pa. 206; *Faxton v. Davidson*,

2 Duer 153; *Devin v. Himer*, 29 Iowa 297; *Bender v. Fromberger*, 4 Dall. 436, 1 L. ed. 898; *Brown v. Dickerson*, 12 Pa. 372; *King v. Pyle*, 8 S. & R. 166. See *Lacey v. Mar-nan*, 37 Ind. 168.

¹ *Combs v. Scott*, 76 Wis. 662, 20 Am. St. 92. The conveyance was to have been made in consideration of the settlement of actions and matters of difference between the parties.

² *Shirk v. Lingeman*, 26 Ind. App. 630.

³ *Rineer v. Collins*, 156 Pa. 342.

⁴ *Boyden v. Hill*, 198 Mass. 477.

⁵ *Hendrick v. Lowe*, 85 Conn. 635.

and expenses incurred in investigating the vendor's title.⁶ But interest will not be allowed where possession under the contract of purchase has been enjoyed except for such time as there is a

⁶ *Rose v. Adler*, 147 N. Y. Supp. 307; *Seymour v. Jaffe*, 78 Wash. 1; *Cullumber v. Winter*, 154 Iowa 263; *Justice v. Button*, 89 Neb. 367, 38 L.R.A.(N.S.) 1; *Dobson v. Zimmerman*, 55 Tex. Civ. App. 394; *Clark v. Yocum*, 116 Cal. 515; *Wilson v. Hendrix*, 13 Ky. L. Rep. 687 (Ky. Super. Ct.); *Kaplron v. Tucker*, 35 App. Div. (N. Y.) 310 (and the sum stipulated as damages); *Eberz v. Heisler*, 12 Pa. Super. 338; *Rineer v. Collins*, 156 Pa. 342; *Perrin v. Reynolds*, 12 Vict. L. R. 440; *Bennett v. Latham*, 18 Tex. Civ. App. 403; *Baltimore P. B. & L. Soc. v. Smith*, 54 Md. 187, 39 Am. Rep. 374; *Northridge v. Moore*, 118 N. Y. 419 (expenses incurred in examining title recoverable although both parties knew the vendor was not possessed of the title, it being supposed he would procure it); *Walton v. Meeks*, 120 N. Y. 79; *Wetmore v. Bruce*, 54 N. Y. Super. 149; *Morgan v. Bell*, 3 Wash. 554, 16 L.R.A. 614; *Walker v. Moore*, 10 B. & C. 416; *Pounsett v. Fuller*, 17 C. B. 660; *Tyrer v. King*, 2 Car. & K. 149; *Wilson v. White*, 161 Cal. 453; *Hooe v. O'Callaghan*, 10 Cal. App. 567; *Lloyd v. Sandusky*, 203 Ill. 621; *Krilling v. Cramer*, 152 Mo. 431; *Willard v. Smith*, 34 Mont. 494 (under the statute and in the absence of bad faith); *Morton v. Witte*, 147 App. Div. (N. Y.) 94; *Reynolds v. White*, 43 App. Div. (N. Y.) 595; *Maupai v. Jackson*, 139 App. Div. (N. Y.) 524; *Reid v. Johnson* (N. Y. Misc.), 121 Supp. 750; *Ruggeno v. Leuchtenburg*, 61 N. Y. Misc. 298; *Blate v. Clary*, 50 N. Y. Misc. 668; *Samuelson v. Glickman*, 113 App. Div. (N. Y.) 654;

Empire Realty Co. v. Sayre, 107 App. Div. (N. Y.) 415; *Filbert v. Behney*, 45 Pa. Super. 24; *Roberts v. McFadden*, 32 Tex. Civ. App. 47 (executing contract); *Bridge v. Calhoun*, 57 Wash. 272; *Babcock v. Urquhart*, 53 Wash. 168, quoting the text; *Vaughn v. Farmers' & Merchants' Nat. Bank* (Tex. Civ. App.), 126 S. W. 690; *Clifton v. Charles*, 53 Tex. Civ. App. 448. See *Southern P. L. Co. v. Arnold* (Tex. Civ. App.), 139 S. W. 917; *Freeman v. Falconer*, 201 Fed. 785, 120 C. C. A. 32.

That measure of damages was applied where a vendor made a collateral agreement in good faith to fill in a creek bordering on the land sold, but was unable to do so because he did not own the bed of the creek. *Hochstein v. Vanderveer Crossings*, 150 App. Div. (N. Y.) 118.

In *McConnel v. Hall*, 3 P. & W. 53, a vendee paid down \$100 on a purchase of land, knowing at the time that the seller's agent had sold the land to another; on the seller being informed of the prior sale he tendered back the \$100, but the vendee refused to accept it. In a suit by the latter on the contract he was held entitled to recover his payment, but without interest or costs, though the tender was not pleaded.

In *Tyrer v. King*, *supra*, an auctioneer entered into an agreement in behalf of A. to sell certain premises to B., without having communicated to A. that B. was in treaty for the premises; A. had previously sold them to another party, and therefore could not fulfill the con-

liability for the profits to another person.⁷ Neither will it be allowed unless there is an established market value of the land or means accessible to the party sought to be charged of ascertaining, by computation or otherwise, the amount to which the plaintiff is entitled.⁸ If the vendor rightfully received and kept the money interest will not be computed anterior to a demand for it.⁹ The legal rate of interest governs.¹⁰ The vendee may recover costs incurred, although not paid, if he makes allegation of them as *incurred* rather than as expenses *paid*;¹¹ and, among them, costs for searches relating to the title and for incumbrances, comparing the abstract with the deeds, and expense of journeys in the investigation of such title.¹² He may also recover expenses for preparing papers with a view to the convey-

tract so made with B. B. sued A. for nonfulfillment of his contract. Held, that under these circumstances B. was not entitled to recover damages for the loss of his bargain, but was entitled to recover £50 deposit and loss of the use, and his expense to his attorney.

⁷ *Thompson v. Guthrie*, 9 Leigh 100.

⁸ *Sloan v. Baird*, 162 N. Y. 327.

⁹ *Allen v. Globe G. & M. Co.*, 156 Cal. 286.

¹⁰ *Davis v. Lee*, 52 Wash. 330, 132 Am. St. 973.

¹¹ *Richardson v. Chasen*, 10 Q. B. 756. See *Sutton v. Page*, 4 Tex. 142, as to pleading.

¹² *Baltimore P. B. & L. Soc. v. Smith*, 54 Md. 187, 39 Am. Rep. 374; *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492. In the last case, in the vendee's action, he alleged that he had been put to great charges and expenses, amounting in the whole to a large sum of money, to wit, to the sum of 1,000*l.*, in and about the negotiation and agreeing for the purchase of said estate, and having the same conveyed; and about the investigating the title to the said estate and the

existence and effect of the said supposed *modus* in the said article mentioned; and in and about his defense of and in a certain suit commenced and prosecuted by the defendant against the plaintiff in the court of chancery for compelling a specific performance by the plaintiff of the said articles of agreement, and in which suit the bill filed by the defendant against the plaintiff was dismissed by the same court, and in and about the making and performing of divers journeys, and otherwise respecting the said purchase; and also thereby the plaintiff lost and was deprived of a great part of the gains and profits which he might or would otherwise have made and acquired, from using and employing the said sum of 1,000*l.* so paid by him as aforesaid, and other moneys provided and kept by the plaintiff for the completion of the said purchase, etc. The damages in respect to each "head of claim" were ascertained by an arbitrator. It was held that the expenses preliminary to the contract ought not to be allowed. The party enters into them for his own benefit at a time

ance of the title.¹³ Where one to whom land was conveyed, upon express condition that he was to convey it to another, refused to convey it he was liable for the expenses of litigation necessarily resulting and for the loss of an opportunity to sell the land.¹⁴ Besides being entitled to interest on the payments recovered the vendee may have interest allowed on money kept idle after the day for consummation of the purchase, pending an endeavor by the vendor to clear the title.¹⁵ But he cannot recover for the expense he may have incurred in moving to the land, nor for improvements, whether of a permanent or temporary nature, nor for repairs. The vendee expends money

when it is uncertain whether there will be any contract or not. The charge for a survey was also disallowed. It would have been prudent in the purchaser to defer the survey till he knew whether or not a title could be made out. There was a charge of 71*l.* 11*s.* 6*d.* for journeys to investigate title, and 6*l.* 17*s.* 2*d.* for searching for judgments. These were allowed. Tindal, C. J., said: "Unless judgments are searched for at an early stage of the proceedings great expense may afterwards be incurred unnecessarily, and, for the same reason, the comparison of deeds with the abstract should be made early." Under the third head, 194*l.* 4*s.* 11*d.* was claimed as plaintiff's costs as between attorney and client, *ultra* the costs as between party and party taxed to him in the suit in chancery. See *Sandbank v. Thomas*, 1 Stark. 306; *Jones v. Dyke*, Sugd. Vend. & Pur., App. 9; *Webber v. Nicholas*, Ry. & Moo. 419. In opposition, see *Hathaway v. Barrow*, 1 Camp. 151; *Sinclair v. Eldred*, 4 Taunt. 7; *Jenkins v. Bidulph*, 4 Bing. 160. Upon that claim the chief justice said: "We all think that the extra costs in chancery are not a damage which

is a necessary consequence of the breach of this contract; * * * but the filing of a bill for enforcing a specific performance is one degree removed from a consequence of the contract."

If the sale is made subject to the approval of a third party and there is no fraud or warranty of ownership the expense of journeys cannot be recovered. *Dey v. Nason*, 100 N. Y. 166.

In Pennsylvania where a contract was rescinded for misrepresentations in its procurement, the cost of removing the purchaser's goods and of repairs were held to be proper elements of damages. *Ohio Valley Trust Co. v. Allison*, 243 Pa. 201.

All the expenses resulting from the vendor's fraud may be recovered. *Fuller v. Mulhollan*, 40 Pa. Super. 257.

¹³ *McNair v. Compton*, 35 Pa. 23; *Dumars v. Miller*, 34 id. 319; *Malaun v. Ammon*, 1 Grant's Cas. 123.

¹⁴ *McMurtry v. Blake*, 45 Neb. 213.

¹⁵ *Sherry v. Oke*, 3 Dowl. Pr. 349; *Metcalfe v. Fowler*, 6 M. & W. 830.

in his own wrong if he takes or prepares to take possession and makes improvements before he has looked into the title and ascertained that it is likely to prove satisfactory,¹⁶ unless he does so pursuant to the contract between him and his vendor.¹⁷ He cannot recover, it has been held, even for repairs;¹⁸ nor for expenses incurred prior to the contract; or of a survey; or for the preparation of conveyances before known objections to the title have been answered.¹⁹ Nor can he recover the difference between his costs, taxed as between party and party, and his costs between solicitor and client in an unsuccessful suit by the vendor for specific performance;²⁰ nor the costs of a suit by himself as purchaser for specific performance where the bill has been dismissed without costs on the master reporting against the title.²¹ And where a purchaser, upon the delivery of an abstract showing an apparently good title, resold at a profit, and it subsequently appeared that the title was defective, he was not

¹⁶ *Gerbert v. Trustees*, 59 N. J. L. 160, 183, 69 L.R.A. 764, 59 Am. St. 578; *Sterne v. Benbow*, 151 N. C. 460; *Walton v. Meeks*, 120 N. Y. 79; *Chamberlain v. Brady*, 49 N. Y. Super. 484; *Cartin v. Hammond*, 10 Mont. 1; *Burnett v. Caldwell*, 9 Wall. 290, 19 L. ed. 712; *Peters v. McKean*, 4 Denio 546; *Walker v. Moore*, 10 B. & C. 416; *Hertzog v. Hertzog*, 34 Pa. 418; *Worthington v. Warrington*, 18 L. J. (C. P.) 350. See *Ryder v. Wall*, 29 N. Y. Misc. 377, and compare *Reid v. Johnson* (N. Y. Misc.), 121 N. Y. Supp. 750; *Miller v. Metz*, stated in § 583.

In *Thuemler v. Brown*, 18 Pa. Super. 117, the owner leased land and gave the lessee the right to purchase it for a fixed amount. Thereafter he conveyed the land subject to the rights of the lessee, and took a bond from the grantee to protect himself from liability to the lessee. The latter subsequently exercised his option to

purchase, and recovered from the lessor for the loss of his improvements and the cost of removing machinery.

¹⁷ *Gilbert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785; *Willis v. Wozencraft*, 22 Cal. 607.

¹⁸ *Bratt v. Ellis*, Sugd. App. No. 5.

¹⁹ *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492.

A commission paid for securing the contract cannot be recovered. *Steers v. Laird*, 3 N. Y. Misc. 408; *Empire Realty Co. v. Sayre*, 107 App. Div. (N. Y.) 415, disapproving *Hening v. Punnett*, 4 Daly 545.

²⁰ *Hodges v. Earl*, *supra*; *Kaufmann v. Kirker*, 22 Pa. Super. 201.

²¹ *Malden v. Fyson*, 11 Q. B. 292. M. agreed with F. to purchase land of him. On production of F.'s title M. objected to it. F. insisted that it was good, and gave M. notice that he should sell at M.'s risk. M. then filed a bill for specific performance, and the question of

allowed the expenses of the resale, there being nothing more on the part of the vendor than negligence in the preparation of the abstract, and the purchaser being equally negligent in reselling

title was referred by the court of chancery to a master, who reported that F. had not a good title, whereupon the bill was dismissed without costs on either side; that being the practice of the court of chancery in such cases. Held, that M. could not recover from F., as damages for breach of the contract, costs incurred by M. in the chancery suit. Lord Denman, C. J., said: "The dismissal of the bill was a matter of course when the defendant appeared to want the power to perform his contract; and the refusal of costs to the defendant seems to have been required by justice, as the plaintiff's failure in his suit was occasioned by the defendant's incompetency to fulfill his own engagement. But the plaintiff has brought this action to recover, amongst other things, the costs to which he was put in the prosecution of his unsuccessful suit. Some of us thought that it might be important, in one view of the case, to inquire into the practice in chancery; and we cannot find or hear of any decision compelling the defendant to pay costs where the bill is dismissed in such a suit. We cannot, however, believe that the court of chancery does not possess the power to award costs to the plaintiff under circumstances involving fraud in any part of the negotiation; but without fraud the rule appears to be inflexible that the unsuccessful plaintiff, though not liable to costs, does not recover them in chancery.

"The plaintiff asserts that these costs are the natural consequence

of the defendant's breach of contract, coupled with his threat to resell the estate, and as such are recoverable. He rests his claim on the practice of chancery, which, he contends, systematically lays these costs out of its consideration, and leaves them to be recovered in an action at law for the damages resulting from that breach of contract; and urges that if he cannot so make good his loss at the expense of him who caused it he has no remedy. On the other hand, the general rule is set up that the right to costs must always be considered as finally settled in the court where the question is adjudicated or to which it is accessory. Several cases were quoted to this effect. And this principle was admitted, in general, to apply; so that, if any costs were awarded, nothing beyond the sum taxed according to the rules of the court could be recovered as damages; or, if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in any other court. We are of opinion that this case falls within the same principle. The general rule of the court of chancery, a court having full discretion, must be intended to apply itself as an adjudication in every particular case which falls within it. In the case of *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 492, in which the plaintiff claimed as damages extra costs of a bill for specific performance, Tindal, C. J., says: "The extra costs in chancery are not a damage which is a necessary conse-

before he had tested its accuracy.²² So where a vendor was prevented from performing by the refusal of a third person to accept substituted security for an incumbrance upon the property, according to a previous parol promise, and negotiations were continued after breach of the contract in the hope that some new arrangement might be come to, the expenses incurred to effectuate that abortive plan were not recoverable because not sufficiently proximate.²³

Where land was conveyed by a trustee and the proceeds applied as directed, after the sale and conveyance were set aside in an action by the purchaser to quiet the title because the grantor in the deed creating the trust did not join with the trustee in the conveyance, the purchaser was allowed, as against the heirs of the trustee's grantor, to treat the rents as an equivalent to the interest on the purchase-money, on accounting for improvements made in good faith, the trustee's grantor having acquiesced in the sale and the making of the improvements.²⁴

quence of the breach of this contract.' 'The filing of a bill for enforcing a specific performance is one degree removed from a consequence of the contract, and the plaintiff must take the consequences of the suit, as in other cases.'"

In *Marvin v. Prentice*, 94 N. Y. 295, land was conveyed absolutely to secure a loan. The grantee refused to reconvey on tender of the amount due. A reconveyance was decreed, and the owner then unsuccessfully sought to recover for the depreciation in its value during the litigation and his costs and expenses therein.

²² *Loney v. Oliver*, 21 Ont. 89; *Walker v. Moore*, 10 B. & C. 416.

²³ *Sikes v. Wild*, 4 B. & S. 421, 1 id. 587.

In *Pounsett v. Fuller*, 17 C. B. 660, A. agreed to sell to B. the shooting on the manor of C. It being afterwards discovered that A. had a mere equitable title, and C. refusing to confirm, B. brought an

action against A. for breach of the contract. Held, that he was only entitled to recover nominal damages and expenses incurred in the investigation of A.'s title; but not damages for the loss of his bargain, or expenses incurred in obtaining shooting elsewhere, or in fruitless endeavors to substitute a new contract on the failure of the original bargain. *Jervis, C. J.*, said: "If it could have been established that the contract being about to go off, on the representation or suggestion of Fuller, the plaintiff's attorney had prepared the deed of covenant for the purpose of supplying the defect in the title, and of carrying out the original contract, that would have been an expense incurred in endeavoring to perfect a title which was imperfect, and the defendant would have been liable."

²⁴ *Halley v. Winchester D. Lodge*, 97 Ky. 438.

On the breach of an agreement to make a contract for the sale of land the recovery cannot exceed nominal damages. But if the person holding an option for the purchase of it has paid the other money as the consideration for the option and which, if the person paying it elected to purchase was to be applied upon the purchase price, otherwise to belong to the person giving the option, the money so paid may be recovered if there is a refusal to execute the contract, although there is no technical breach of the contract to convey, the election to purchase having been made.²⁵

§ 583. **Recovery on parol contract.** The statute of frauds, although preventing the specific performance of a parol contract to convey land, does not prevent an action for damages for a breach of the contract. In Pennsylvania it is considered that the allowance of a recovery for the value of the land would be equivalent to specific performance, and therefore the value of the land cannot be shown in order to fix the damages; that is done by proving the value of what has been paid on the contract and the damages sustained in consequence of its breach.²⁶ The plaintiff may recover the consideration paid²⁷ and compensation for improvements made in reliance upon the contract,²⁸ less a reasonable charge for rent, there being no fraud on the part of the vendor. The failure to convey does not establish fraud, although the ability to convey existed.²⁹ The vendor must restore the vendee to the condition in which he found him; but he is not bound to compensate him for the

²⁵ *Boyd v. DeLancey*, 17 App. Div. (N. Y.) 567.

²⁶ *Stephens v. Barnes*, 30 Pa. Super. 127; *Hertzog v. Hertzog*, 34 Pa. 418; *Swayne v. Swayne*, 19 Pa. Super. 160.

²⁷ *Amonson v. Idaho Development Co.*, 25 Idaho 615; *Durham v. Wick*, 210 Pa. 128; *Mankin v. Jones*, 68 W. Va. 422; *Lipscomb v. Lipscomb*, 66 W. Va. 55; *Herrick v. Newell*, 49 Minn. 198; *Payne v. Hackney*, 84 Minn. 195, citing the

text; *McClowry v. Chroghan*, 31 Pa. 22.

²⁸ *Buck v. Pond*, 126 Wis. 382.

²⁹ *Glasse v. Stewart*, 32 Pa. Super. 385; *Stephens v. Barnes*, 30 id. 127; *Harris v. Harris*, 70 Pa. 170; *Welch v. Lawson*, 32 Miss. 170, 66 Am. Dec. 606.

In the absence of fraud in the origin of the contract the damages are measured by the money paid and the expenses incurred on the faith of the contract. *Rincer v. Collins*, 156 Pa. 342.

loss of a bargain,³⁰ except where that measure of recovery is recognized as to written contracts.³¹ The rent is to be based on the value of the property without the improvements made by the purchaser, and computed only from the beginning of the action.³² The purchaser is entitled to interest on the purchase-money paid from the time the action was begun;³³ this is to be diminished by the value of what he has realized from the land.³⁴ Expenses incurred in reliance on the performance of the contract are likewise an element of damages.³⁵

In New York the defense of the statute of frauds must be pleaded; if the complaint does not show whether the contract for the sale of land was oral or written and the answer does not plead the statute, objection to the proof of an oral contract cannot be made, and if such a contract be shown there may be a recovery of the same damages for its breach as if it had been written. Where the purchaser under such a contract had disposed of his home at a great sacrifice and removed therefrom to the property bought and taken possession of it, on being ejected in consequence of the sale of the property to another, the expense of removing, the value of the repairs made and of services rendered, and the damages resulting from the sale of the former home were elements of the loss for which the vendor was liable.³⁶ The vendor does not absolve himself from liability to his vendee for subsequent taxes and improvements by serving notice that he would not convey and would consider the vendee a trespasser, if the notice is withdrawn or he is led to believe that the original contract would be carried out.³⁷ In Texas if a party makes a parol agree-

³⁰ Allison v. Montgomery, 107 Pa. 455; Glasse v. Stewart, *supra*; Gray v. Howell, 205 Pa. 211.

³¹ Doty v. Doty, 118 Ky. 204, 2 L.R.A. (N.S.) 713. See sec. 584.

³² Padgett v. Decker, 145 Ky. 227.

³³ Id.; Reid v. Reid, 141 Ky. 402.

³⁴ Reid v. Reid, *supra*.

³⁵ Gray v. Howell, 205 Pa. 211.

³⁶ Mathews v. Mathews, 154 N. Y. 288.

Under the Montana Code the expense of moving the purchaser's family to the land, as well as attorney's fees and court costs incurred in defending an action to quiet the title brought by the vendor's previous grantee, may be recovered. Ross v. Saylor, 39 Mont. 559.

³⁷ Halthouse v. Rynd, 155 Pa. 43.

ment for the sale of lands, puts the purchaser in possession and afterwards takes advantage of the contract being void by the statute of frauds he is bound to pay for the improvements. If in such an agreement the vendor stipulates to pay for such improvements, but no stipulation is made as to rents, on his refusal to complete the agreement and a suit against him for the improvements the rents will not be allowed as a set-off.³⁸ Where a vendee goes into possession and makes valuable improvements under a parol contract and specific performance is successfully resisted by the vendor because the contract is not in writing, equity will in general decree compensation for improvements.³⁹ The measure of damages is not what it cost to put the improvements on the land, but the extent that the land is improved by them; the increase in value measures the recovery.⁴⁰ It may be shown by parol that a party entered and placed improvements on land under a parol contract to convey it, the owner denying the existence of the contract.⁴¹ The vendee may recover the money paid and the reasonable value of his services in working the farm, after deducting the income thereof received by him.⁴² The fact that the vendor who orally contracts to convey an interest in land is only a part owner of such interest does not absolve him from liability for damages to the extent to which he is unable to perform his agreement, he having put the vendee into possession.⁴³ In Washington if the vendor violates his parol contract by conveying the property to a third person he is liable for the value of the land at

³⁸ *Thouvenin v. Lea*, 26 Tex. 612; *Taylor v. Rowland*, id. 293; *Goodwin v. Lyons*, 4 Port. 297. See *Lister v. Batson*, 2 Kan. 420, 85 Am. Dec. 595, and an intimation of its disapproval in *Tracy v. Gunn*, 29 Kan. 508.

³⁹ *Thomas v. Kyles*, 1 Jones' Eq. 302; *Goodwin v. Lyon*, 4 Port. 297; *Boze v. Davis*, 14 Tex. 331; *Albea v. Griffin*, 2 Dev. & B. Eq. 9; *Herring v. Pollard*, 4 Humph. 362, 40 Am. Dec. 653; *Mathews v. Davis*, 6 Humph. 324; *Parkhurst v. Van*

Courtlandt, 1 Johns. Ch. 273. See *Cook v. Doggett*, 2 Allen 439. *Contra*, *McCracken v. McCracken*, 88 N. C. 272. But see *Luton v. Badham*, 127 N. C. 96, 53 L.R.A. 337, which is in harmony with the text, and which reviews the local cases.

⁴⁰ *North v. Bunn*, 128 N. C. 196.

⁴¹ *Luton v. Badham*, 127 N. C. 96, 35 L.R.A. 337.

⁴² *Miller v. Metz*, 103 Wis. 220; *Reid v. Reid*, 141 Ky. 402.

⁴³ *Cuddy v. Foreman*, 107 Wis. 519.

the time the breach was committed and for the loss resulting to the vendee from the purchase of material designed to be used in making further improvements on the premises.⁴⁴ But there are authorities which hold that the purchaser is not justified in making improvements in reliance on the contract and in advance of obtaining the title.⁴⁵

On the breach of a contract to sell all the trees standing on a tract of land which are adapted for a specified purpose at an agreed price per thousand feet, their purchaser may, after a sale of all the timber to another party, recover the market value of such trees as were included in his purchase, less the price he was to have paid for them, with interest on the balance, no question as to the right to recover for the loss of profits being involved.⁴⁶ The liability of a vendor who refuses to perform a parol contract for the sale of lands cannot, in a suit to recover the purchase-money, be mitigated by showing a depreciation in their value subsequent to the making of it.⁴⁷ Where there has been no written contract of sale binding on the vendor, but the matter rests on an invalid oral agreement the purchaser has no means of recovering the expenses incurred by him in investigating the title. He may, however, recover the deposit and auction duty as money paid upon a consideration that has failed.⁴⁸ Where one owning a life estate in land made a parol agreement to lease the same for a term of years and died before the term was to commence and before a lease was executed, the other party was entitled to recover from the administrator no more than his actual damages, namely, money paid on the agreement and interest; he could not recover the value of his bargain.⁴⁹ If the contract is for land and machinery thereon as a part of it and the vendee has sold the machinery and used the proceeds to pay the vendor, his liability is for the land as it

⁴⁴ *Cade v. Brown*, 1 Wash. 401.

⁴⁵ *Prentice v. Townsend*, 143 App. Div. (N. Y.) 151; sec. 582.

⁴⁶ *Clements v. Beatty*, 87 Ala. 238; *Mackey v. Olssen*, 12 Ore. 429.

⁴⁷ *Shryer v. Morgan*, 77 Ind. 479.

⁴⁸ Cases cited in n. 23, p. 2002; *Nicholson v. Wadsworth*, 2 Swanst. 387. See *Welch v. Lawson*, 32 Miss. 170, 66 Am. Dec. 606; *Hertzog v. Hertzog*, 34 Pa. 418.

⁴⁹ *McClowry v. Chrogan*, 31 Pa. 22.

was after the removal of the machinery.⁵⁰ If the owner of lands agrees with another to give him a portion of the purchase-money and also a certain parcel of land for his services in effecting a sale of the land of the former, there being no note or memorandum in writing of the promise, the whole contract, as well for the money as the land, is void; and no action will lie for either. In such case the injured party has no remedy at law upon the contract; he may, however, ignore it, and maintain his action to recover any money paid and the value of the services rendered.⁵¹ But if the other party is able and willing to fulfill, the party paying in money or services has not the option to disaffirm the contract.⁵² The consideration for the parol contract to convey land being the assignment of a contract, the purchaser's damages were not measured by the value of the contract, but by the value of the land after deducting the value of a life estate.⁵³ As has been shown on the repudiation by the vendor of a parol contract the vendee may recover the money paid under it.⁵⁴ Such a contract is void only at the instance of the party who pleads the statute and he cannot take any advantage of it, but is left in the condition he was in at the time he abandoned it. If the vendee repudiates after a demand by the vendor for compliance he cannot recover the money paid although the vendor conveyed the land to another.⁵⁵

§ 584. Elements of damage where *Flureau v. Thornhill* does not apply; mitigation. Where damages for loss of the bargain are recoverable by the vendee he is entitled to recover the difference between the contract price and the actual or market value⁵⁶

⁵⁰ *Hawley v. McCall*, 4 Ky. L. Rep. 626 (Ky. Super. Ct.).

⁵¹ *Clark v. Davidson*, 53 Wis. 317; *Fuller v. Reed*, 38 Cal. 99.

⁵² *Shaw v. Shaw*, 6 Vt. 69; *McKinney v. Harvie*, 38 Minn. 640; *Plummer v. Buckman*, 55 Me. 105; *Gray v. Gray*, 2 J. J. Marsh. 21; *Ketchum v. Evertson*, 13 Johns. 359, 7 Am. Dec. 384.

⁵³ *Bryant v. Everley*, 22 Ky. L. Rep. 345.

⁵⁴ *Wilkie v. Womble*, 90 N. C. 254.

⁵⁵ *Durham Con. L. & I. Co. v. Guthrie*, 116 N. C. 381.

⁵⁶ The value of a large tract of land is not to be ascertained by what could be obtained for it in small parcels if it was sold subject to incumbrances these are to be deducted. *Maxon v. Gates*, 136 Wis. 270.

It is error to charge the jury that the market value of land is

of the land at the time when the conveyance should have been made, whether then enhanced by improvements or otherwise, and all other damages which result from the vendor's breach of the contract; further, the vendor must place his vendee, as near as money can do so, in the same position in which he would have been if he had obtained that for which he contracted.⁵⁷

the highest price which the land will bring in the market, regardless of the causes that contribute to its value, because land may bring under peculiar circumstances and on very favorable terms much more than its fair cash value. *Dady v. Condit*, 188 Ill. 234, 240.

So far as the cash market value of the land in question is affected by expected changed conditions the fact may be shown. *Dady v. Condit*, 209 Ill. 488.

All the objects for which the land is desirable may be regarded. *Warren v. Wheeler*, 21 Me. 484.

⁵⁷ *Harten v. Löffler*, 29 App. D. C. 490; *Walshe v. Endon*, 129 La. 148; *Beetem v. Follmer*, 87 Neb. 514; *Anderson v. Olmoutka*, 84 Neb. 517; *Vernam v. Wilson*, 31 Pa. Super. 257; *Doty v. Doty*, 118 Ky. 204, 2 L.R.A.(N.S.) 713; *Erickson v. Bennet*, 39 Minn. 326; *Lancoure v. Dupre*, 53 Minn. 301; *Holland v. Hardy*, 3 New South Wales 450; *Kempner v. Cohn*, 47 Ark. 519, 58 Am. Rep. 775; *Skaaraas v. Finnegan*, 31 Minn. 48 (the time when the agreement was made is that at which the market value of the property is to be determined, not the time of purchaser's eviction by the owner); *S. C.*, 32 Minn. 107 (improvements made in good faith recovered for); *Kirkpatrick v. Downing*, 58 Mo. 32; *Hartzell v. Crumb*, 90 Mo. 629; *Combs v. Scott*, 76 Wis. 662; *Muenchow v. Roberts*, 77 Wis. 520; *Wilson v. Robertson*, 1

Brun. Coll. Cas. 109, 1 Overt. 464 (the value was determined as of the time of the trial); *Sanford v. Cloud*, 17 Fla. 532, 554; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Chartier v. Marshall*, 56 N. H. 478; *Yokom v. McBride*, 56 Iowa 139; *Turner v. Lord*, 92 Mo. 113 (the same rule applies in an action for the breach of a bond to convey as for the breach of the contract to be performed so long as the penalty of the bond is not exceeded); *Allen v. Atkinson*, 21 Mich. 351; *Cannell v. McClean*, 6 Har. & J. 297; *Hopkins v. Yowell*, 5 Yerg. 305; *Dustin v. New Comer*, 8 Ohio 49; *Trull v. Granger*, 8 N. Y. 115; *Engel v. Fitch*, L. R. 3 Q. B. 314, 4 id. 659; *Martin v. Wright*, 21 Ga. 504; *Cox v. Henry*, 32 Pa. 18; *Burr v. Todd*, 41 id. 206; *Foley v. McKeegan*, 4 Iowa 1, 66 Am. Dec. 107; *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463; *Drake v. Baker*, 34 N. J. L. 358; *Godwin v. Francis*, L. R. 5 C. P. 295; *Sweem v. Steele*, 5 Iowa 352; *Case v. Wolcott*, 33 Ind. 5; *Naylor v. Parker* (Tex. Civ. App.), 139 S. W. 93.

In *Robertson v. Dumaresq*, 2 Moore P. C. (N. S.) 66, the value of the land at the time of the trial was fixed as the basis for computing damages. In this case the land was to have been conveyed to the plaintiff, who had been an officer in the army, in consideration of his making a settlement in New South Wales; the condition was per-

This rule applies to one who undertakes to procure a conveyance from another and fails on account of the refusal of that person,⁵⁸ and to one who unauthorizedly assumes to act as agent for the owner and makes a contract as such to convey.⁵⁹ The vendee may not only recover payments he may have made, with interest thereon and upon the sum which represents the profits lost and expenses of investigating the title, but damages with reference to an enhanced value which he could make on a resale pursuant to an actual contract, of which the vendor had notice,⁶⁰

formed, but the governor failed to convey.

⁵⁸ *Conner v. Baxter*, 124 Iowa, 219; *Skaaraas v. Finnegan*, 31 Minn. 48, 32 Minn. 107; *Gale v. Dean*, 20 Ill. 320.

In *New Haven & N. Co. v. Hayden*, 117 Mass. 433, the defendant agreed to secure for the plaintiff a right of way free of expense. On his failure to perform plaintiff resorted to the usual proceedings and subsequently brought an action for the breach of the contract. The following items entered into the damages: 1. Land taken for the roadbed five rods in width, and also land outside that limit if it was required. 2. Damages for land taken for the use of the road and ordered paid by the commissioners, although payment had not been made. 3. Money paid for building farm bridges over the road and for building a bank wall if the land damages were decreased thereby to an amount equal to their cost. 4. The ordinary legal costs and compensation to attorneys and other agents for their services in settling the damages for land taken. The defendant was not liable for land taken exclusively for stations or for procuring material to be used in the construction of the road, nor for money paid to the public officers

for their services in assessing damages to lands taken.

⁵⁹ *Le Roy v. Jacobosky*, 136 N. C. 443, 67 L.R.A. 977; *Godwin v. Francis*, L. R. 5 C. P. 295; *Spedding v. Nevell*, 4 id. 212; *Gibbs v. Jamison*, 12 Ala. 820; *Hammon v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Holland v. Hardy*, 3 New South Wales, 450; *Tulane Educational Funds Adm'rs v. Baccich*, 129 La. 469. (Defendant knew he was not the owner of the title to part of the land he contracted to convey; the purchaser secured such part from the owner at a price exceeding its value; he recovered the difference between such price and that agreed to be paid to the defendant.)

⁶⁰ *Munson v. McGregor*, 49 Wash. 276 (the sum at which the vendor sold the land pending his contract with the original vendee was assumed to be its value); *Mailer v. Clayton*, 1 West Aust. L. R. 3; *Engel v. Fitch*, L. R. 3 Q. B. 314; *Godwin v. Francis*, *supra*; *Kiger v. McCarthy Co.*, 10 Cal. App. 308 (including interest on each installment paid and interest on deferred payments pursuant to the contract); *Hopkins v. Grazebrook*, 6 B. & C. 31; *Bigler v. Morgan*, 77 N. Y. 312; *Sanderlin v. Willis*, 94 Ga. 171; *Violet v. Rose*, 39 Neb. 660;

or caused by improvements made by him.⁶¹ In Texas a majority of the judges of one of the courts of civil appeals have held a vendor in culpable default liable for the profits which might have been realized on a resale of the land though he had no notice of the contract for resale at the time he agreed to convey, but had such notice in time to have avoided the loss.⁶² The right to recover the profits a resale would have brought is lost by practicing deceit on the vendor in respect thereto.⁶³ There cannot be a recovery of the rental or profits of a mill not on the land; and though the principal inducement to its purchase was the existence of a mill-site thereon and the vendor knew it was the purchaser's intention to erect a mill thereon, the measure of recovery is not thereby affected.⁶⁴ Expenses incurred in getting a survey made of the estate or plans preparatory to the making of the contract, but before it was entered into, cannot be recovered by the purchaser, nor can the expense of a conveyance prepared before the title has been approved and before it is known whether objections raised to the title can be answered by the vendor.⁶⁵ The attorney's fees of a purchaser in proceedings to foreclose a lien for part of the purchase price paid cannot be recovered on a breach by the vendor.⁶⁶ If interest has been recovered on the purchase price there cannot be a recovery for the loss of interest on money which has lain idle, nor for the

McMurtry v. Blake, 45 Neb. 213;
Lynch v. Wright, 94 Fed. 703.

The sum paid may not be recovered. Williams v. Hill I. Co., 48 Wash. 695.

⁶¹ Maxon v. Gates, *supra*; Cade v. Brown, 1 Wash. 401; Wither-
spoon v. McCalla, 3 Desaus. 245;
Thompson v. Kilcrease, 14 La. Ann.
340; Winters v. Elliott, 1 Lea 676.

The purchaser at a void guardian's sale who enters upon land under the deed and bona fide makes permanent improvements thereon may recover therefor to the extent that the market value of the land is enhanced thereby. Hicks v. Blakeman, 74 Miss. 459.

⁶² Naylor v. Parker (Tex. Civ. App.), 139 S. W. 93. The same principle as to notice has been applied in Texas to carriers. The rule is peculiar to that state and one or two others. See the chapter on Carriers.

⁶³ Smith v. Cauthen, 98 Miss. 746.

⁶⁴ Claggett v. Easterday, 42 Md. 617.

⁶⁵ Hodges v. Earl of Litchfield, 1 Scott, 443; 2 Addison on Cont., § 529.

⁶⁶ Evans v. Ozark O. Co. 103 Ark. 212.

loss of a lease made before notice of the vendor's refusal to comply with his contract.⁶⁷ Interest cannot be recovered on the damages if they were so uncertain that the vendor could not know in advance of the trial how much they were.⁶⁸ The liability of the vendor may be reduced by proof of the reasonable rental value of the premises while held by the vendee with interest thereon from the close of each year's possession.⁶⁹ A vendor who sells land to a third person is liable to a previous purchaser for its value at the time of such sale.⁷⁰ The rule of liability, stated in general terms, is for such damages as may reasonably be said to have naturally arisen from the breach of contract, or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise therefrom.⁷¹ The Kentucky cases have recently been held to favor the view that, in the absence of fraud or bad faith, the failure to convey, though that was because of lack of title, is attended with liability for the difference between the contract price and the value of the land when the contract was made, rather than its value at the date contemplated for conveyance, and reasonable expenses prudently incurred under the contract.⁷² Where the contract of purchase was made for the benefit of a third party to whom the purchaser became liable because of the vendor's inability to convey the whole of the land contracted for, the vendor, knowing the object for which the contract was made, the situation was regarded as akin to that which arises upon the breach of a covenant against incumbrances, and the vendor was liable for the additional price the purchaser necessarily paid

⁶⁷ *Kempner v. Cohn*, 47 Ark. 519, 58 Am. Rep. 775.

In Louisiana there cannot be a recovery of interest on money deposited, nor money expended for attorney's fees in a suit for specific performance, nor, where the vendor was the vendee's landlord, for rent paid after the breach of the contract. *Walshe v. Endom*, 129 La. 148.

⁶⁸ *Dady v. Condit*, 209 Ill. 488. See §§ 347, 348.

⁶⁹ *Beetem v. Follmer*, 87 Neb. 514; *Anderson v. Ohnoutka*, 84 Neb. 517.

⁷⁰ *Phillips v. Herndon*, 78 Tex. 378, 22 Am. St. 59.

⁷¹ *Jaques v. Miller*, 6 Ch. Div. 153; *Jones v. Gardiner*, [1902] 1 Ch. 191; *Morton v. Witte*, 147 App. Div. (N. Y.) 94.

⁷² *Freeman v. Falconer*, 120 C. C. A. 32, 201 Fed. 785. See *Whitworth v. Pool*, 29 Ky. L. Rep. 1104.

for so much of the land as the former could not convey.⁷³ As in other cases, special damages cannot be recovered unless they are specially alleged; hence a special allegation as to commissions paid or liability therefor on a resale of the land is necessary.⁷⁴ Where the vendor's title is imperfect and he is for that reason unable to perform his contract, but the vendee has perfected the title by extinguishing an incumbrance or buying in an adverse title, his damages will be limited to his outlay for this purpose,⁷⁵ and he can charge no more to the vendor for moneys expended in perfecting the title than would otherwise be recoverable for breach of the contract as damages.⁷⁶ A vendor who has sold part of the land conveyed may mitigate his liability by repurchasing it and tendering a deed to the purchaser; the refusal to accept a conveyance mitigates the recovery of the latter to the rental value of the land from the time the contract to buy was made until the time of the offer to convey.⁷⁷ Where the purchaser has made improvements on the land and recovers the value thereof at the date of the breach accrued liens are to be deducted; he may not recover the value of the land plus the cost of the labor and material represented by the improvements.⁷⁸ The breach of a contract to convey a mining claim, the purchaser having gone to the locality prepared to work it, which he would have done if possession could have been obtained, is cause for the recovery of interest on the profits he might have made while excluded; these may be shown by the proceeds of the mine after possession was secured. There is no liability for the traveling expenses and loss of time of the purchaser incidental to his efforts to obtain title, or in connec-

⁷³ *Boyden v. Hill*, 198 Mass. 477.

⁷⁴ *Shapman M. & R. Co. v. Sussman* (App. Div.), 131 N. Y. Supp 645.

⁷⁵ *Kerley v. Richardson*, 17 Ga. 602; *Baker v. Corbett*, 28 Iowa 317; *Hull v. Harris*, 64 Ga. 309; *Boyden v. Hill*, *supra*. But compare *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 403.

⁷⁶ *Spring v. Chase*, 22 Me. 509,

39 Am. Dec. 595; *Foote v. Burnett*, 10 Ohio 334; *Dimmick v. Lockwood*, 10 Wend. 142; *Donohoe v. Emery*, 9 Metc. (Mass.) 68; *Davis v. Lyman*, 6 Conn. 255; *Cox v. Henry*, 32 Pa. 18.

⁷⁷ *Claggett v. Easterday*, 42 Md. 617.

⁷⁸ *Jennings v. Oregon L. Co.*, 48 Ore. 287.

tion with his suit; the recovery so far as machinery bought for use in the mine was limited to interest on its value.⁷⁹

§ 585. **Defaulting vendee's rights.** If a vendee who has partly performed makes default, in consequence of which the sale fails of consummation, he is seldom entitled to relief or compensation for his part performance; he cannot recover a deposit or the money paid.⁸⁰ If the vendor has in his hands a sum paid him on the contract of purchase largely in excess of the damages sustained by him in consequence of the loss of the bargain he may retain it, because while the contract subsists the party in default cannot recover it or any equivalent of it in damages, the vendor not being in default.⁸¹ A recent California case, which was carefully considered and the opin-

⁷⁹ *Hogdendorn v. Daniel*, 202 Fed. 431, 120 C. C. A. 537.

⁸⁰ *Findley v. Koch*, 126 Iowa 131; *El Paso C. Co. v. Stafford*, 176 Fed. 41, 99 C. C. A. 515; *Hillyard v. Banchor*, 85 Kan. 516; *Branch v. Taylor*, 40 Tex. Civ. App. 248; *Donovan v. Hanauer*, 32 Utah 317; *McLean v. Wedell*, 31 Utah 468; *Cash v. Meisenheimer*, 53 Wash. 576; *Jennings v. Horton*, 43 Wash. 301; *Palmer v. Washington S. I. Co.*, 43 Wash. 451; *Woodman v. Blue Grass L. Co.*, 125 Wis. 489; *Bradford v. Parkhurst*, 96 Cal. 102, 31 Am. St. 189; *Joyce v. Shafer*, 97 Cal. 335; *Garberino v. Roberts*, 109 Cal. 125; *Glock v. Howard & W. C. Co.*, 123 Cal. 1, 69 Am. St. 17, 43 L.R.A. 199; *Patterson v. Murphy*, 41 Neb. 818; *Whiteman v. Perkins*, 56 Neb. 181; *Ex parte Barrell*, L. R. 10 Ch. 512; *Ketchum v. Evertson*, 13 Johns. 365; *Green v. Green*, 9 Cow. 46; *Battle v. Rochester City Bank*, 5 Barb. 414; *Davis v. Hall*, 52 Md. 673; *Estes v. Browning*, 11 Tex. 237, 60 Am. Dec. 238; *Fuller v. Hubbard*, 6 Cow. 13; *Hudson v. Swift*, 20 Johns. 24; *Gillet v. Maynard*, 5 id. 85, 4 Am. Dec. 329;

Roach v. Waid, 2 T. B. Mon. 142; *Essex v. Daniel*, L. R. 10 C. P. 538; *Power v. North*, 15 S. & R. 12; *Frost v. Frost*, 11 Me. 235; *Rounds v. Baxter*, 4 Me. 454; *Page v. McDonnell*, 46 How. Pr. 52; *Haynes v. Hart*, 42 Barb. 58.

In *Bullock v. Adams*, 20 N. J. Eq. 367, 374, Chancellor Zabriskie said: "It is common both in sales at auction and other sales to stipulate that the percentage or part paid on the contract shall be forfeited if the purchaser does not comply with his contract, and I am not aware of any case where the payment so made has been recovered at law, even where the vendor, upon resale, has received a higher price. I know of no principle upon which such payment can be recovered either at law or in equity."

⁸¹ *Sanders v. Brock*, 230 Pa. 609, 35 L.R.A.(N.S.) 532; *Newberry v. Ruffin*, 102 Va. 73; *Downey v. Riggs*, 102 Iowa 88, quoting the text; *Lawrence v. Miller*, 86 N. Y. 131; *McManus v. Blackmarr*, 47 Minn. 331; *Grant v. Munch*, 54 Minn. 111; *Martin v. McCormick*, 4 Sandf. 366; *Gobble v. Linder*, 76

ion in which is worthy of examination, lays down these propositions: If time is made of the essence of the contract and performance by the purchaser a condition precedent, and it is further expressed that he shall forfeit all rights under the contract and all moneys paid thereon, the purchaser, being in default, cannot, without excusing his default, by tendering the amount due, acquire either a legal or equitable right to recover the moneys paid; such right exists only when, after a breach by the purchaser, the vendor agrees to a mutual abandonment of the contract. The vendor's refusal to accept such a tender and to convey does not rescind the contract. If time is made of the essence equity will not ignore that condition, nor relieve against it. The vendor's right to retain the money paid is independent of any express condition of the contract to that effect.⁸²

Where the contract is terminated by the vendor for the vendee's default, according to the English doctrine, the question whether a deposit is forfeited depends on the intention of the parties. A. agreed to demise a house to B. for a term in consideration of 300*l.* then paid "by way of deposit, and in part of 5,500*l.*," the whole purchase-money; possession to be delivered and accepted on a day named; B. agreed to accept the demise, but on the day fixed therefor refused; A. afterwards disposed of the house to a third person. This agreement contained a clause providing for a penalty of 1,000*l.* to be paid by either party making default. And being silent in respect to forfeiture of the deposit in case of the vendee's default, it was held not forfeited because there was evidence in the agreement of a different intention. Lord Denman, C. J., said: "The ground on which we rest this opinion is that in the absence of any specific provision the question whether the deposit is forfeited depends on the intent of the parties to be collected from the whole instrument; but as this imposes on either party that

III. 157 (exchange of farms; agreement to "forfeit and pay as damages" a sum named, held to be for stipulated damages); *Cox v. Smith*, 93 Ark. 371.

⁸² *Glock v. Howard & W. C. Co.*, *supra*; *Grant v. Munch*, 54 Minn. 111; *Skookum O. Co. v. Thomas*, 162 Cal. 539.

could make a defense a penalty of 1,000*l.*, the intent of the parties is clear that there should be no other remedy. * * * The consequence appears to be that this vendor may sue for the penalty and recover such damages as a jury may award; but he cannot retain the deposit; for that must be considered, not as an earnest to be forfeited, but in part payment. But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser.”⁸³

If the agreed deposit has not been paid it cannot be recovered as such when the vendee has refused to perform—even if the intention is manifest that in that event the deposit shall be absolutely forfeited. One of the conditions of a sale⁸⁴ was that, should the purchaser neglect or fail to comply with any of the conditions his deposit money should be actually forfeited to the vendor, who should then be at liberty to resell the property at public auction or private sale; and if the price obtained on the second sale should not be sufficient to cover the amount bid at the present sale, with all the expenses incidental to it, the deficiency should be paid by the defaulter to the vendor. The deposit was not paid, and on a resale a less sum than the defendant's bid was realized. In an action on the contract Lord Campbell, C. J., said: “There having been an actual forfeiture of the deposit, by the express words of the seventh condition, the deposit, if paid, could not in any event be recovered back by the purchaser; and the seller would have been entitled to any additional benefit on a resale. But the seller having obtained a right to the forfeited deposit, and making a further demand of damages sustained on the resale, it becomes necessary to consider what was the nature of the deposit. Now it is well settled that by our law, following the rule of the civil law, a pecuniary deposit upon a purchase is to be considered as a payment of part of the purchase-money, and not as a mere pledge.”⁸⁵ Therefore, in this case, had the deposit been paid the balance only of the

⁸³ *Palmer v. Temple*, 9 A. & E. 508.

⁸⁴ *Ockenden v. Henly*, El., B. & E. 485.

⁸⁵ 1 Sugden on Vendors, p. 73 (4th Am. ed.). See 2 Warvelle on Vendors, § 927 (2d ed.).

purchase-money would have remained payable. What then, according to the * * * condition, is the deficiency arising upon the resale which the seller is entitled to recover? We think the difference between the balance of the purchase-money on the first sale and the amount of the purchase-money obtained on the second sale; or, in other words, the deposit, although forfeited, so far as to prevent the purchaser from recovering it back, as without a forfeiture he might have done,⁸⁶ still it is to be brought by the seller into account if he seeks to recover as for a deficiency on a resale." Under a contract with a like condition in another case,⁸⁷ where the deposit had been paid but there had been no resale, Lord Coleridge, C. J., said: "The deposit, therefore, is absolutely forfeited, and the vendor is at liberty, not bound, to resell; and may recover against the purchaser any deficiency on the second sale, together with the expenses of the abortive sale. The property not having been resold in this case the expenses to which the vendor has been put with reference to the abortive sale are recoverable from the purchaser, plus the deposit money. The case of *Ockenden v. Henly*⁸⁸ has been referred to; but the circumstances of that case, which are somewhat complicated, are wholly different from those of the present; the deposit had never been paid, and the action was brought for the loss on the resale and the expenses of the resale; these expenses formed part of the deficiency on the resale, occasioned by the default of the purchaser, and the loss on the second sale would be the deficiency of price and the expenses."

§ 586. **Same subject; conflict of American cases.** There is much conflict in the American decisions as to a purchaser's right in respect to payments made on a contract of purchase, after the vendor has put an end thereto for the vendee's default. One class of cases holds that, under such circumstances, the payments made are forfeited and lost; and another that the putting an end to a contract by the vendor for such cause is a rescission, and entitles both parties to be put in *statu quo*. In a case of the former class the contract contained this clause:

⁸⁶ *Palmer v. Temple*, 9 A. & E. 508.

⁸⁷ *Essex v. Daniel*, L. R. 10 C. P. 538.

⁸⁸ *El.*, B. & E. 485.

"And in case of failure on the part of said party of the second part to make either of the preceding payments when due, or in any respect to fulfill this contract, the same shall become void on such failure if the party of the first part shall elect to rescind it, and on his previously giving notice of at least thirty days of such election; * * * and besides, the party of the second part shall, in case of such failure and consequent rescinding of the contract, forfeit \$100 as the ascertained and liquidated damages, and shall retain no legal or equitable interest in the premises after this contract is rescinded." There was afterwards default, rescission by notice, and surrender of possession. Welles, J., said: "The cases in which a vendee is allowed to recover back money paid on a contract for the purchase of real estate where the contract has been rescinded are, first, where the rescission is voluntary and by the mutual consent of both parties, and without the default or wrong of either; second, where the vendor is incapable or unwilling to perform the contract on his part; or third, where the vendor has been guilty of fraud in making the contract. In either of those cases it would be against equity and conscience for the vendor to retain the money, and the law implies a promise on his part to refund it. But in a case where the vendor has in all respects performed his part and the rescission is entirely in consequence of the unexcused default of the vendee in making further payment, to allow him to recover back the money paid would in my opinion be little short of offering a bounty for the violation of contracts."⁸⁹ But in a subsequent case in the same state, and in numerous cases in other states, it is held that where a vendor, in pursuance of a right reserved in the contract of sale, declares the contract void and re-enters and takes possession of the lands and sells the same to another person, the contract is rescinded; and the vendee

⁸⁹ *Battle v. Rochester City Bank*, 5 Barb. 414. See *Ashbrook v. Hite*, 9 Ohio St. 357, 75 Am. Dec. 468.

The rescission of a contract does not operate as though it had never existed, and if the vendee sues upon the contract he is bound by a clause
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of it forfeiting payments made if default should occur. He cannot ignore the contract because it would follow that the payments sought to be recovered were voluntarily made. *Patterson v. Murphy*, 41 Neb. 818.

may recover payments made by him in an action for money had and received,⁹⁰ with interest if the vendor has had possession, and without it if the purchaser has been in possession,⁹¹ and the reasonable value of improvements made in good faith while he was in possession, less the value of the use of the premises.⁹² If the vendor has sustained actual damage by the breach of the contract the vendee's recovery is diminished to that extent.⁹³ In the absence of proof showing such damage if the vendee, notwithstanding his default, is willing and able to take the land, it is immaterial that it has depreciated in value and that the vendor has removed a cloud on the title.⁹⁴ If there is mutual default money paid "as a forfeit" by the purchaser remains in the vendor's hands as if it were had and received for the use of the other, and may be recovered by him after the vendor has recouped the damage sustained by reason of the failure to purchase.⁹⁵

On principle, if a contract is rescinded by the vendor, even for the vendee's default, the former should restore what he has received upon it; and this view is believed to be sustained by the weight of authority.⁹⁶ Even if the contract shows that the parties intended that on default of the vendee all previous payments should be forfeited and it be declared void at the vendor's option, this intention should be disregarded for the same reasons

* ⁹⁰ *Gwin v. Calegaris*, 139 Cal. 384; *Merrill v. Merrill*, 103 Cal. 287; *Miller v. Metz*, 103 Wis. 220, citing the text; *Phelps v. Brown*, 95 Cal. 572; *Utter v. Stuart*, 30 Barb. 20, 2 Hill 288; *Jacoby v. Stettler* (Pa.) 4 Atl. 342; *Wotring v. Shoemaker*, 102 Pa. 496; *Hudson v. Reel*, 5 id. 279; *Lawrence v. Simons*, 4 Barb. 354; *Fancher v. Goodman*, 29 id. 315; *Ellenwood v. Putts*, 63 id. 321; *Feay v. Decamp*, 15 S. & R. 227; *Gilbreth v. Grewell*, 13 Ind. 484, 74 Am. Dec. 266; *Burge v. Cedar Rapids, etc. R. Co.*, 32 Iowa 101; *Franklin v. Miller*, 4 A. & E. 599; *Hunt v. Silk*, 5 East 449; *Beed v. Blandford*, 2 Y. & J.

278; *McCarty v. Moorer*, 50 Tex. 287.

⁹¹ *Kicks v. State Bank*, 12 N. D. 567.

⁹² *Bartlett v. Smith*, 146 Mich. 188, 117 Am. St. 625, citing the text; *Sheard v. Welburn*, 67 Mich. 387.

⁹³ *Phelps v. Brown*, 95 Cal. 572; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. 257; *Easton v. Cressey*, 100 Cal. 75.

⁹⁴ *Easton v. Cressey*, *supra*.

⁹⁵ *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. 187.

⁹⁶ Cases cited in first three notes to this section.

that govern in other cases of penalties.⁹⁷ If the vendee comes to a court of equity to be relieved of the loss of his earnest money the case will be disposed of on equitable principles. If the vendor has paid out some of the money in reasonable expenses fairly incurred in making or attempting to carry out the contract he will not be liable therefor. And in determining how much the vendor may retain the court will not confine itself to a consideration of his disbursements, but will regard his rights in view of the situation in which he is left. If at the termination of the contract the reasonable market value of the land was not equal to the amount due the vendee the vendor would be the loser to that extent by reason of the vendee's breach of the contract. He will not be allowed to make a profit out of his wrong, and cannot be placed in a more favorable situation than he would have occupied if he had complied with his contract. His recovery can only go to the extent that the vendor should not be allowed to retain money over his costs and reasonable expenses on account of the contract.⁹⁸ If the vendee elects to consider the contract at an end and the vendor rests upon the former's breach, he alleging that the vendor has no title, and issue is joined upon that allegation, no claim for specific performance being set up by the vendor, and it is adjudged in equity that the title is good there cannot be a recovery of the money paid, neither will the vendee be entitled to specific performance of the contract.⁹⁹ Where the contract is silent concerning the rights of the parties in the money deposited the vendee may recover it in so far as the vendor has not been damaged by the default.¹ The recovery of judgment for it is an affirmance of the contract of sale and entitles the vendee to the rents and profits of the land from the time of his default.² The right of action of a vendee who may not demand a deed until payment of the last instalment of the purchase-money does not arise until it has been made.³

⁹⁷ *Allison v. Cocke*, 21 Ky. L. Rep. 434, 23 Ky. L. Rep. 1589.

⁹⁸ *Ibid.*, as reported in the latest volumes cited.

⁹⁹ *Steinhardt v. Baker*, 163 N. Y. 410, affirming 25 App. Div. (N. Y.) 197.

¹ *Norris v. Letchworth*, 140 Mo. App. 19.

² *Ferguson v. Epperly*, 127 Iowa 214.

³ *Riverside R. Co. v. Husted*, 109 Va. 688.

It is provided by statute in South Dakota that where an obligation imposes a forfeiture by reason of failure to comply with all its provisions the party may be relieved therefrom on making full compensation to the other, and that contracts for stipulated damages shall be void except in cases where it would be impracticable or extremely difficult to fix the actual damages. A contract for the sale of land provided that the purchaser should take possession, pay therefor in instalments, and that in case of default all payments made should be retained by the vendor as rent, free and clear of any demand of the vendee. Four days after being ejected the vendee offered in good faith to pay the full sum due the vendor, which he refused to accept. The recovery of the difference between the amount paid on the purchase price and the reasonable value of the use of the land was sustained.⁴

§ 587. **Adjustment of counter demands on rescission.** In Kentucky, where the vendee recovers against the vendor purchase-money and interest as damages for breach of a covenant to convey lands, there can be no deduction at law for rents and profits received by the covenantee. If the latter has had possession, taken the rents and profits, made improvements or committed waste these things are too complicated for a jury, and properly belong to chancery and must be settled there.⁵ In that state, whether a judgment at law be given for either vendor or vendee, and whether the vendee is entitled to recover only consideration paid and interest, or enhanced damages by reason of the vendor's fraud or wilful default, it may be suspended by a suit in equity until there has been an adjustment in the latter forum of rents and profits, compensation for improvements or waste; and the amount of the judgment will be subject to equitable deductions which result from that adjustment. The rule on these subjects appears to be the same in such cases as upon rescission of the contract in equity at the instance of either party.⁶ As a rule the interest earned by the consideration paid

⁴ *Barnes v. Clement*, 12 S. D. 270.

⁵ *Combs v. Tarlton*, 2 Dana 464 (1834).

⁶ In *Wickliffe v. Clay*, 1 Dana 585, it was decided that where one in possession of land, held bona fide as his own, has erected buildings

for the land, up to the time of rescission, would be considered an equitable set-off for the use of the land during the like

thereon he or those claiming under him may remove them without incurring any responsibility to the owner of the paramount title. If one buys land with buildings upon it, which he moves off, and then loses the land by a better title appearing his vendors, upon a rescission of their contract, will be entitled to retain out of the consideration to be restored the value of the buildings so removed, assessed at their value when removed, not their estimated value at the time of the sale, but so much as they would have been worth—preserved with common care—as additions to the land at the time of the erection, and equivalent to what the occupant could have recovered for them of the successful claimant. And where the removal was without the consent or privity of the party against whom the decree for restoration of the purchase-money is obtained he may, because of the difficulty of the proof, elect to return the value of the buildings according to the above rule or as movable structures. The use of land and the interest on the consideration paid for it are, in general, to be considered equivalent and to be set off against each other. But, as the evictor may recover for *mesne* profits for five years, the party evicted is entitled to interest for the same time on the consideration recovered from his vendor, and such vendee should pay interest on so much of the consideration as was unpaid while he held possession.

Williams v. Wilson, 4 Dana 507 (1836): Part of the consideration remaining unpaid, the purchaser was required to account for the

same proportion of the total value of the rents that the unpaid part bore to the whole consideration.

Richardson v. McKinson, Litt. Sel. Cas. 320 (1821): Where a vendee of land has been let into possession and the contract of sale has been rescinded on account of the misrepresentations of the vendor and his inability to make a good title, the vendee cannot be compelled to pay rent beyond the profits actually received. In such a case an inquiry as to how much the premises would have been reasonably worth annually to a man of ordinary industry and diligence is unnecessary and irrelevant. The vendee will be entitled to pay for the improvements made by him when the premises go out of his hands into the hands of the vendor.

Caldwell v. White, 4 T. B. Mon. 561: Where the vendee rescinds the contract he must account for the rents from the date of his purchase.

Gaines v. Bryant, 4 Dana 395: Where the possession is wrongfully withheld from a vendee he is not obliged to pay interest on purchase-money due.

Barnett v. Higgins, 4 Dana 565 (1836): A purchaser who had received the possession, but failing to get a title had recovered judgment against his vendor for the purchase-money and interest, is accountable in equity to the vendor for the rents and for waste and is entitled to pay for improvements. And if he is allowed in the adjustment for improvements made by him in clearing land, etc., at their value when first made he should be charged with the rent of them as well as for those which were on the

period. It being, however, the object of equity in such cases to restore the parties so far as may be to *statuo quo*, wide lati-

land when he entered. In adjusting an account of rents, improvements, etc., for a decree the rents were computed up to a certain time, and decree rendered for the balance; the cause was then appealed, reversed and remanded with directions to ascertain by a commissioner the value of the use, not before included, of certain improvements, and also the amount of rents, of waste, etc., accrued after the period to which the accounts were brought down in the former adjustment, and up to the time when the purchaser would relinquish the possession and for a decree for the balance so ascertained.

Stephenson v. Harrison, 3 Litt. 171 (1823): Where a man covenants to convey land to which he knows he has no title and to deliver possession on a particular day the value of the land on the day the possession was to have been delivered, with interest, is the measure of damages. Judgment at law had been recovered for the purchase-money and a bill in equity was filed for compensation for failure of title to part of the land. The court say: "Here it is apparent that Harrison not only had no title to the tract, * * * but that prior to his sale to the complainant he must have had a perfect knowledge of Hays' right; and, although the sale was for three thousand one hundred acres, including the tract of Hays, it is in proof that the four hundred acres of Hays formed such an essential inducement to the purchase that without the separate and specific covenant of Harrison for that part the complainants would

not have completed the purchase. Besides, the proof is satisfactory that the tract of Hays is in value greater than an average four hundred acres and was so considered by the complainant when making the purchase, and, after selling the land, Harrison, for an adequate sum, might have obtained from Hays his four-hundred-acre tract. The failure of Harrison to comply with his covenant thus made, and which might have been thus fulfilled, instead of being the result of an honest inability to perform his undertaking must be ascribed to a wilful and fraudulent intention not to comply with his stipulations in relation to the tract of Hays, and ought to subject him to the complainants' demand for compensation in a sum equal to the value of the tract of Hays together with the accruing interest thereon. The value should be ascertained by the inquest of a jury who, in their inquiry, ought to be confined to the 1st of October, 1817, the time when by the covenant of Harrison the possession of Hays' tract was to be delivered to the complainants."

In *Combs v. Tarlton*, 2 Dana 464 (1834), Judge Underwood said: "Where the profits of the land in the possession of the vendee are of more value than the interest of the money enjoyed by the vendor it is utterly unjust to allow the vendee to recover the purchase-money with its interest and to hold the profits of the land. If the vendee is evicted by an adverse paramount claim and becomes responsible to the evictor for the *mesne* profits then he ought to recover interest from his vendor for as many years as

tude is given to show how the application of the rule would work injustice. Likewise either party will usually be permitted to

he is or may be required to account to the evictor for profits. But where the vendee is not bound to account for the profits of the land to any one, and where, as in this case, the profits greatly exceed the interest of the purchase money, manifest injustice would result from permitting the vendee to recover interest and likewise to keep the profits. The principle upon which all contracts ought to be rescinded is that the parties should be placed in *statu quo*. If the contract between the vendor and the vendee is set aside by the chancellor he would never give interest to the vendee and allow him also to keep the profits. On the contrary, he would say to the vendee: 'As you have enjoyed all you contracted for and as the profits of the land are as valuable, or more so, than the interest on the purchase-money, you shall not have both; but if you require a restoration of the purchase-money and interest you must restore, on your part, the land and its profits; but as by the contract you and the vendor regarded the land and purchase-money equivalent to each other, I (the chancellor) will regard the use of each as of the same value and take no account between you for interest or profit.' This doctrine—where the land yields a profit, or can be made, by such care, attention and management as proprietors usually bestow, to yield a profit equal to the interest on the purchase-money—is sustained by the clearest principles of reciprocal justice. But where the land yields no profit and cannot be made to yield any without the expenditure of money, or

labor or both then there may be strong reasons for insisting, in case the contract be rescinded, that the purchase-money with its interest should be restored by the vendor. In such a case the vendee generally regards the prospect of a rise or appreciation in the price of land as the equivalent or consideration which he receives for the interest on the purchase-money; and if he cannot, in consequence of the default of the vendor, get the land, being deprived of the contemplated rise which constituted the leading motive for the contract, and, receiving no esples or profits, the land not being in condition to yield any, justice would require the restoration of the purchase-money with interest upon a rescission of the contract. The cases first decided by this court were, in all probability, of this description.

"Whether the rules which would govern in chancery can be applied with safety to a trial at law has been a subject of much consideration with the court. The rules of right ought to be the same in every tribunal, and should be applied so as to settle controversies with all practicable speed. To avoid the expense and delay of another suit would be desirable, if insuperable objections did not present themselves. There are, however, too many questions growing out of the rescission of a contract between vendor and vendee put into possession to allow them to be considered and settled by a jury upon the trial of an action of covenant. The vendor may be entitled to a set-off for the profits of the land, for waste and damage, and against

show that bad faith on the other's part caused the rescission. In the case of a rescission of a contract by the vendee he has a

these claims the vendee may be entitled to an allowance for improvements. To settle such multifarious and complicated matters the chancellor is more competent to administer justice than the common-law judge aided by the hasty inquiry of a jury. We shall therefore leave the rule at law to stand as we found it and as recognized by the case of *Cox v. Strode*, 2 Bibb 273. The vendee is entitled to his judgment at law for the amount of purchase-money and interest, and then the vendor may resort to the chancellor for a settlement of the rents, profits, waste and improvements, and for such decree as equity requires."

Cornish v. Stratton, 8 B. Mon. 586: C. sold S. three tracts of land, on one of which was a grist-mill and a saw-mill. The purchase-money having been paid, the vendee brought an action of covenant against the vendor, alleging a failure to convey. C. filed a bill for specific performance, and to restrain the action at law. This bill was dismissed, but without prejudice to any claim the vendor might have for rent or waste. The vendee proceeded with his action and obtained judgment for the consideration and interest, \$3,000. After the recovery of this judgment the vendor filed a bill setting forth the foregoing facts, alleging waste by negligent burning of the mills and otherwise; that the rental value of the mills was \$500 per annum; also that the vendee was unable to pay the rent and damages for waste unless by set-off of his judgment; there was a prayer for injunction against the judgment which was

awarded him, and a rescission of the contract. The destruction of the mills was found to have resulted from a want of reasonable care and attention on the part of the vendee. He was held responsible for the loss and the amount deducted from the judgment; as to the residue, the injunction was dissolved. The vendee in his action at law recovered a judgment for \$149 more than the *ad damnum* in his declaration and remitted it. But in the final adjustment the vendor was required to pay it to do equity.

Williams v. Wilson, 4 Dana 507 (1836): The general rule, according to former decisions (*Cogswell v. Lyon*, 3 J. J. Marsh. 41; *Morton v. Ridgway*, id. 254; *Taylor v. Porter*, 1 Dana 421, 25 Am. Dec. 155), is, that where a contract for the sale of improved land of which the purchaser has had possession is rescinded, the use of the land and interest on the purchase-money shall be deemed equivalents, constituting set-offs one against the other. But there are many cases where this rule would not be equitable, and would not, therefore, be applied, e. g., where the sale was of wild land—where much of the tract was unimproved, and especially where the purchase was not made with a view of deriving profit from the use of the land. In such cases the interest would be decreed to the purchaser with the purchase-money, deducting the value—if anything—of the use of the land, provided money was paid and he was not chargeable with improper delay in urging the consummation of the legal title or a rescission of the contract. There has never been any

lien upon any part of the land owned by the vendor for any sum he may have paid upon the purchase price, whether the vendee was ever in possession or not.⁷

In Texas if a husband makes an executory contract for the sale of a part of his homestead with one who had no knowledge of the character of the property and who, with the consent of the covenantor and his wife, makes valuable improvements thereon, there may be a recovery for their value.⁸ The right thereto does not depend upon the statutes regulating the action of trespass to try title, but on the principles of equity.⁹ A wrongful sequestration of the premises by the vendor entitles the vendee to credit for the rents received by the vendor and the value of timber cut therefrom while he was in possession.¹⁰

It is a general rule that if the rescission is on account of a defect in the title the purchaser may recover purchase-money¹¹ and interest¹² and for permanent improvements, less the value of the rents while he had possession or control.¹³ He cannot recover rents and profits if he had no right to the possession be-

universal rule for adjusting and setting off rents against interest upon rescission of a sale of lands. As cases vary the equity of allowing rents and interest must vary—the object in every case being to place the parties as near as possible in *statu quo*.

Where a conveyance was made in consideration of support and the payment of a sum to a third person, which was made, and the grantee became unable to provide the support, the deed was set aside on repayment to him of the money paid and the expense of the support furnished, less the value of the use of the land. *Maddox v. Maddox*, 135 Ky. 403.

⁷ *Bullitt v. Eastern Kentucky L. Co.*, 99 Ky. 324.

⁸ *Eberling v. Deutscher Verein*, 72 Tex. 339; *Kilborn v. Johnson*, — Tex. Civ. App. —, 164 S. W. 1108.

⁹ *Patrick v. Roach*, 21 Tex. 256.

¹⁰ *Moore v. Brown*, 46 Tex. Civ. App. 523.

¹¹ *Crim v. Umbsen*, 155 Cal. 697, 132 Am. St. 127; *Muller v. Palmer*, 144 Cal. 305; *Howe v. Coates*, 97 Minn. 385, 4 L.R.A. (N.S.) 1170, 114 Am. St. 723; *Moulton v. Koldzik*, 97 Minn. 423; *Reynolds v. Lynch*, 98 Minn. 58 (option holder); *Miller v. Shelburn*, 15 N. D. 182; *Sutthoff v. Maruca*, 57 Wash. 102, *Kares v. Covell*, 180 Mass. 206.

¹² *Walsh v. Colvin*, 53 Wash. 309; *Eby v. Larkin*, 53 Wash. 454; *Cooper v. Rutland*, 99 S. C. 83; *Donovan v. Hoenig*, 157 Wis. 250.

¹³ *Everett v. Mansfield*, 148 Fed. 374; *Seibel v. Purchase*, 134 Fed. 484; *Livesley v. Muckle*, 46 Ore. 420; *Treat v. Smith*, 139 Ill. App. 262; *Cordes v. Cushman*, 79 Kan. 702; *Piper v. Gunn*, 74 Kan. 884; *Mason v. Lawing*, 10 Lea 264; *Hawkins v. Merritt*, 109 Ala. 261; *Eberg v. Heisler*, 12 Pa. Super.

fore paying the purchase price; and if he was relieved of liability for interest after the debtor became in default he had no claim to the profits thereafter. Any injury sustained by the vendee because of such default must be redressed in a suit for damages.¹⁴ Where a sale of land by a county was void because of an error of the officer who executed the deed, the purchase-money being covered into the treasury, there was a right of action in favor of the purchaser to recover the same; but the right to interest thereon did not antedate the demand for the return of the money. Because the purchaser had conveyed some of the land to third persons and was incapable of restoring the vendee to its former position, it not appearing that he was liable to his grantees, the amount of the purchase-money recovered was abated to the extent of the sum received from such sale.¹⁵ Aside from the question of title, a vendor who rescinds must return the money received if its forfeiture is not stipulated for.¹⁶ A minor who disaffirms his contract to buy land may recover its market value at the time thereof with interest, less the sum due the vendor as purchase money.¹⁷

In Tennessee the vendee, when he procures rescission on the ground that the vendor cannot make title, may recover interest on purchase-money recovered from the time when it was paid, as well as for valuable improvements,¹⁸ and in Washington there may be a recovery according to that measure though the vendors had possession. "The respondents were not in possession as tenants. They came into possession under a contract of sale, and were therefore not liable for rents for the use of the premises."¹⁹

388; *Lancoure v. Dupre*, 53 Minn. 301.

The vendor's fraud does not entitle the purchaser to interest anterior to the date of rescission and demand for the money paid. *Hayt v. Bentel*, 164 Cal. 680.

¹⁴ *Hayes v. Elmsley*, 23 Can. Sup. Ct. 623.

¹⁵ *Rice v. Ashland County*, 114 Wis. 130. See *Foxley v. Rich*, 35 Utah 162.

¹⁶ *Frederick v. Davis*, 133 Iowa 362; *Pedley v. Freeman*, 132 Iowa 356, 119 Am. St. 557.

¹⁷ *Beickler v. Guenther*, 121 Iowa 419.

¹⁸ *Winters v. Elliott*, 1 Lea 676; *Mason v. Lawing*, 10 id. 264.

¹⁹ *Snarski v. Washington State C. Co.*, 53 Wash. 221, citing *Ankeny v. Clark*, 148 U. S. 345, 37 L. ed. 475.

Generally the vendee will not be allowed for improvements, taxes and other beneficial expenditures except as a set-off against rents and profits, where only nominal damages for loss of the bargain would be given at law unless there is fraud in the sale;²⁰

²⁰ Conger v. Weaver, 20 N. Y. 140; Peters v. McKean, 4 Denio 550; Coffman v. Huck, 19 Mo. 435; Gibert v. Peteler, 38 N. Y. 170, 97 Am. Dec. 785; Hoover v. Calhoun, 16 Gratt. 109; Bright v. Boyd, 1 Story 478; McMalkin v. Bates, 46 How. Pr. 405; Lemmon v. Brown, 4 Bibb 308; Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 430; McKinley v. Holliday, 10 Yerg. 477; Wilhelm v. Fimple, 31 Iowa 131, 7 Am. Rep. 117; Gillet v. Maynard, 5 Johns. 85, 4 Am. Dec. 329; Morris v. Terrell, 2 Rand. 6; Putnam v. Ritchie, 6 Paige 390.

Where the owner of leasehold premises under a lease in fee died, leaving several infant children and their mother, who was the administratrix of his estate, assigned the lease to the owner of the rent as heir of the lessor, in consideration of his discharging his claim for the rent against the estate of the decedent: Held, that the assignment was void, and that the children of the decedent were not divested of their legal estate in the premises; and that the assignee of the lease having, under a misapprehension of his legal rights in the premises, made large and valuable improvements thereon, the owners of the legal estate were not bound to pay him for these improvements. The chancellor: "The arrangement for giving up the lease being wholly unauthorized, the defendants (claiming under that lease) are therefore entitled to the benefit of the natural increase in the value of the property since that time. I am not

aware that the law of any civilized country has directly deprived the legal owner of property of the natural accession to the same; although the supreme court of the United States, in the case of Green v. Biddle (8 Wheat. 1, 5 L. ed. 547), appear to have supposed that the occupying claimants' law of Kentucky was calculated to produce that effect indirectly. But the rule of natural equity appears to be different in regard to industrial accessions or permanent improvements made upon the property of another by a *bona fide* purchaser. By the rules of the civil law, the possessor of the property of another, who had erected buildings or made other improvements thereon in good faith, supposing himself to be the owner, was entitled to payment for such improvements, after deducting from the value thereof a fair compensation for the rents or use of the property during the time he occupied it. Puff., B. 4, ch. 6, § 6; Code Napol., art. 555; 3 Partida., tit. 28; Bell's Law of Scotland, 130, art 538; Rutherford, Inst. 71; Inst. of Law of Spain, 102. This principle of natural equity has been adopted by the law of England and in this state to a limited extent, in the action for *mesne* profits, where the *bona fide* possessor of property is permitted to offset or recoup in damages the improvements he has made upon the land, to the extent of the value of the rents and profits during his occupancy. Here the use of the lot, subject to the

and he will be chargeable for any waste and deteriorations which occur by his acts or negligence.²¹ But when the circumstances are such that the vendee would be entitled to recover for loss of the bargain at law he is entitled, on rescission in equity, or where damages are given in lieu of specific performance, not only to recover the purchase-money and interest, but to be fully compensated for improvements and beneficial expenditures, with proper deductions for the rents and profits which he has enjoyed.²² The rental value of the premises will be fixed on the basis of the contract between the parties, they having stipu-

widow's right of dower, which the complainant is equitably entitled to under her assignment of the lease, although it could not be sold so as to pass the legal title before it was set off to her, is probably equal to two-thirds of the rent reserved upon the lease. And if I felt myself authorized to introduce this principle of natural equity into the law of this court farther than it has been adopted here, I should direct a reference to a master to ascertain the present value of the lot, exclusive of the buildings, subject to the widow's dower and to the future rents, exclusive of her share thereof, and also to ascertain the present value of the buildings, subject to the right of dower therein; and should give the defendants the right to elect, upon the coming in of the master's report, whether they would retain the legal title to the lot, subject to the rent and right of dower, and pay to the complainant the value of such improvements, or would release to him their legal estate in the premises upon being paid the value thereof as thus ascertained exclusive of the buildings. This principle of natural equity is constantly acted upon in this court, where the legal title is in the per-

son who has made the improvements in good faith, and where the equitable title is in another, who is obliged to resort to this court for relief. The court, in such cases, acts upon the principle that the party who comes here as a complainant, to ask equity, must himself be willing, to do what is equitable. I have not, however, been able to find any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant who has made improvements upon land the legal title to which was in the defendant, where there was neither fraud nor acquiescence on the part of the latter after he had a knowledge of his legal rights." See *Bright v. Boyd*, 1 Story 478; *Herring v. Pollard*, 4 Humph. 362, 40 Am. Dec. 653; *Green v. Biddle*, 8 Wheat. 79, 5 L. ed. 566.

²¹ *Gillis v. Arringdale*, 135 N. C. 295; *Cornish v. Stratton*, 8 B. Mon. 586; *Foster v. Gressett*, 29 Ala. 393; *Harvey v. Wiens*, 16 Manitoba 230.

²² *Stinson v. Sneed*, — Tex. Civ. App. —, 163 S. W. 989; *Gillis v. Arringdale*, *supra*; *Perry v. Boyd*, 126 Ala. 162; *Peabody v. Tarbell*, 2 Cush. 226; *Case v. Wolcott*, 33 Ind.

lated such value.²³ There cannot be a recovery for improvements put upon the land prior to the contract for its purchase.²⁴ The fee paid for the examination of the title may also be recovered.²⁵ If the vendee, with the consent of the vendor, has sold part of the land the latter must account for so much of the purchase-price as was in excess of the value of it as fixed by the price designated in the rescinded contract.²⁶ The allowance for improvements cannot exceed the value added thereby to the land,²⁷ unless they were made in pursuance of the contract, when their cost measures the recovery.²⁸ One who has erected a building cannot be allowed anything on account of it if he put one of the walls on the land of a third party, and the building will be rendered worthless by removing the wall.²⁹ The vendor is entitled to such allowance for rental value as the land would bring, regardless of the sum for which it was in fact rented.³⁰ A vendee who was under the necessity of removing from the place he was on may not recover the expense of moving to the premises of the vendor.³¹

In an action by the vendee of a mine to rescind the contract of sale the vendor, who held notes of the vendee secured by a deed of trust on the property, counter-claimed for damages resulting from the breach of a contract to work the mine prop-

5; *Carroll v. Rice*, Walk. Ch. 373; *Putnam v. Ritchie*, 6 Paige 390; *McConnell v. Dunlap*, Hardin 41, 3 Am. Dec. 723; *Fisher v. Kay*, 2 Bibb 434; *Gerault v. Anderson*, id. 543; *Patrick v. Marshall*, id. 40, 4 Am. Dec. 670; *Thompson v. Bell*, 37 Ala. 438; *Lytle v. Scottish Am. M. Co.*, *infra*; *Kicks v. State Bank*, 12 N. D. 576; *Blitch v. Edwards*, 96 Ga. 606.

In *Thompson v. Bell*, *supra*, there was misrepresentation of quantity in a particular parcel included in the purchase; and it was held that the proper mode of computing damages is to multiply the average value (not of the entire tract) but of the particular parcel per acre by the

difference between the number of acres which it actually contained and the number which it was represented to contain.

²³ *Blitch v. Edwards*, 96 Ga. 606.

²⁴ *North v. Bunn*, *infra*.

²⁵ *Moore v. Williams*, 115 N. Y. 586, 5 L.R.A. 654, 12 Am. St. 844.

²⁶ *Lytle v. Scottish Am. M. Co.*, 122 Ga. 458.

²⁷ *Conlan v. Sullivan*, 110 Cal. 624; *Lancoure v. Dupre*, 53 Minn. 301; *North v. Bunn*, 128 N. C. 196.

²⁸ *Read v. Loftus*, 82 Kan. 485, 31 L.R.A.(N.S.) 457.

²⁹ *Laevison v. Baird*, 91 Ky. 204.

³⁰ *Worthington v. Campbell*, 8 Ky. L. Rep. 416.

³¹ *Neely v. Rembert*, 71 Ark. 91.

erly, alleging that it was injured by being improperly worked. The legal title to the property was in a trustee, but he was not a party to the contract respecting the working of the mine, and was a party to the action only because he held such title. The vendor occupied the position of a mortgagee having, under the local law, only a lien upon the property. The issue, therefore, was between the vendor and the vendee. The only interest of the former was by way of security for his claims. If the security was not impaired he had not suffered damage, although the land may have been depreciated in value by reason of the breach of the contract. Hence, the injury done could be recovered for only to the extent that the security was affected.³² On the breach by the purchaser of the terms of the agreement under which property was conveyed to him, if the vendor has had the advantage of the transaction for a considerable time and the parties cannot be placed in the positions they formerly occupied, the vendor cannot rescind the contract and recover the value of the property; his relief is limited to the damages sustained from the breach.³³ Acquiescence by a purchaser in default in the rescission of the contract entitles him to recover the purchase money paid, less such sum as will compensate the vendor for his loss.³⁴

§ 588. Adjustment of counter equities in specific performance.

The manner of accomplishing such adjustments is not everywhere the same; but there is uniformly recognized the elements which may be involved.³⁵ The general principle is that he who withholds possession after it is his duty to deliver or surrender

³² *Belmont M. & M. Co. v. Costigan*, 21 Colo. 471.

³³ *Marston v. Singapore R. Co.*, 163 Mass. 296.

³⁴ *Morris v. Letchworth*, 167 Mo. App. 553.

³⁵ The damages are to be ascertained upon an equitable basis. If the vendee has been kept out of possession by the wrongful act of the vendor the general rule is that the latter will be regarded as a trustee

of the land for the benefit of the former, and must account to him for the rents and profits which he received or might have realized by due diligence. The rule is not inflexible in its application, for if there are no rents and profits, or if they are less than the value of the land, the vendor in the discretion of the court, may be charged with the value of such use during the time the vendee is so kept out of possession. In special cases,

it shall make compensation to the party to whom such delivery or surrender was due for benefits received from such possession while withheld, or the value of the use, and for waste or deterioration resulting from his acts or neglect. After the purchaser is entitled to possession, if the vendor retain it or prevent its delivery, the vendee is entitled to compensation for the loss. He will be allowed the value of the rents and profits,³⁶ and where these are less than the interest on the purchase-money the latter will be allowed instead.³⁷ In ascertaining the amount of the rents and profits the necessary expenses of raising, securing and marketing the crops, and the amount paid for taxes and necessary repairs must be deducted; but nothing can be allowed for the personal services of the vendor in superintending the management of the land, he being a trustee in his own wrong.³⁸ A contrary view has been held on the grounds that the decree for specific performance relates back to the time when the conveyance ought to have been made; that it was not obligatory upon the vendor to cultivate the land, and compensation for so doing is not due him, and if the purchaser pays interest on the price the vendor must account for the profits, or, at the election of the purchaser, for the value of the use and occupation.³⁹ A vendor in default may not recover taxes paid if he could at any

where equity requires it, the court will not allow the vendor any interest on the purchase price during the time he retains possession of the land, nor charge him with *interim* rents and profits. Equity will in each case place the parties, so far as possible, in the same situation as they would have been in if the contract had been performed. *Abrahamson v. Lamberson*, 79 Minn. 135.

³⁶ See *Nolan v. Foley*, 141 Iowa 671.

³⁷ *Beckwith v. Clark*, 188 Fed. 171, 110 C. C. A. 207; *Newman v. Mountain Park L. Co.*, 85 Ark. 208, 122 Am. St. 27; *Prichard v. Mulhall*, 140 Iowa 1; *Straus v. Norris*,

77 N. J. Eq. 33; *Pryor v. Buffalo*, 197 N. Y. 123; *Westtown R. Co. v. Keller*, 143 App. Div. (N. Y.) 458; *Beddow v. Flage*, 22 N. D. 53; *Abrahamson v. Lamberson*, *supra*; *Nikkel v. Conaway*, 27 Okla. 405; *Lynch v. Wright*, 94 Fed. 703; *Stewart v. Gillett*, 79 N. Y. Misc. 93; *Seaver v. Hall*, 50 Neb. 878, 52 Neb. 316; Kentucky cases cited in preceding section; *Esdaille v. Stephenson*, 1 Sim. & S. 122; *Jones v. Mudd*, 4 Russ. 118; *Burton v. Todd*, 1 Swanst. 255; *Kennedy v. Koopmann*, 166 Mo. 87.

³⁸ *Abrahamson v. Lamberson*, *supra*.

³⁹ *Colton v. Butterfield*, 14 N. D. 465.

time have shifted the liability therefor to his vendee,⁴⁰ and if he has received the profits he must pay the taxes for the corresponding time.⁴¹ Interest will not ordinarily be allowed intermediate a decree for specific performance and the time fixed therein for payment.⁴² The purchaser may not recover for the necessity he was under of moving his family and household goods.⁴³

From the date of the contract everything that forms part of the inheritance belongs in equity to the purchaser; if anything is severed and converted by the vendor he is bound to make compensation either on the basis of the value of the severed property or the diminished value of the land, according to the circumstances.⁴⁴ There is an interesting discussion of this liability in a New York case.⁴⁵ P. contracted to convey certain lands to the plaintiff, but conveyed them instead to the defendant, M., who had knowledge of the prior agreement. The plaintiff in 1844 filed his bill to compel a specific performance of the agreement, and obtained a decree. This decree directed a reference to a master to ascertain the amount of damages sustained by the plaintiff by reason of having been kept out of possession, and by reason of waste committed by defendant M. The purchase-money was paid by the plaintiff, according to the decree, and P. executed and tendered a conveyance of the premises, but defendant M. continued in possession pending sundry appeals until 1859. These appeals related to the question of damages

⁴⁰ Wright v. Brooks, 47 Mont. 99.

⁴¹ Stewart v. Gillett, *supra*.

⁴² Townsend v. Swallow, 91 Neb. 564.

⁴³ Nikkel v. Conaway, *supra*.

⁴⁴ Caldwell v. White, 4 T. B. Mon. 561; Robertson v. Skelton, 12 Beav. 260; Dyer v. Hargrave, 10 Ves. 506; Barnett v. Higgins, 4 Dana 565; Combs v. Tarlton, 2 id. 464; Cornish v. Stratton, 8 B. Mon. 586; Shawhan v. Long, 26 Iowa 488, 96 Am. Dec. 164; Gaines v. Bryant, 4 Dana 395; Hepburn v. Dunlap, 1 Wheat. 179, 4 L. ed. 65, 3 id. 231,

4 L. ed. 377; Bolling v. Lersner, 26 Gratt. 36. See Burgett v. Bissell, 14 Barb. 638; Stewart v. Gillett, *supra*.

In South Carolina only such damages as were done to the freehold and such compensation as may be just for the use and detention of the land are recoverable. There cannot be a recovery for the removal by the vendor of wood cut on the land by the vendee. Latimer v. Marchbanks, 57 S. C. 267, 278.

⁴⁵ Worrall v. Munn, 38 N. Y. 137, 55 Am. Dec. 330.

as found and assessed, first by the master and subsequently by a referee. It was also a part of the case, and it appeared in evidence, that the lands were of little value for agricultural purposes, and were purchased by the plaintiff for the manufacture of brick. It was held: 1. That the general rule which allows to the vendor the interest on the purchase-money, and to the purchaser the rents and profits, failing here to apply as an equitable remedy because of the peculiar circumstances, the equitable indemnification of the plaintiff for being kept out of possession is found in allowing him as damages an annual sum equal to the interest on the purchase-money paid by him. 2. He should be allowed the damages sustained by the deterioration from waste committed by the defendant. 3. These should be continued down to the time when the plaintiff was let into possession. 4. Upon the damages caused by being kept out of possession interest should be computed on each actual amount from the end of each year down to the time of the assessment or report; and upon the damages caused by waste only from the time when the plaintiff was let into possession to the time of the assessment or report.⁴⁶ Following the principles enunciated

⁴⁶ Woodruff, J., said: "The present case is peculiar in two respects, viz.: First, the purchase-money, with the interest thereon, was payable, and was properly decreed to be paid, to the defendant Pratt, the original owner and vendor of the premises, who acquiesced in the decree and executed a deed in obedience to its requirements, while the possession was held by the defendant Munn; and second, the principal value of the lands consisted in the deposits of clay, adapted by the consumption thereof to the manufacture of brick on the premises. The inapplicability of the general rule above stated to land of this description may be rendered quite apparent by an illustration closely analogous to the present. For example, suppose a
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sale of land, of no value for ordinary use because incapable of cultivation and entirely unsuited to pasture, and yet by reason of a bed of valuable ore of very large value, and for that sole reason, sold at a large price. On a decree for specific performance, shall the purchaser be charged with interest on the purchase-money for the period during which he is kept out of possession, and the vendor pay nothing (because the rents and profits are nothing) for depriving the purchaser of the opportunity of working the mine or ore bed during the period of delay? Or, if the purchase-money has been paid, shall the vendor, who has enjoyed the use of the purchase-money, have the advantage of his own wrong, and make no compensation to the pur-

in this case it has been ruled by the New York court of common pleas that upon a judgment in favor of the plaintiff in an action for specific performance of a contract to sell land which he pur-

chaser for his loss of opportunity? The answer must be, not so, unless the rules of equity are so imperfect that such injustice cannot be prevented. Does it follow that the damages are to be ascertained by inquiring what profits the purchaser could have made by working the mine? That question is in substance this: Was the referee right, on the first reference in the present case, in inquiring how much the plaintiff might have received for the privilege of making brick on the land, thereby exhausting the bed of clay, which, in fact, now remains to him to be worked presumptively with equal benefit, and thereupon allowing the plaintiff interest on such possible receipts from year to year as damages for the delay? This mode of estimating his damages proceeded upon the ground, not that the plaintiff lost the clay beds (which constituted the chief value of the land), but that he lost the opportunity of converting them into money so soon as, perhaps, he might have done if he had obtained the possession when he was entitled thereto. I find no warrant for any such speculative rule or measure of damages; no case is cited to us, and I think it may be safely averred that no case can be found, in which such a rule was adopted. No analogy can be found in any rule of assessment of damages at law. The rule, then, is the value of the use, not the profits of the consumption of the property detained, when in fact the entire property is restored to the plaintiff's possession. * * * The

plaintiff offered to prove that he purchased for the express purpose of devoting it to the making of brick, and to converting its contents into money. Now suppose the plaintiff, although he had contracted to pay therefor a large sum, had, in fact, paid no part of the purchase-money, and he was now to be put in possession and permitted to carry into effect the purpose for which he bought the property. He would be completely indemnified against loss by relieving him from the payment of interest. True, he would fail to realize at so early a day as he anticipated, the profits of his bargain, but he has now that chance of profits, and meantime he has had the use of the purchase-money. In short, the general rule which allows to the vendor the interest, and the purchaser the rents and profits, failing to apply, because, from the character of the land, there are no rents and profits, or an amount grossly inadequate to a just indemnity, the purchaser is equitably entitled to be indemnified, if any definite and certain mode can be found by which to ascertain it. Relief from the payment of interest is, in such a case, palpably the most obvious, as it is the most equitable, mode of doing so. For, otherwise, the vendor is permitted to profit by his own wrong, and the purchaser compelled to submit to a certain loss. * * * But it is one of the peculiarities of this case that the purchase-money and interest was due to the defendant Pratt, and has been paid while the defendant Munn has been in possession,

chased for the purpose of improving, and from which no rents or profits were derivable so long as it remained unimproved, that inasmuch as the damage sustained by being kept out of

and during the period of litigation down to 1859, at least, has kept the plaintiff out of possession. The plaintiff has lost the interest on the purchase-money, and the nature of the property is such that there can be no measure of damages founded on the rents and profits, or the value of the use of the premises, which furnishes any indemnity. Within the principles of the cases referred to, and, as I think, in most just conformity to reason and equity, the defendant should be charged with the amount of that interest as damages down to the time when the plaintiff was let into possession."

The question whether the damages for waste committed by a vendor pending a contract of purchase should be measured by the injury to the inheritance occasioned thereby, or by the value of the materials taken from the premises, or where timber has been cut, or stone has been quarried, or earth removed by him; or whether either method may be adopted in the ascertaining the damages, was not particularly considered in the opinion from which the foregoing quotation has been made. The judgment directed that in ascertaining the damage sustained by reason of waste committed by the defendant, the court should allow to the plaintiff the "actual value of the clay and sand taken from the premises by the defendant, and of any timber or trees cut thereon and removed by him, with interest on such value from the time the plaintiff was let into possession until the time of

the assessment." The damages were subsequently assessed in accordance with the judgment, and judgment was given for the same. This judgment having been affirmed at general term, the defendant again brought the case before the court of appeals. He asked reversal on the ground that the rental value of the premises for ordinary purposes of husbandry is the only criterion of damages for keeping the plaintiff out of possession; and that the diminished value of the land, and not the value of the materials taken therefrom, should be adopted as the measure of compensation to which the plaintiff was entitled for the injury in the nature of waste committed. It was held that the assessment was in strict conformity to the directions given on the former appeal, and that the judgment should be affirmed on the principle of *stare decisis*, unless there was a plain error committed by the court in giving those directions." The principles laid down in the former opinion were reaffirmed in respect to the right to assess damages down to the time of assessment and to the adoption of interest on the purchase-money paid as a measure of damages for the plaintiff being kept out of possession. On the other question, Andrews, J., said (53 N. Y. 185, 189): "It is not denied that the defendant is liable to the same extent as the vendor would have been. He entered under a contract with him, and with notice of the plaintiff's rights; and the waste was committed *pendente lite*. It is clear, I think, that the de-

possession was not capable of legal ascertainment the plaintiff should not be charged with interest upon the unpaid purchase-money, and the defendant should be charged with all interest

terioration in the value of the land would be an appropriate method of fixing the amount of the injury. In some cases it would be the only way in which compensation for waste could be given, in view of the nature of the plaintiff's interest and the character of the injury. A mortgagee or lienor could only recover on proof that his security was rendered inadequate by the injury to the freehold. If the soil, having no value separate from the land, was stripped from it, so as to render it unproductive and unfit for the use to which it was applied, the diminished value of the land would be the only adequate measure of compensation. So, also, where trees designed for shade or ornament have been cut down, whereby the value of the land has been greatly lessened. And in cases of permissive waste, where a purchaser has been kept out of possession, and the land has suffered from lack of cultivation, the court would compel an allowance to be made by the seller for the injury to the land. (*Foster v. Deacon*, 3 Madd. 394; 3 Sugd. on V. & P. 133 [2 id. (4th Am. ed.) 336]). But the diminished value of the land is not the exclusive measure of relief for an injury in the nature of waste committed by a wrong-doer on the land of another. In many cases it would substantially exempt him from responsibility. Cutting a few trees on a timber tract, or taking a few hundred tons of coal from a mine, might not diminish the market value of the tract, or of the mine, and yet the value of the wood

or coal, severed from the soil, might be considerable. The wrong-doer would, in the cases instanced, be held to pay the value of the wood and coal, and he could not shield himself by showing that the property from which it was taken was, as a whole, worth as much as it was before. (*Martin v. Porter*, 5 M. & W. 351; *Morgan v. Powell*, 3 Q. B. 278; *Bennett v. Thompson*, 13 Ired. 146.) The liability of the vendor who, pending a contract of purchase, commits waste upon the premises by cutting timber, trees, or removing stone, sand or clay therefrom, to pay or account to the purchaser for the value thereof, results, I think, from the principle that in equity everything which forms a part of the inheritance belongs to the purchaser from the date of the contract. The purchaser is deemed in equity to be the owner of the land, and a court of equity will, in an action for specific performance, adjust the respective rights and liabilities of the parties upon this assumption. I am satisfied that the judgment declaring the defendant liable for the value of the sand, clay and timber taken by him from the premises was not inadvertently pronounced, but is supported by reason and authority; and I shall content myself by citing some authorities bearing on the subject, without further discussion: *Nelson v. Bridges*, 2 Beav. 239; *Attersol v. Stevens*, 1 Taunt. 183; *De Visme v. De Visme*, 1 Macn. & G. 336; *Dart on Vend.* 116; 3 Sugd. on Vend. 134 [2 id. (4th Am. ed.) 336]; *Paine v. Miller*, 6 Ves.

and taxes accruing prior to the delivery of his deed without being allowed anything for the increase in the value of the land.⁴⁷ A purchaser who obtains a decree for specific performance may elect to pay interest on the purchase-price for the time elapsed since the conveyance should have been made and take the rents and profits received by the vendor, or allow the latter to retain these and thereby relieve himself of liability for interest.⁴⁸ The purchaser is entitled to interest on money deposited pursuant to the agreement where the defaulting vendor has had the profits of the land, and if the deed tendered is not signed by his wife the purchase price will be abated to the extent of her inchoate dower right.⁴⁹ The vendee relieves himself from liability for interest, though he recovers the rents and profits, by setting aside and keeping the purchase-money ready to pay on the delivery of a deed, and giving the vendor notice thereof.⁵⁰ The latter is liable for interest if the vendee is required to account for the rents and profits.⁵¹

If the vendor retains possession as security for the purchase-

349; *Moore v. Wait*, 3 Wend. 104, 20 Am. Dec. 667."

In Pennsylvania a purchaser who has been prevented by the vendor from paying the balance of the purchase-money is treated as a trustee thereof, and, on securing specific performance of the contract, is liable for interest unless he shows he has kept the money unappropriated. *Conover v. Wright*, 9 Pa. Dist. 688.

⁴⁷ *Selleck v. Tallman*, 11 Daly 141.

In *Haffey v. Lynch*, 193 N. Y. 67, the vendor was charged with the rental value of vacant property during the pendency of litigation to establish his title. The court of appeals said that the lower court might have relieved him from that liability upon the waiver of the right to interest on the purchase money, but refused to interfere be-

cause the question was, to some extent, for its discretion. It was error to charge interest on the rental value from the termination of each year the latter being less than the annual interest due on the unpaid price. The rent should have been applied to the interest which accrued annually on the purchase money, and should not bear interest, and the plaintiff should have been relieved from interest on the taxes paid by the defendant.

The allowance for interest will not antedate the tender of a sufficient deed. *Armstrong v. Maryland C. Co.*, 67 W. Va. 589.

⁴⁸ *Lynch v. Wright*, 94 Fed. 703.

⁴⁹ *Stewart v. Gillett*, 79 N. Y. Misc. 93.

⁵⁰ *Beckwith v. Clark*, 188 Fed. 171, 110 C. C. A. 207, and cases cited.

⁵¹ *Mart v. Oliver*, 246 Ill. 316.

money pending a question incidental to specific performance, where that relief as to the principal part of the land is not disputed but mutually contemplated, he will be charged in respect to it like a mortgagee in possession. In an English case⁵² dispute arose between trustees for a deceased vendor and a purchaser, the latter claiming to be entitled under his agreement to an additional piece of land. The trustees filed a bill and obtained a decree for specific performance, excluding such piece. They had not allowed the purchaser to take possession of the rest of the land whilst the purchase-money remained unpaid, and in the meantime it was allowed to lie waste. It was held that the purchaser should be allowed to set off against the interest payable by him the amount which might have been received, and the amount of deterioration. The lord chancellor said: "By the effect of the contract, assuming there to be no ground on either side for simply setting it aside according to the principles of equity, the right of the property passes to the purchaser, and the right of the vendor is turned into a money right to receive a purchase-money, he retaining a lien upon the land which he has sold until the purchase-money is paid. Let us for a moment suppose the case of any other description of security and that the holder of the security insisted, for his protection, upon entering into possession of the land over which the security extended; then, is not such a person so entering into possession answerable, when the account under the security comes to be taken, for not keeping the property in the condition in which a person in possession ought to keep it? I apprehend that he is so answerable; and, on principle, I can see no reason why a vendor, who insists upon continuing in possession of the land over which he has security, the contract being one which, in the view of a court of equity, has changed the title of the land,—I see no reason why such a vendor should not be under the same obligations as those under which any other person would be, who, having security on land, insisted on the possession of the land as a farther security. He, when the account comes to be taken between him-

⁵² *Phillips v. Silvester*, L. R. 8 Ch. 173.

self and the purchaser, will be entitled to credit for all proper expenditures, for the purpose of maintaining the purchaser's property in a proper condition, as against the account of rents and profits to which he is necessarily subject. He will receive, on the other hand, the interest which, by the contract, he is entitled to receive. Perfect justice is done in that way; and it is wholly unimportant, as it appears to me, that he has the right, which undoubtedly he has, to insist upon retaining possession until payment of the purchase-money is made and the conveyance is accepted. He has that right; but the question is upon what terms that right is to be exercised. It appears to me that it must be upon the terms of his undertaking the duties of possession while he insists upon retaining possession. He is *pro tanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things which he would be bound to do if he were a trustee for any other person.⁵³ * * * My

⁵³ The further remarks of the lord chancellor are important. He said: "The vendors run no serious risk if they take that course, assuming always that the property is worth being preserved. No doubt there might be special circumstances tending to show that it was not worth being preserved, if the expenses of the necessary repairs would be greater than those which the property would bear. In that case it is very possible that a purchaser might have no claim, if previous notice were given to him that, unless he would supply the vendors with funds in order to make the necessary repairs, the property must be left to take its chance. But no case of that kind is alleged here. There is nothing whatever to show, or to suggest, that this was not property which would bear the expense of keeping it in a proper state of repair; there is nothing to show or suggest that

the purchaser was not a person who could be made responsible for anything that might be due from him in pursuance of the contract. I entirely agree that the vendors were acting in their strict right, and were doing nothing wrong in insisting as they did upon retaining possession until the purchase-money was paid; yet on the other hand, I cannot admit that that is any reason why they should be exonerated from the obligations attaching to persons insisting upon remaining in possession. As far as appears they would have incurred no risk in allowing possession (the purchase-money remaining unpaid) to be taken by a solvent and responsible purchaser, retaining, as they might have done, their lien for the purchase-money over the estate. They were not bound to do so; but they cannot play fast and loose, and in one breath say: 'The time has come when you might

opinion is that, in that state of things, there being proof of careless, and, I must say, of wantonly negligent conduct on the part of the plaintiff, which has caused serious dilapidations, I cannot differ from the master of the rolls, or see any reason

have taken, and ought to have taken, possession, and therefore you must bear the consequences of all the subsequent deterioration;’ and in another breath say: ‘We have a right to refuse you possession, and we choose to exercise that right.’ Now, the authorities appear to me to be entirely consistent with this view. One or two were referred to, but they simply come to this: that from the time when the party might have taken possession, and when it was his duty actually to take possession, if he does not do so he may be answerable for deterioration. I have no doubt whatever, that if in this particular case the plaintiffs had sent to Mr. Silvester and had said: ‘We are perfectly willing to let you go into possession subject to the question between us,’ and Mr. Silvester had said in reply: ‘I am willing to take possession, but I am not willing to pay the purchase-money;’ or if he had said: ‘I will not take possession unless you give a conveyance and the whole thing is closed up,’ Mr. Silvester would have put himself within the reach of those authorities. In that case, according to the contract, the time for taking possession would have come, possession would have been offered to him, and there would have been no obstacle or impediment to his taking it except one, which, in the exercise of his strict rights, he would have himself created. But although it is true that each party is entitled to refuse to alter the possession until the whole contract is completed, it is not true that

when the parties differ upon some subordinate question as to the manner of completing the contract, whether in the form of the conveyance or in the parcels, each party being minded that the contract should go on, it is not true that giving possession to the vendee would be a departure from the ordinary course of proceeding. Possession may be changed before completion. But payment of the purchase-money before completion is not according to the ordinary course of proceeding, although sometimes the money is paid into court. Here there was a very small question between the parties as to this land occupied by the railway—a question as to parcels merely. The purchaser was willing to complete, and the vendor desired to compel them to complete, however that question might be determined. The purchaser was perfectly solvent, and there was no good reason why he should not be let into possession, pending the settlement of the question, leaving the question of payment to stand over. At one time it appears to have been contemplated that on the payment of a small sum of money, £250, he might and would have been let into possession. But there was some misunderstanding as to the payment, and the delay unfortunately led to different views being taken by some of the parties, so that when the time had elapsed the consent of the vendors, which was necessary for the purchaser taking possession, was absolutely refused; and I cannot per-

to alter his lordship's order in this respect." The order of the master was: that the plaintiffs have the balance of the purchase-money with interest; that an account be taken of the rents and profits received by them in respect of the premises, or which, but for their wilful neglect and default, might have been received; and an inquiry as to any deterioration in the premises from the date from which the interest on the purchase-money was to be computed, and as to what would be required to restore them; and it was declared that the defendant would be entitled to set off against the interest the amount so found.⁵⁴ If as a consequence of withholding possession the pur-

ceive that anything which afterwards took place changed the relative position of the parties."

⁵⁴ The case last stated has been followed in *Royal Bristol P. B. Soc. v. Bomash*, 35 Ch. Div. 390; *Earl of Egmont v. Smith*, 6 id. 469. It has been regarded by Mr. Dart as a departure from the rule which formerly prevailed in England. He says in the last edition of his work on *Vendors & Purchasers* (vol. 2, p. 650, 5th Eng. ed.): "This decision was strongly disapproved of by Sir George Jessel, M. R., when the cause came on before him for further consideration. As his honor remarked, the reasoning upon which it is based is wholly inconsistent with the law as laid down by the court in *Sherwin v. Shakespear* [5 De G., M. & G. 517, 536, 17 Beav. 267], and followed in subsequent cases. A vendor who retains possession of the estate until completion of the purchase does so, not in the character of a mortgagee for better protecting his lien for unpaid purchase-money, but in the character of trustee (using the term in a qualified sense, and not as implying the obligations of an ordinary trusteeship) for the purchaser; and, as in the case of a trustee, so

a fortiori in the case of a vendor so circumstanced, it is only under special circumstances that he ought to be charged with wilful default as respects the due preservation of the property; especially where, as in the case just referred to [*Phillips v. Silvester*, *supra*], the non-completion of the purchase by the appointed time is occasioned by the purchaser's own default. If the rule were otherwise a vendor might find himself compelled to make a heavy outlay for repairs or the like (as on the sale of a mill and machinery), which might be objected to by the purchaser as unnecessary or improper; and, unlike a mortgagee or trustee, he would have no means except by a suit or possibly by a summons of recovering from the purchaser the amount which he has so expended." This view coincides with that of the court in *Royal B. Soc. v. Bomash*, *supra*, though the rule of *Phillips v. Silvester*, being authoritative, was followed.

A vendor who has kept possession is not entitled to interest on the purchase-money, and by resisting an action for specific performance subjects himself to liability for the taxes accruing during its

chaser loses a tenant who has entered into a lease of the premises the vendor is liable for the rent lost;⁵⁵ and if residence property deteriorates in value because the vendor allows it to remain unoccupied during the pendency of a suit brought by the purchaser to obtain specific performance the latter is entitled to an allowance on account of such deterioration.⁵⁶ According to principles which are elsewhere exemplified,⁵⁷ special damages resulting from the failure to make a resale can only be recovered where the contract for resale was brought to the knowledge of the vendor, and where, by reason of his special knowledge of the circumstances, he impliedly undertook, in case of default, to pay such damages.⁵⁸ Where the contract provided that if the title to land was so defective that it could not be remedied it should be void, and the payment made should be returned, also, that if the vendee did not make the full payment required the money paid should be forfeited and the title to part of the premises failed, and the vendee sued for specific performance, which was refused, he obtained judgment for the payment made, with interest and costs.⁵⁹ If timber has been cut and removed from lands by another than the vendor under a contract in force when the conveyance was made, the cutting being done thereafter, the vendee is entitled to an allowance therefor and also to interest thereon from the date of the last payment made to the vendor by the vendee of the timber.⁶⁰ A vendor who disables himself from performing his contract by cutting and removing timber from the land must respond for the value it would have had when he was ready to execute a deed to the vendee.⁶¹ A vendee who has been guilty of laches may not recover for timber cut at a time the vendor thought the contract had been abandoned because thereof.⁶² The rate of

pendency. *Brewer v. Sowers*, 118 Md. 681.

⁵⁵ *Royal Bristol P. B. Soc. v. Bomash*, 35 Ch. Div. 390; *Buck v. Duvall*, 9 Ga. App. 656.

⁵⁶ *Lynch v. Wright*, 94 Fed. 703.

⁵⁷ § 45 *et seq.*

⁵⁸ *Lynch v. Wright*, *supra*.

⁵⁹ *Ryan v. Dunlap*, 111 Mo. 610.

See *Rice v. Ashland County*, stated in § 587.

⁶⁰ *Gates v. Parmly*, 93 Wis. 294.

⁶¹ *McCowen v. Pew*, 147 Cal. 299.

⁶² *Bright v. James*, 35 R. I. 492.

interest agreed upon is binding upon a purchaser who seeks specific performance.⁶³

589. Same subject. Where there is a rescission of a land contract the parties are to be put in *statu quo* as nearly as possible. There cannot be a literal restoration where the contract has been acted upon, payments made or possession enjoyed; then rescission requires compensation for what has been mutually enjoyed under the contract, as well as for deteriorations.⁶⁴ If the contract be rescinded in equity, even on the ground of fraud in the purchase, the court will in general direct an allowance to be made to the purchaser for beneficial expenditures, substantial improvements and repairs.⁶⁵ This allowance, however, when the sale is set aside at the suit of the purchaser, will not extend to improvements or even repairs—except such as are essential to the preservation of the property—where they are made subsequently to the discovery of the matter on which he grounds his right to relief.⁶⁶ Such expenditures as are made before discovery of the defect in the title will be allowed, upon proper pleading, to the vendee;⁶⁷ but subject to the counter-claim of rents and profits received or which, without his wilful default, might have been received; and this is especially so where the improvements or expenditures have been made in pursuance of the contract.⁶⁸

In the absence of a promise to convey the occupation of land and the expenditure of money thereon do not create an implied promise to convey, and the value of the use of the premises and the receipt of the proceeds thereof will be set off against any

⁶³ Barrett v. Durbin, 106 Ark. 332.

⁶⁴ Foster v. Gressett, 29 Ala. 393; Smith v. Stewart, 83 N. C. 406; West v. Waddill, 33 Ark. 575; Kicks v. State Bank, 12 N. D. 576.

Where there is an outstanding lease the purchaser may have an abatement of the price to the extent the premises were thereby depreciated in value, whether by fire or otherwise. Eppstein v. Kuhn, 225 Ill. 115, 10 L.R.A.(N.S.) 117.

⁶⁵ Buck v. Duvall, 9 Ga. App. 656; Dart on Vendors & P. 222; McClure v. Lewis, 72 Mo. 314. See Jackson v. Ludeling, 99 U. S. 513, 25 L. ed. 460.

⁶⁶ Id.

⁶⁷ Dart on Vendors & P. 380; Patrick v. Roach, 21 Tex. 251.

⁶⁸ Davis v. Strobridge, 44 Mich. 157; Gibert v. Peteler, 38 Barb. 488, 38 N. Y. 165, 97 Am. Dec. 785; Sheard v. Welburn, 67 Mich. 387; Blitch v. Edwards, 96 Ga. 606.

equity created by expenditures made in permanent improvements.⁶⁹ But this principle, according to the supreme court of New York, does not apply where, in pursuance and upon the faith of a parol promise to convey land, the promisee has taken actual possession and remained in occupation of the premises, having made permanent and valuable improvements, thereby taking the parol agreement out of the statute of frauds and entitling him to specific performance of the contract. In that case the value of the occupation of the premises by the promisee is not to be set off against the expenditures made by him thereon and a decree for the conveyance denied because the value of such occupation equals or exceeds the expenditures made. In equity the property became the promisee's at the time of performance on his part entitling him to a deed; he was not, therefore, liable for the subsequent rental of it.⁷⁰

Where vendees have made expenditures upon the premises, not only in good faith and relying upon the performance of the agreement by their vendors, but in actual and direct compliance with their own covenants in that agreement, the vendor, who is unable to perform the contract by giving a good title, cannot recover the possession of the lands without repaying these expenditures. If a vendor is unable to make a good title to a portion of the premises the vendees are entitled to elect whether they will rescind the contract *in toto* and receive back their expenditures under it, or will accept such conveyance of the whole property as the vendor can give, paying him the price stipulated, less such deduction as may be just for the defect.⁷¹ If, in such a case, the vendees elect to rescind the agreement *in toto* they are entitled to be repaid the amount which they have expended in compliance with its terms in permanent improvements; and that sum will be made a lien upon the premises, or its payment a condition to the surrender of the possession or the recovery thereof by the legal owners.⁷² But if the vendees elect to

⁶⁹ Wack v. Sorber, 2 Whart. 387, 30 Am. Dec. 269; Walton v. Walton, 70 Ill. 142; McMahonill v. McMahonill, 69 Iowa 115.

⁷⁰ Young v. Overbaugh, 76 Hun 151.

⁷¹ Phinizy v. Guernsey, 111 Ga. 346, 50 L.R.A. 680; Kares v. Covell, 180 Mass. 206.

⁷² Gibert v. Peteler, 38 N. Y. 195; Hawkins v. Merriitt, 109 Ala. 261, citing the text.

receive such title as the vendors can give, with compensation for the defect, they have a right to ask for a judgment to that effect. The vendor cannot recover possession until the vendees have had an opportunity to make their election and have it complied with either by the repayment to them of the expenditures, or by the payment of the sum which shall be fixed as the proper purchase-money, and a tender of a conveyance of the vendor's title. Purchasers will not be compelled to take part only of what they have agreed to buy as an entirety. The compensation for the deficiency, in cases where a performance is decreed in part, consists in an abatement from the price for the diminution in value of the whole property in consequence of defects or incumbrances and not in a deduction of what may be supposed to be a proportionate part of the whole price for a part not conveyed at all with a conveyance of the residue only.⁷³ If the vendee has had possession

A vendee under an oral contract is entitled to be reimbursed for expenses incurred in reliance thereon, not because of the contract, but on the facts. *Baldrige v. Centgraf*, 82 Kan. 240.

⁷³ *Id.*; *Archer v. Turrell*, 66 Ark. 171; *Whittier v. Gormley*, 3 Cal. App. 489. See *Huey v. Starr*, 79 Kan. 781; *Boggs v. Bush*, 137 Ky. 95; *Nelson v. Gibe*, 162 Mich. 410; *King v. Thompson*, 9 Pet. 204, 9 L. ed. 102.

Where the building on a lot burned before the vendor could convey the title and before the vendee took possession, the loss was the vendor's, and he was entitled to the insurance money. The vendee, seeking specific performance of the contract, was entitled to an abatement of the price, the rule for fixing the amount being to ascertain if there was any difference on the day the contract became binding between the market value of the entire property and the contract price. If

there was no difference, the purchaser would be entitled to a decree requiring a conveyance upon payment of a sum equal to the market value of the lot without the building on the day the contract was made. If, when the contract became effectual, the market value of the property was greater than the contract price, a sum representing this difference should be deducted from the market value of the lot without the building, and the balance would be the amount which the plaintiff should pay for a conveyance. This would give the purchaser the benefit of his bargain. If the contract price exceeded the market value the purchaser should pay, in addition to the market value of the lot without the building, the difference between the market value of the property at the date of the contract and the contract price, thus giving the vendor the benefit of his bargain. *Phinizy v. Guernsey*, *supra*.

under the contract and afterwards procures a rescission on the ground of the vendor's failure to convey he is entitled to have the purchase-money refunded, to interest upon it during the time he is liable to another party as owner of the paramount title for rents and profits;⁷⁴ but not while in receipt of the rents and profits, in the absence of such liability, unless they are of less value than the interest.⁷⁵ A vendee in possession is entitled to the profits and is liable for interest on the unpaid purchase-money.⁷⁶ If payment is made in depreciated currency or in property the refunding on rescission is to be according to its value.⁷⁷ The vendee's liability for interest under a contract exempting him therefrom on deferred payments, these to be made within a reasonable time, dates from the filing of the vendor's cross-bill to the bill for specific performance, no previous demand for interest being shown.⁷⁸ The purchaser who has not had possession may recover interest paid on the principal of a mortgage on the land which was being foreclosed.⁷⁹

§ 590. **Damages in suits for specific performance.** In suits for specific performance equity may retain the case to give compensation in lieu of specific performance, or that may be decreed in part and compensation allowed for the residue;⁸⁰ but equity will not retain a bill for specific performance for the purpose of assessing damages if the complainant knew, when

⁷⁴ Talbot v. Seabee, 1 Dana 56; Oakes v. Buckley, 49 Wis. 592.

⁷⁵ See cases cited in note 15, *ante*, p. 2026.

⁷⁶ Brown v. Norcross, 59 N. J. Eq. 427; Pillsbury v. Streeter, 15 N. D. 174; Sanders v. Bryer, 152 Mass. 141, 9 L.R.A. 255, and cases cited. See Holyoke E. Co. v. United States E. Co., 186 Mass. 498.

⁷⁷ Bodley v. McChord, 4 J. J. Marsh. 477.

⁷⁸ Brown v. Brown, 124 Mo. 79.

The vendor may recover interest only from the time he was able to show a marketable title. Mills v.

Trustees, etc., 119 Md. 510; Bright v. James, 35 R. I. 492.

⁷⁹ Brewer v. Sowers, 118 Md. 681.

⁸⁰ Union C. M. Co. v. McAdam, 38 Iowa 663; Leach v. Forney, 21 id. 271, 89 Am. Dec. 574; Presser v. Hildenbrand, 23 Iowa 483; Hazelrig v. Hutson, 48 Ind. 481; Case v. Wolcott, 33 id. 5. Compare Sternberger v. McGovern, 15 Abb. Pr. (N. S.) 257. See Reynolds v. Johnson, 13 Tex. 214; Longworth v. Mitchell, 26 Ohio St. 334; Nickerson v. Bridges, 216 Mass. 416; McCarten v. Smith, 163 App. Div. (N. Y.) 900.

he filed it, that the vendor had parted with the title to the property.⁸¹ Where the entire relief which can be afforded in a suit of that character is compensation courts of equity have sometimes granted it;⁸² the measure is the same as that given at law.⁸³ If there is a defect or an excess of quantity there will be an abatement or increase of the purchase-money according to the average price per acre of the whole tract;⁸⁴ and this defense of deficiency is generally good at law by way of recoupment;⁸⁵ but for the loss of a distinct parcel there will be an abatement of the purchase price of that parcel or of its actual

⁸¹ *Roach v. Irvin*, 245 Pa. 162; *Sellers v. Greer*, 172 Ill. 549, 40 L.R.A. 589.

⁸² *Combs v. Scott*, 76 Wis. 662; *Peabody v. Tarbell*, 2 Cush. 226; *Andrews v. Brown*, 3 id. 130; *Pratt v. Law*, 9 Cranch 494; *Payne v. Graves*, 5 Leigh 561; *Morss v. Elmendorf*, 11 Paige 277; *Ferrier v. Buzick*, 2 Iowa 136; *Sternberger v. McGovern*, *supra*; *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45; *Rockwell v. Lawrence*, 6 N. J. Eq. 190; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225; 2 *Story's Eq.*, § 798; *Carroll v. Rice*, Walk. Ch. 373; *Berryman v. Hewitt*, 6 J. J. Marsh. 462; *Reeder v. Trullinger*, 151 Pa. 287; *Ellis v. Salomon*, 57 App. Div. (N. Y.) 118; *Haffey v. Lynch*, 143 N. Y. 241.

⁸³ *Peabody v. Tarbell*, 2 Cush. 226; *Carroll v. Rice*, *supra*; *Stanton v. Miller*, 14 Hun 383; *Dustin v. Newcomer*, 8 Ohio 49; *Taylor v. Smith*, 2 Whart. 432; *Lee v. Dean*, 3 id. 316; *Coe v. Lindley*, 32 Iowa 437; *Smith v. Sillyman*, 3 Whart. 589; *Gerault v. Anderson*, 2 Bibb 543; *Patrick v. Marshall*, id. 40, 4 Am. Dec. 670; *McConnell v. Dunlap*, *Hardin* 14; *Fisher v. Kay*, 2 Bibb 434.

The legal rate of interest governs in equity. *Smith v. Johnson*, 30 S. D. 200.

Testimony as to the loss resulting from inability to obtain the use or profits of the land is incompetent. *Ibid.*

⁸⁴ *Jersey City v. Flynn*, 74 N. J. Eq. 104; *Gallup v. Bernd*, 132 N. Y. 370; *Connor v. Potts*, [1897] 1 Irish 534; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453.

Interest on the purchase money may not be recovered if the plaintiff is responsible for having prevented payments being made as stipulated. *Finlen v. Heinze*, 32 Mont. 354.

⁸⁵ *Walsh v. Hale*, 25 Gratt. 314; *Nelson v. Carrington*, 4 Munf. 332, 6 Am. Dec. 519; *Gray v. Handkinson*, 1 Bay 278; *State v. Gaillard*, 2 id. 11, 1 Am. Dec. 628; *Sumter v. Welsh*, 2 Bay 558; *Adams v. Wylie*, 1 N. & McC. 78; *Hoback v. Kilgore*, 26 Gratt. 442, 21 Am. Rep. 317; *Quesnel v. Woodlief*, 6 Call 218; *Hundley v. Lyons*, 5 Munf. 342, 7 Am. Dec. 685; *Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec. 202; *Funk v. McKeoun*, 4 J. J. Marsh. 169; *Hampton v. Eubank*, id. 634; *Burk's App.*, 75 Pa. 141, 15 Am. Rep. 587; *Harder v. Woodward*, 75 Pa. 479; *Kent v. Carcaud*,

value according to the circumstances; that is, whether as to that parcel the damages for loss of the bargain should be substantial or only nominal.⁸⁶ Where a tract of land is sold for a sum *in gross*, and not by the acre, and the quantity stated is qualified by the words "more or less," there is no warranty of quantity, and there can be no abatement if the number of acres is less than that stated, nor compensation allowed for any excess.⁸⁷ The force of the qualifying word "about" is comparatively slight; while it does not bind the parties to the precise number of acres it imports that the actual quantity is a near approximation to that stated, "that is to say, within a fraction of an acre, or perhaps it might cover a discrepancy of one or two acres."⁸⁸ The right to an abatement is not affected by the value of the land actually conveyed; and if the full purchase price has been paid the purchaser is entitled to interest on the sum abated.⁸⁹ Where the vendee seeks specific performance after the loss of improvements on the property by fire intermediate the contract for a conveyance and the actual conveyance, a just and reasonable abatement of the contract price will be allowed. The principle on which this may be done is thus stated: Let it be kept in mind that the plaintiff is entitled to be placed, so far

17 Md. 291; *Stow v. Bozeman*, 29 Ala. 401; *Rowland v. Shelton*, 25 id. 220; *Worthy v. Patterson*, 20 id. 172; *Whiteside v. Jennings*, 19 id. 784; *Marshall v. Wood*, 16 id. 812; *Willis v. Dudley*, 10 id. 938; *Joliffe v. Hite*, 1 Call 262; *Hall v. Cunningham*, 1 Munf. 310; *Hall v. Mayhew*, 15 Md. 551. See *Courcier v. Graham*, 2 Ohio 341.

⁸⁶ *Thompson v. Bell*, 37 Ala. 438; *Gibson v. Marquis*, 29 id. 668; *Walsh v. Hale*, 25 Gratt. 314. See *Ragsdale v. Meridian L. & I. Co.* 71 Miss. 284.

⁸⁷ *Sprague v. Griffin*, 22 App. Div. (N. Y.) 223; *Clay County L. & C. Co. v. Angelina County*, 23 Tex. Civ. App. 220; *Hall v. Mayhew*, 15 Md. 551; *Commissioners v. Thompson*, 4 McCord 241, 17 Am. Dec. 735;

Tucker v. Cocke, 2 Rand. 51; *Chipman v. Briggs*, 5 Cal. 76; *Voorhees v. De Meyer*, 2 Barb. 37; *Harrell v. Hill*, 19 Ark. 102, 68 Am. Dec. 202; *Ketchum v. Stout*, 20 Ohio 453; *Tyson v. Hardesty*, 23 Md. 305; *Seamonds v. McGinnis*, 3 Gratt. 319; *Faure v. Martin*, 7 N. Y. 210, 57 Am. Dec. 515; *Mack v. Patchin*, 29 How. Pr. 20; *Jones v. Tatum*, 19 Gratt. 735; *Reed v. Patterson*, 7 W. Va. 263. Compare *Triplett v. Allen*, 26 Gratt. 724, 21 Am. Rep. 320. See *Estes v. Odom*, 91 Ga. 600, for the rule under the local code.

⁸⁸ *Baltimore P. B. & L. Soc. v. Smith*, 54 Md. 187, 204, 39 Am. Rep. 374. See § 636; *Wolcott v. Hayes*, 43 Ind. App. 578.

⁸⁹ *Estes v. Odom*, *supra*.

as property and money will place him, in exactly the same position that he was in on the day that the contract of sale was entered into. If on that day the property was worth more than he agreed to pay for it, he is entitled to the profit on his bargain. If, on the other hand, the property was worth less than he agreed to pay for it, he must suffer the loss. Let it be ascertained what was the market value with the building on it on the day that the contract was entered into. Let it also be ascertained what was the market value of the lot, without regard to the building, on that day. If the market value of the improved lot was more than the contract, the difference between these two sums would be the profit that the plaintiff would have realized on his bargain. Deduct the amount of profit from the market value of the lot alone, and the sum remaining will be the amount which the plaintiff should be required to pay. If the market value of the property and the contract price are the same, then the plaintiff should be required to pay a sum which would equal the market value of the lot without the building. If the market value of the whole property was less than the contract price, then the plaintiff should be required to pay the market value of the lot without the building, and in addition to this the difference between the market value of the lot and building and the contract price, but not more than that.⁹⁰ The basis of the abatement will vary with the facts. If the improvements on the land are valuable, bearing a large proportion to its value, the average value of the land without them, considering both to be worth the contract price, and estimating the quantity of land as the parties did, will equitably adjust their rights.⁹¹

The English chancery amendment act of 1858,⁹² commonly called Lord Cairn's Act, provides that in all cases in which the court of chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of

⁹⁰ *Shinizy v. Guernsey*, 111 Ga. 346, 50 L.R.A. 680.

⁹¹ *Hoback v. Kilgore*, 26 Gratt. 442, 21 Am. Rep. 317.

⁹² 21-22 Vict., ch. 27, sec. 8.

any wrongful act, or for the specific performance of any covenant, contract or agreement it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance. It has been held that under this statute the court would not interfere to award damages where it would not have interfered to grant relief before.⁹³ It will not grant relief where the bill is filed for damages only;⁹⁴ and this is the general doctrine of equity.⁹⁵ In a case which was decided in England in 1874 a railway company agreed for a valuable consideration with a land-owner to erect, construct and fit up a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company having refused to perform and substituted a station at a distance of two miles, the land-owner instituted a suit for specific performance. The court, under the act mentioned, held that the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance. The lord chancellor thus contrasted these modes of relief: "It has been a matter of some surprise to us that the plaintiff should have been dissatisfied with that conclusion; for if the view which has been already expressed is correct, supposing the court to have given him specific performance, it could not have extended the express obligation of the company, and therefore could only have given him the very minimum of that which is expressed in the terms creating the obligation; whereas, in the case of damages, as it appears to me, the plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in courts both of law and equity against persons who are wrong-doers in the sense of refusing to perform, and not performing, their agreements. We know it to be an estab-

⁹³ *Scott v. Rayment*, L. R. 7 Eq. 112, 116.

⁹⁴ *Middleton v. Magnay*, 2 Hem. & Mill. 233; *Betts v. Gallais*, L. R. 10 Eq. 392.

⁹⁵ *Richmond v. Dubuque, etc. R. Co.*, 33 Iowa. 422; *Black v. Black*, 15 Ga. 445; *Lewis v. Yale*, 4 Fla. 418; *McQueen v. Chouteau*, 20 Mo. 222, 64 Am. Dec. 178; *Wright v. Taylor*, 9 Wend. 538.

lished maxim that, in assessing damages, every reasonable presumption may be made as to the benefit which the other parties might have obtained by the *bona fide* performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting, and was not forthcoming, a great judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according to the circumstances of each case. So applying it to the circumstances of the present case, it appears to me that a jury might, with perfect propriety, take into account the probable benefit which the plaintiff's estate might have derived from the existence of a stopping place on the line, to which traffic might have been attracted or which might have been convenient to the persons resident upon that estate. They might take into account the reasonable probability that if the company had *bona fide* performed the agreement they would have made the station in a reasonable manner as regards the mode of construction and the extent of accommodation; and they might also take into account the reasonable probability that if the company had made the station they would, in their own interest, have thought it worth while to make a reasonable use of it. All these are elements, no doubt, more or less of an indefinite character, but proper for the consideration of a jury on the question of damages and proper for the consideration of this court when it discharges the functions of a jury."⁹⁶

There are cases in which a vendor may obtain specific performance although in some particulars he is unable to fulfill the contract on his part. Thus, it was allowed, though the land, which was sold at auction, was described in the particulars preceding the sale as all within a ring fence and the house in good repair, when they were otherwise.⁹⁷ But in such cases

⁹⁶ *Wilson v. Northampton, etc. R. Co.*, L. R. 9 Ch. 279.

⁹⁷ *Dyer v. Hargrave*, 10 Ves. 505. See *King v. Bardeau*, 6 Johns. Ch.

38, 10 Am. Dec. 312; *Guynet v. Mantel*, 4 Duer 94; *Beyer v. Marks*, 2 Sweeny 715; *Reynolds v. Vance*, 4 Bibb. 213.

the court allows compensation for the defect, if the variation be such, and to the extent that it diminishes the value of the purchase.⁹⁸ A purchaser is allowed more liberally than the vendor to have specific performance in part and compensation for the rest, where the latter is not able and cannot be compelled to completely execute the contract of sale.⁹⁹ And in such cases the rule of abatement is the same.¹

A vendor who affirms the validity of his contract to sell and convey by unsuccessfully suing upon it cannot limit his liability to the damages stipulated in the contract and which were payable if he should declare the contract void. The vendee may recover expenses incurred in searching the title in consequence of the attempt to enforce the contract.² By waiving the right to sue for damages and proceeding for a specific performance the right to collect attorney's fees because of bad faith in breaching the contract is waived, if it existed.³

SECTION 3.

COVENANTS FOR TITLE — OF SEIZIN AND GOOD RIGHT TO CONVEY. .

§ 591. Their purport; when broken. A purchaser under a general agreement to convey is entitled to a perfect title; to a deed properly framed to convey it and containing the usual covenants.⁴ The acceptance of a deed operates as a fulfillment

⁹⁸ *Id.*; *Nagle v. Newton*, 22 Gratt. 814; *Merges v. Ringler*, 24 N. Y. Misc. 317.

⁹⁹ *Williams v. Pearman*, — Tex. Civ. App. —, 164 S. W. 43; *Horn v. Phillips*, 167 Iowa 169; *Wood v. Griffith*, 1 Swanst. 54; *Dart on Vendors & P.* 499, 500; *Mortlock v. Buller*, 10 Ves. 315; 1 *Sugd. on Vendors*, 351; *Mestaer v. Gillespie*, 11 Ves. 621, 640; *Seaman v. Vawdrey*, 16 id. 390; *Western v. Russell*, 3 V. & B. 187; *Ketchum v. Stout*, 20 Ohio 453; *Painter v. Newby*, 11 Hare 26.

¹ *Dale v. Lester*, 16 Ves. 7, 11; *Lemmon v. Brown*, 4 Bibb 308; *Clagett v. Easterday*, 42 Md. 617.

² *Van Schaick v. Lese*, 31 N. Y. Misc. 610.

³ *Brunswick Co. v. Dart*, 93 Ga. 747.

⁴ *Mead v. Altgeld*, 136 Ill. 298; *Dikeman v. Arnold*, 71 Mich. 656, 674; *Allen v. Atkinson*, 21 Mich. 361; *Bryant v. Wilson*, 71 Md. 440; *Rogers v. Borchard*, 82 Cal. 347; *Burwell v. Jackson*, 9 N. Y. 535; *Doe v. Stanion*, 1 M. & W. 701; *Shreck v. Pierce*, 3 Iowa 360; *Cul-*

of the agreement, whether the deed is strictly in conformity therewith or not, and the contract is thus merged in the deed.⁵ Henceforth, in the absence of fraud,⁶ accident or mutual mistake, the purchaser must look to the covenants which the deed contains for his indemnity if the title is defective or fails.⁷

The usual covenants are, first, of seizin and good right to convey; second; of warranty and for quiet enjoyment; and third, against incumbrances. The covenants of seizin and of good right to convey are not precisely alike, but they are practically so similar that they are connected and are generally of the same import and effect and directed to one and the same object.⁸ The former asserts an estate in the covenantor which may pass by his deed; the other is satisfied by the covenantor having even a naked power to convey. They are

lum v. Branch Bank, 4 Ala. 21, 37 Am. Dec. 725; Gibson v. Richart, 83 Ind. 313.

A vendor who sells land by a contract incorporating certain conditions of the transfer of land act which refers to an existing certificate of title, and to the vendor signing a "transfer" of the property, is bound to sell under that act although he has not made any other representation as to the title being under it. Skinner v. Australian & B. L. D. & A. Co., 15 Vict. L. R. 674.

⁵ Aird v. Alexander, 72 Miss. 358; Brandt v. Foster, 5 Iowa 287; Wheeler v. Ball, 26 Mo. App. 443; Wheeler v. Wayne County, 132 Ill. 599; Gibson v. Richart, 83 Ind. 313; Howes v. Barker, 3 Johns. 506, 3 Am. Dec. 526; Bull v. Willard, 9 Barb. 641.

Though the deed warrants the title and the grantee has not been disturbed in his possession he may insist upon the performance of the contract to furnish an abstract showing a perfect title. Loring v. Oxford, 18 Tex. Civ. App. 415.

⁶ See Darlington v. Gates L. Co. 142 Wis. 198, 135 Am. St. 1070, and cases cited.

⁷ Slocum v. Bracy, 55 Minn. 249, correcting *obiter* in Donlan v. Evans, 40 Minn. 501; Thorkildsen v. Carpenter, 120 Mich. 419; McLennan v. Prentice, 85 Wis. 427; Fisk v. Duncan, 83 Pa. 197; Witbeck v. Waine, 16 N. Y. 535; Williams v. Hathaway, 19 Pick. 388; Earle v. De Witt, 6 Allen 520; Jobe v. O'Brien, 2 Humph. 34; Maney v. Porter, 3 id. 347. See § 567.

A contract to give a deed that shall convey the premises is not satisfied by the delivery of a warranty deed, it being subsequently determined the vendor had no title. The vendee may recover the money paid without being ousted and suing on the covenants in the deed. Colburn v. Northern Pac. R. Co., 13 Mont. 476.

⁸ Brady v. Bank of Commerce of Coweta, 41 Okla. 473; Hayden v. Patterson, 39 Colo. 15; Howell v. Richards, 11 East 633.

generally regarded as covenants for title, not merely for possession. A covenant that one is seized in fee is a covenant for title. And whenever the covenant is expressed, as it usually is in England, in formal and precise terms as evincing an intention to assure the highest title, it has uniformly received a construction to require the title specified.⁹ Whenever the grantor plainly covenants that he has an indefeasible estate in fee-simple or any other specified and clearly defined estate, anything less will constitute a breach, or the covenant will be construed to bind the covenantor for the title specified.¹⁰ But there is great diversity in the forms of this covenant in the United States. It does not uniformly state, except as implied in the word *seized* or *seizin*, that the grantor has the highest title. In Massachusetts and Maine such an equivocal covenant is construed to mean only a seizin in fact or actual possession under color of title.¹¹ In the former state the court held this language in an action upon these covenants: "The defendant, to maintain the issue on his part, was obliged to prove his seizin when the deed was executed. But it was not necessary to show seizin under an indefeasible title. A seizin in fact was sufficient, whether he gained it by his own disseizin or whether he was in under a disseizin. If, at the time he executed the deed, he had the exclusive possession of the premises, claiming the same in fee-simple, by a title adverse to the owner, he was seized in fee and had a right to convey. If the defendant's grantor had no right to convey the premises to the defendant yet, if in fact he entered under color, though not by virtue, of

⁹ *Coleman v. Clark*, 80 Mo. App. 339; *Mercantile T. Co. v. South Park R. Co.*, 94 Ky. 271; *Prescott v. Trueman*, 4 Mass. 631; *Smith v. Strong*, 14 Pick. 128; *Raymond v. Raymond*, 10 Cush. 134; *Garfield v. Williams*, 2 Vt. 327; *Pierce v. Johnson*, 4 id. 247; *Abbott v. Allen*, 14 Johns. 252; *Collier v. Gamble*, 10 Mo. 472.

¹⁰ *Dubay v. Kelly*, 137 Mich. 345.

In Iowa, before sec. 1937 of the Code was enacted a husband who

joined with his wife in conveying land owned by her was liable on his covenant. *Bellows v. Litchfield*, 83 Iowa 36.

Both husband and wife are liable on a joint deed containing full covenants of seizin. *Bolinger v. Brake*, 4 Kan. App. 180. See § 593.

¹¹ *Marston v. Hobbs*, 2 Mass. 439, 3 Am. Dec. 61; *Raymond v. Raymond*, 10 Cush. 134, 146; *Twambly v. Henley*, 4 Mass. 441.

that deed, and acquired a seizin by disseizin, by ousting the former owner, he has not broken these covenants.”¹² A similar doctrine has been advanced in Nebraska and Illinois.¹³ In these states however, the law is settled, in accordance with the prevailing rule, that the covenant of seizin is broken as soon as made if the grantor has not the covenanted title, and delivery of possession will not satisfy it.¹⁴ And in Maine if the grantee does not enter into possession he is evicted from the time the covenant is made.¹⁵ A statute declaring that the words “grant, bargain and sell,” unless limited by express words, shall operate as an express covenant that the grantor was seized of an estate free from incumbrances made by him, does not warrant that he was seized of a fee-simple estate, but only of some estate of freehold; the existence of a life estate satisfies the covenant, which is not enlarged because the *habendum* clause contains the words, “to have and to hold” the property to the grantee, his heirs forever “in fee-simple.”¹⁶

§ 592. **Same subject.** When the covenants in express terms or by construction require the conveyance of a specified title they have effect accordingly; and if the title of the grantor, or the title which he has power to convey, is less to the whole or any part of the granted premises the covenant is broken; in other words, the covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which his conveyance purports to convey.¹⁷ Being covenants

¹² Slater v. Rawson, 1 Metc. (Mass.) 450; Hacker v. Storer, 8 Me. 228; Ballard v. Child, 34 id. 355.

¹³ Scott v. Twiss, 4 Neb. 133; Watts v. Parker, 27 Ill. 224. But see Brady v. Spurck, id. 478; Funniss v. Williams, 11 id. 229.

¹⁴ Webb v. Wheeler, 80 Neb. 438, 17 L.R.A.(N.S.) 1178 (the covenant was “I hold said premises by good and perfect title.” The opinion distinguishes other local cases on the ground that the covenants on which they rested were to warrant and de-

fend the granted premises); Baker v. Hunt, 40 Ill. 264, 89 Am. Dec. 346; Brady v. Spurck, 27 Ill. 478; King v. Gilson, 32 id. 348, 83 Am. Dec. 269; Frazer v. Supervisors, 74 Ill. 291; Tone v. Wilson, 81 id. 529; Wadhams v. Swan, 109 id. 46.

¹⁵ People’s Sav. Bank v. Hill 81 Me. 71.

¹⁶ Cunningham v. Dillard, 71 Miss. 61. See Seldon v. Jones, 74 Ark. 348.

¹⁷ Seldon v. Jones, *supra*; Fortescue v. Columbia R. E. Co., 75 N. J. L. 272; Howell v. Richards, 11 East

de præsenti, if broken at any time they are broken when made. And a suit may be brought at once though the grantee goes into possession and has not been evicted.¹⁸ In England and in some of the states it is held that these covenants run with the land

633; *Gray v. Briscoe*, Noy, 142; *Guthrie v. Pugsley*, 12 Johns. 126; *Kingdom v. Nottle*, 4 M. & S. 53; *Smith v. Strong*, 14 Pick. 128; *Park v. Cheek*, 4 Cold. 20; *Kincaid v. Brittain*, 5 Sneed 119; *Gilbert v. Buckley*, 5 Conn. 262, 13 Am. Dec. 57; *Hall v. Gale*, 20 Wis. 292; *Parker v. Brown*, 15 N. H. 176; *Pickering v. Staples*, 5 S. & R. 107, 9 Am. Dec. 336; *Mott v. Palmer*, 1 N. Y. 573.

A covenant by the grantor "for his heirs, executors and administrators" does not bind him. *Bowne v. Wolcott*, 1 N. D. 497; *Rufner v. McConnel*, 14 Ill. 168; *Traynor v. Palmer*, 86 Ill. 477.

¹⁸ *Bryant v. Mosher*, 96 Neb. 555; *Turner v. Lawson*, 144 Ala. 432; *Pinckard v. American F. L. M. Co.*, 143 Ala. 568; *Seyfried v. Knoblauch*, 44 Colo. 86; *Hayden v. Patterson*, 39 Colo. 15; *Leet v. Gratz*, 124 Mo. App. 394; *Werner v. Wheeler*, 142 App. Div. (N. Y.) 358; *Wick v. Rea*, 54 Wash. 424; *Eames v. Armstrong*, 142 N. C. 506; *Meservey v. Snell*, 94 Iowa 222, 58 Am. St. 391; *Mercantile T. Co. v. South Park R. Co.*, 94 Ky. 271; *Bement v. Ohio Valley B. & T. Co.*, 99 Ky. 109, 59 Am. St. 445; *Adkins v. Tomlinson*, 121 Mo. 487; *Colburn v. Northern Pac. R. Co.*, 13 Mont. 476; *Ilseley v. Wilson*, 42 W. Va. 757; *Curtis v. Brannon*, 98 Tenn. 153, quoting the text; *McLennan v. Prentice*, 85 Wis. 427, 442, citing the text; *Building, L. & W. Co. v. Fray*, 96 Va. 559; *Parkinson v. Woulds*, 125 Mich. 325; *Bolinger v. Brake*, 57 Kan. 663, 4

Kan. App. 180; *Jewett v. Fisher*, 9 Kan. App. 630; *Egan v. Martin*, 71 Mo. App. 60; *De Long v. Spring Lake, etc. Co.*, 65 N. J. L. 1, 7, citing the text; *Benton County v. Rutherford*, 33 Ark. 640; *Brandt v. Foster*, 5 Iowa, 287; *Sac County Bank v. Foster*, 77 id. 435; *Price v. Deal*, 90 N. C. 290; *Dickey v. Weston*, 61 N. H. 23; *McInnis v. Lyman*, 62 Wis. 191 (unoccupied lands); *Morrison v. Underwood*, 20 N. H. 369; *Triplett v. Gill*, 7 J. J. Marsh. 438; *Spencer's Case*, 1 Smith's Lead. Cas., pt. 1, p. *179; *Smith v. Jeffs*, 44 N. H. 482; *Bartholomew v. Candee*, 14 Pick. 167; *Lawless v. Collier*, 19 Mo. 480; *Pringle v. Witten*, 1 Bay 256, 1 Am. Dec. 612; *Abbot v. Allen*, 14 Johns. 252; *Brady v. Spureck*, 27 Ill. 478; *McCarty v. Leggett*, 3 Hill 134; *Mott v. Palmer*, 1 N. Y. 573; *Pollard v. Dwight*, 4 Cranch 421; *Chapman v. Holms*, 10 N. J. L. 24; *Fowler v. Poling*, 2 Barb. 300; *Garrison v. Sandford*, 12 N. J. L. 261; *Fitzhugh v. Crogan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139; *Lawrence v. Montgomery*, 37 Cal. 183, 188; *Murphy v. Price*, 48 Mo. 247; *Mitchell v. Warner*, 5 Conn. 497; *Dale v. Shivly*, 8 Kan. 276; *Innes v. Agnew*, 1 Ohio 179; *Kennison v. Taylor*, 18 N. H. 220; *Morrison v. Underwood*, 20 id. 369; *Parker v. Brown*, 15 id. 176; *Bickford v. Page*, 2 Mass. 455; *Gilbert v. Bulkley*, 5 Conn. 262, 13 Am. Dec. 57; *Clark v. Swift*, 3 Metc. (Mass.) 390; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Ingram v. Morgan*,

if there is not a total breach at first. A distinction is made between a mere formal breach, from which no injury results, and a final and complete breach, by which the possession is lost or other actual injury sustained.¹⁹

It is held that where the covenantor is in possession claiming title and delivers possession to the covenantee, the covenant of seizin is not a mere present engagement, made for the sole benefit of the covenantee, but is one of indemnity, entered into in respect to the land conveyed and intended for the security of all subsequent grantees when it is finally and completely broken; and consequently, on such nominal breach when the covenant is made, no such right of action accrues to the covenantee as is sufficient to arrest the covenant or to deprive it of the capacity of running with the land for the benefit of the person holding under the deed when the eviction takes place or other real injury is sustained. The possession of the land or seizin in fact under the deed by the covenantee and those claiming through him is considered such an estate as carries the covenant along with it.²⁰ In Ohio and Louisiana the covenant of seizin is held to be one for title; it runs with the land where the grantor has an actual seizin; it is broken in such a case only when there has been an actual disturbance of the purchaser or same one claiming under him; or, in other words, until actual injury is sustained there is not even a nom-

4 Humph. 66, 40 Am. Dec. 626; Craig v. Donovan, 63 Ind. 513.

It was held in the last case that a deed executed in Indiana of lands in another state should be governed by the laws of the latter as to the conveyance; but the covenant of seizin should be expounded by the laws of Indiana, and if false was broken immediately.

¹⁹ But see Spoor v. Green, L. R. 9 Ex. 99; Turner v. Moon, [1901] 2 Ch. 825.

²⁰ Sturgis v. Slocum, 140 Iowa 25; Bonvillain v. Bodenheimer, 117 La. 793; Coleman v. Lucksinger, 224 Mo. 1, 26 L.R.A.(N.S.) 934;

Leet v. Gratz, 124 Mo. App. 394; Rawle on Cov. Tit. 325, and note; Kingdon v. Nottle, 4 M. & S. 53; Schofield v. Iowa H. Co., 32 Iowa 317, 7 Am. Rep. 197; Turner v. Moon, [1901] 2 Ch. 825; Martin v. Baker, 5 Blackf. 232; McCradey v. Brisbane, 1 N. & McC. 104, 9 Am. Dec. 676; Mecklem v. Blake, 22 Wis. 495; Eaton v. Lyman, 30 id. 41; Boon v. McHenry, 55 Iowa 202; Cockrell v. Proctor, 65 Mo. 41; Allen v. Kennedy, 91 id. 324; Graham v. Baker, 10 Up. Can. C. P. 426; Scriver v. Myers, 9 id. 225; Banon v. Frank, 14 id. 295.

inal breach. If, however, there is no actual seizin and nothing passes by the deed the covenant is broken immediately.²¹ In Kentucky if there is no deficiency in the quantity of land the cause of action arises at the time of eviction.²²

The general doctrine held in this country, however, is that these are personal covenants and if broken at all are so at the moment they are made and are thereby turned into mere rights of action incapable of assignment, or of being sued upon at law by any but the covenantee and his personal representatives.²³ The covenant is broken if the grantor has not the very estate in quantity and quality which he purports to convey.²⁴ It is broken if another has a paramount right to divert a natural spring;²⁵ or if the deed contains a conveyance of and covenant for raising a dam to a certain height, and raising it to that height would cause a tortious flooding of lands belonging to third persons.²⁶ The covenant extends not only to the land itself, but to all such things as should be properly ap-

²¹ *Backus v. McCoy*, 3 Ohio 211, 17 Am. Dec. 585; *Foote v. Burnett*, 10 Ohio 334; *Devore v. Sunderland*, 17 id. 60, 49 Am. Dec. 442; *Stambaugh v. Smith*, 23 Ohio St. 584, 588; *Great Western S. Co. v. Saas*, 24 id. 542; *Bonvillain v. Bodenheimer*, 117 La. 793.

²² *Chenault v. Thomas*, 119 Ky. 130.

²³ *Thompson v. Richmond*, 102 Me. 335; *Reinhalter v. Hutchins*, 26 R. I. 586; *Bowne v. Wolcott*, 1 N. D. 497; *Prestwood v. McGowin*, 128 Ala. 267, 274; *Rawle on Cov. Tit.* 319, 320; *Greenby v. Wilcocks*, 2 Johns. 1, 3 Am. Dec. 379; *Hacker v. Storer*, 8 Me. 228; *Heath v. Whidden*, 24 id. 383; *Smith v. Jeffs*, 44 N. H. 482; *McCarty v. Leggett*, 3 Hill 134; *Thayer v. Clemence*, 22 Pick. 490; *Slater v. Rawson*, 1 Mete. (Mass.) 450; *Fitzhugh v. Crogan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139; *Mitchell v. Warner*, 5 Conn. 497; *Clark v. Swift*,

3 Mete. (Mass.) 390; *Davis v. Lyman*, 6 Conn. 249; *Bickford v. Page*, 2 Mass. 455; *Marston v. Hobbs*, id. 439, 3 Am. Dec. 61; *Williams v. Wetherbee*, 1 Aik. 233; *Garfield v. Williams*, 2 Vt. 327; *Pierce v. Johnson*, 4 id. 247; *Richardson v. Dorr*, 5 id. 9; *Potter v. Taylor*, 6 id. 676; *Hamilton v. Wilson*, 4 Johns. 72, 4 Am. Dec. 253; *Bartholomew v. Candee*, 14 Pick. 167; *Lot v. Thomas*, 2 N. J. L. 297; *Carter v. Denman*, 23 id. 260; *Eames v. Armstrong*, 142 N. C. 506.

²⁴ *McLennan v. Prentice*, 85 Wis. 427; *Howell v. Richards*, 11 East 633; *Bull v. Beiseker*, 16 N. D. 290, 14 L.R.A.(N.S.) 514; *Jeffords v. Dreisbach*, 168 Mo. App. 577.

²⁵ *Clark v. Conroe*, 38 Vt. 469; *Turner v. Moon*, [1901] 2 Ch. 825.

²⁶ *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 20 id. 292; *Adams v. Conover*, 87 N. Y. 422, 41 Am. Rep. 381.

purtenant to it and pass by conveyance of the freehold. Thus it has been held to be broken where the grantor had, before the conveyance, sold to another a quantity of rails which had been erected into a fence and thereby became a fixture.²⁷ And the same doctrine has been applied generally to buildings and other fixtures upon the land, the right to remove which was vested in other parties and did not pass to the purchaser by the conveyance.²⁸ A judgment perpetually enjoining the grantee from using an easement which the grantor assumed to convey may be treated as an eviction.²⁹ In case of such breaches the plaintiff is entitled to recover damages according to the difference in value between the property in the condition it was covenanted to be and its actual condition.³⁰ The covenant is not broken by an outstanding inchoate right of dower, because the technical seizin of the grantee is not affected. His deed carries the title, and although the dower right may be an incumbrance from which he may be protected by his covenant against incumbrances, his possession or legal title is not affected.³¹ The covenant of seizin is not broken although the front wall of the building encroached over the line of the street, or the side wall encroached on the land of the adjoining owner.³² The existence of railways and other highways over land at the time a deed is executed is presumed to have been within the knowledge of the purchaser, and they constitute no breach of the covenants. In respect to railways, where the power of eminent domain is exercised in their behalf, their being on the premises is not a breach of the covenants of title in any case.³³ An un-

²⁷ *Mott v. Palmer*, 1 N. Y. 564, 49 Am. Dec. 359.

²⁸ *Larson v. Cook*, 85 Wis. 564; *Brantley Co. v. Johnson*, 102 Ga. 850; *Gates v. Parmly*, 93 Wis. 294; *Powers v. Dennison*, 30 Vt. 752; *Van Wagner v. Van Nostrand*, 19 Iowa 427; *West v. Stewart*, 7 Pa. 122; *Rawle on Cov. Tit.* (4th ed.) 78, 79.

²⁹ *Harrington v. Bean*, 89 Me. 470; *Scheible v. Slagle*, 89 Ind. 323.

³⁰ *Hall v. Gale*, 20 Wis. 292; *Turner v. Moon*, [1901] 2 Ch. 825.

³¹ *Building, L. & W. Co. v. Fray*, 96 Va. 559.

³² *Stearn v. Hesdorfer*, 9 N. Y. Misc. 134, citing *Sasserath v. Metzgar*, 30 Abb. N. C. 407; *Burke v. Nichols*, 1 Abb. Ct. of App. 260.

³³ *Smith v. Hughes*, 50 Wis. 620; *Kutz v. McCone*, 22 Wis. 628, 99 Am. Dec. 85; *Frost v. Earnest*, 4 Whart. 86; *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122; *McLennan v.*

lawful intrusion on lands is not a breach of any of the ordinary covenants.³⁴

§ 593. **Damages for breach of these covenants.** For a total breach of the covenant of seizin or good right to convey, where nothing passes by the conveyance, the measure of damages is the amount of the consideration paid, interest.³⁵ And the same

Prentice, 85 Wis. 427, 434; Bailey v. Miltenberger, 31 Pa. 37.

³⁴ McLennan v. Prentice, Bailey v. Miltenberger, *supra*.

³⁵ Crandall v. Kirk, 185 Ill. App. 460; Dubay v. Kelly, 137 Mich. 345; Hartford & S. O. Co. v. Miller, 41 Conn. 112; Board of Directors v. Myers, 79 Ark. 14; Seyfried v. Knoblauch, 44 Colo. 86; Norfolk & W. R. Co. v. Mundy, 110 Va. 422; Mercantile T. Co. v. South Park R. Co., 94 Ky. 271; Bellows v. Litchfield, 83 Iowa 36, 45; Doom v. Curran, 52 Kan. 360; Looney v. Reeves, 5 Kan. App. 279; Harrington v. Bean, 89 Me. 470, citing the text; Bradley v. Norris, 63 Minn. 156, 169; Evans v. Fulton, 134 Mo. 653; Curtis v. Brannon, 98 Tenn. 153, 69 L.R.A. 760, citing the text; McLennan v. Prentice, 85 Wis. 427, 445, citing the text; Curran v. Carnell, Newf. Rep. 1884-96, 375; De Long v. Spring Lake, etc. Co., 65 N. J. L. 1, 7; Horne v. Walton, 117 Ill. 130, 135; Price v. Deal, 90 N. C. 290; Wilson v. Peele, 78 Ind. 384; Wright v. Nipple, 92 id. 310; Rhea v. Swain, 122 id. 272; Norman v. Winch, 65 Iowa 263; Conrad v. Trustees Grand Grove, etc., 64 Wis. 258; Bibb v. Freeman, 59 Ala. 612; McInnis v. Lyman, 62 Wis. 191; Bickford v. Page, 2 Mass. 455; Sumner v. Williams, 8 id. 162, 5 Am. Dec. 83; Leland v. Stone, 10 Mass. 459; Ela v. Card, 2 N. H. 175, 9 Am. Dec. 46; Morse v. Shat-

tuck, 4 N. H. 229, 17 Am. Dec. 419; Marston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 61; Caswell v. Wendell, 4 Mass. 108; Smith v. Strong, 14 Pick. 128; Stubbs v. Page, 2 Me. 378; Wilson v. Forbes, 2 Dev. 30; Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Nutting v. Herbert, 35 N. H. 120; Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169; Sterling v. Peet, 14 Conn. 245; Henning v. Withers, 3 Brev. 458, 6 Am. Dec. 589; Tapley v. Lebaume, 1 Mo. 550; Martin v. Long, 3 id. 391; Lawless v. Collier, 19 id. 480; Frazer v. Supervisors, 74 Ill. 291; Cummins v. Kennedy, 3 Litt. 118; Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 328; Barnett v. Hughey, 54 Ark. 195; Backus v. McCoy, 3 Ohio 211, 17 Am. Dec. 585; Clark v. Parr, 14 Ohio 118, 45 Am. Dec. 529; Kimball v. Bryant, 25 Minn. 496; Cox v. Strode, 2 Bibb 277, 5 Am. Dec. 603; Nichols v. Walter, 8 Mass. 243; Chapel v. Bull, 17 id. 213; Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; Hacker v. Storer, 8 Me. 228; Bonta v. Miller, 1 Litt. 250; Blackwell v. Justices, 2 Blackf. 143; Lacey v. Marnan, 37 Ind. 168; Sheets v. Andrews, 2 Blackf. 274; Overhiser v. McCollister, 10 Ind. 41; Kincaid v. Brittain, 5 Sneed 119; Recohs v. Younglove, 8 Baxter 385; Park v. Cheek, 4 Cold. 20; Hacker v. Blake, 17 Ind. 97; Hodges v. Thayer, 110 Mass. 286; Foster v. Thompson, 41 N. H. 373; Brandt v. Foster, 5 Iowa 287; Blossom v.

rule applies where there is a breach as to the quantity of land,⁸⁶ or there has been a failure of title to an undivided interest,⁸⁷

Knox, 3 Pin. 262; Blake v. Burnham, 29 Vt. 437; Phipps v. Tarpley, 31 Miss. 43; Campbell v. Johnston, 4 Dana 182; St. Louis v. Bissell, 46 Mo. 157; Eames v. Armstrong, 142 N. C. 506.

⁸⁶ McComb v. Gilkeson, 110 Va. 406, 135 Am. St. 944; Cameron v. Burke, 61 Wash. 203; Pitman v. Conner, 27 Ind. 337; Drury v. Holden, 121 Ill. 130; Jeffords v. Dreisbach, 168 Mo. App. 577; Mengel v. Williamson, 50 Pa. Super. 100; Mercantile T. Co. v. South Park R. Co., *supra*; Folk v. Graham, 82 S. C. 66; Larkin v. Trammel, 47 Tex. Civ. App. 548; Martin v. Gordon, 24 Ga. 594; Phillips v. Reichart, 17 Ind. 120, 79 Am. Dec. 463; McNally v. White, 154 Ind. 163, 172; Bolinger v. Brake, 57 Kan. 663 (without interest); Adkins v. Tomlinson, 121 Mo. 487; McLennan v. Prentice, *supra*; Larson v. Cook, 85 Wis. 564; Brantley Co. v. Johnson, 102 Ga. 850; Morris v. Courtney, 120 Cal. 63; Brown v. Allen, 73 Hun 291; Grantier v. Austin, 66 Hun 157; Gates v. Parmly, 93 Wis. 294; Burkholder v. Farmers' Bank, 22 Ky. L. Rep. 2449; Doyle v. Brundred, 189 Pa. 113; De Long v. Spring Lake, etc., Co., *supra*; Sears v. Stinson, 2 Wash. 615; Nelson v. Matthews, 2 Hen. & Munf. 164, 3 Am. Dec. 620; Bond v. Quattlebaum, 1 McCord 584, 10 Am. Dec. 702; Morris v. Owens, 3 Strobb. 199; Blessing v. Beatty, 1 Rob. (Va.) 287. See Cornell v. Jackson, 3 Cush. 506, and note to § 614.

Where there is a deficiency in the acreage of the tract agreed to be conveyed the purchaser is entitled to have credited on his purchase-money mortgage a sum equivalent

to the value of such deficiency, calculated on the basis of the purchase price of the whole tract after deducting the reasonable value of the buildings at the time of the sale. Lyons v. Barnum, 60 Misc. (N. Y.) 625.

Where the sale of timber is by the acre the purchase price measures the damages for the failure of title to part whether the stumpage is or is not of the same quality or value per acre. Ackley v. Hunter, 154 Ala. 416, citing Conklin v. Hancock, 67 Ohio St. 455; Welch v. Browning, 115 Iowa 690; Haynie v. American T. I. Co. (Tenn. Ch. App.), 39 S. W. 865.

Neither a court of equity nor a court of law may enforce the rule which prevailed in feudal times and take from the grantor so much of his land as the title to that conveyed has failed and give it to the grantee as damages. Doyle v. Brundred, 189 Pa. 113.

Where the purchaser removed the timber, the chief value of the land, and was thereafter evicted, the eviction was considered to be only partial, and the damages recoverable were only such part of the price paid as the value of the land at the time the title failed bore to its value with the timber thereon. Brown v. Allen, 73 Hun 291.

⁸⁷ Roake v. Sullivan, 69 N. Y. Misc. 429.

In Hall v. Gale, 20 Wis. 292, for the breach of the covenant of seizin covering the right to raise water in a creek to a specified height, the damages were based on the lessened value of the property.

In Mott v. Palmer, 1 N. Y. 564,

or the loss of an easement appurtenant to the land.³⁸ This measure is not affected by the fact that intermediate the conveyance and the discovery that the title is defective the value of the land has been largely enhanced by improvements or by other causes. A recovery of its value, as estimated by the parties at the time of the purchase, is precisely in accord with the standard of redress afforded by the ancient writ of *warrantia chartæ*; and this standard is now maintained as politic and just. In an early New York case³⁹ Kent, C. J., said: "Upon the sale of lands the purchaser usually examines the title for himself, and in case of good faith between the parties (and of such cases only I now speak), the seller discloses his proofs and knowledge of the title. The want of title is, therefore, usually a case of mutual error; and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be if that rise was owing to the taste, fortune or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser without the hazard of absolute ruin." And again: "To find a proper rule of damages in a case like this is a work of some difficulty. No one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion where there has been no fraud may also be attended with injustice if not ruin. A piece of land is bought solely for the purpose of agriculture; by some unforeseen turn of fortune it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of

the value of a fence owned by a stranger was recovered.

³⁸ Sweet v. Howell, 96 App. Div. (N. Y.) 45.

In Lyles v. Perrin, 134 Cal. 417, the rule applied was the value of the water right appurtenant to the land, which the grantor conveyed to

a third person intermediate the negotiations for the purchase of the land and their consummation. This measure of damages was disapproved of in Sweet v. Howell, *supra*.

³⁹ Staats v. Ten Eyck, 3 Cal. 111, 2 Am. Dec. 254.

calling on a *bona fide* vendor to refund its present value, and that few fortunes could bear the demand. Who for the sake of one hundred pounds would assume the hazard of repaying as many thousands, to which the value of the property might rise by causes not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee? The safest general rule in all actions on contract is to limit the recovery as much as possible to an indemnity for the actual injury sustained, without regard to the profits which the plaintiff has failed to make, unless it shall clearly appear from the agreement that the acquisition of certain profits depended on the defendant's punctual performance, and that he had assumed to make good such a loss also. To prevent an immoderate assessment of damages when no fraud has been practiced, Justinian directed that the thing which was the object of contract should never be valued at more than double its cost. This rule a writer on the civil law applies to a case like the one before us; that is, to the purchase of land which had become of four times its original value when an eviction took place; but, according to this rule, the party could not recover more than twice the sum he had paid. This law is considered by Pothier as arbitrary, so far as it confines the reduction of the damages to precisely double the value of the thing, and is not binding in France; but its principle, which does not allow an innocent party to be rendered liable beyond the sum on which he may reasonably have calculated, being founded in natural law and equity, ought, in his opinion, to be followed, and care taken that damages in the case be not excessive. Rather than adhere to the rule of Justinian, or to leave the matter to the opinion of a jury, as to what may or may not be excessive, some more certain standard should be fixed on. However inadequate the return of the purchase-money must be in many cases, it is the safest measure that can be followed as a general rule.”⁴⁰

⁴⁰ Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229; Bender v. Fromberger, 4 Dall. 436, 1 L. ed. 898; Rawle on Cov. Tit. (4th ed.), 238;

Curtis v. Brannon, 98 Tenn. 153, 163, 69 L.R.A. 760; Withers v. Crenshaw (Tex. Civ. App.), 155 S. W. 1189.

Where, for some purpose of the vendor, the purchaser as part of the consideration of the sale, undertakes to make improvements upon the purchased property, it would be manifestly just and in accord with general principles that, in

It is said in a late case: We cannot perceive any basis for a different rule as to the measure of damages upon a breach of covenant that the grantor has good title and the measure of damages upon a breach of contract to convey and give such title, which, in the jurisdiction, is the value of the bargain. The vendee may not recover the value of his improvements as damages; he must seek redress under the occupying claimant's act. *Webb v. Wheeler*, 80 Neb. 438, 17 L.R.A.(N.S.) 1178.

Mr. Rawle, in his *Covenants for Title*, says: "In certain parts of the United States unimproved ground is frequently conveyed to a purchaser in fee, reserving to the vendor, as the entire consideration, an annual fee farm or ground rent which represents the value of the land, the purchaser covenanting that he will, for the purpose of securing to the vendor the rent so reserved, erect certain stipulated improvements. In this class of cases, the improvements being directly within the contract of the parties, and one of its inducements, it would seem that if the land thus improved were subsequently lost by reason of a defect of title or incumbrance created by the vendor, the damages should not be limited by the consideration, but might with propriety be increased by the value of the improvements thus made; and if there could be any doubt as to the liability of the vendor to this extent in case the defect or incumbrance were not

created by himself, although within the covenants he might have given, there would seem to be none where the loss was the consequence of his own act." 5th ed., § 170. It is said in a note that "there is no direct authority for this suggestion, but it is quoted with approval in *Field on Damages*, § 497, and 2 *Sutherland on Damages*, 259, and since it was made the following has been said by an English writer: 'I conceive that the doctrine laid down by Kent, C. J., in *Staats v. Ten Eyck*, 3 Cai. 111, 2 Am. Dec. 254, is clearly the equitable rule, where the improvements arise from causes of an entirely collateral nature, such as the growth of a town, the formation of a railway or the like. The occupier has had all the benefit of this increased value, so long as it lasted, without paying anything for it. Even supposing that he had sold again after the land had arisen in value, and been forced to pay back to his purchaser according to that additional value, still, he would only be repaying money which he had actually received, and would on the same principle have a right to call on his vendor to return the sum which he had received, and no more. But the same obvious equity seems by no means to exist when the additional value arises on the outlay of the plaintiff's own capital upon the land. No doubt cases might be put in which claim of damages on this account would be clearly inadmissible; as, for instance, if a person bought a moor or a mountain for shooting over,

case of a subsequent loss of it by reason of a defect of title, the value of such improvements should be included in the assessment of damages, not only in an action for breach of these covenants, but any others which might be broken by such deprivation.⁴¹ If there has been a constructive eviction and before an action is begun upon the covenant the grantee's title becomes perfect by an after-acquired title of the grantor inuring to his benefit, the grantee may recover indemnity for damage done to the land by the acts of the owners of the adverse title.⁴² In Wisconsin a married woman who joins in the execution of a deed for the sole purpose of barring her dower right in the land conveyed is not personally liable on the covenant of seizin.⁴³

The vendee may recover the costs attending his eviction;⁴⁴ but if he has not been evicted he cannot recover the expense incurred in buying in the outstanding title.⁴⁵ The vendor is not liable for expenses incurred by the vendee in attempting to bring about a settlement between them.⁴⁶ But if the vendor

and choose to reclaim the one or build a mansion with pleasure grounds upon the other. But suppose he purchased building ground, at so much per foot, in London or Manchester, for the express object of building; ought he not to be repaid for money laid out in this way, the benefit of which is seized by a stranger? In this case the damage incurred is the direct result of the breach of contract, and a result which must have been contemplated by the party entering into the covenant. Probably this will be found to be the true ground of distinction, and that every case must be decided upon its own merits, according as the improvements were the fair consequence of the contract of sale or not.' Mayne on Damages (3d ed.), 182. See also, 2 Dart on Vendors & P. (5th ed.) 793."

⁴¹ *Id.*; *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785; *Read v. Lof-Suth. Dam. Vol. II.—52.*

tus, 82 Kan. 485, 31 L.R.A.(N.S.) 457.

⁴² *McInnis v. Lyman*, 62 Wis. 191.

⁴³ *Semple v. Whorton*, 68 Wis. 626. See §§ 591, 613.

⁴⁴ *Chenault v. Thomas*, 119 Ky. 130; *Coleman v. Lucksinger*, 224 Mo. 1, 24 L.R.A.(N.S.) 934; *Cox v. Strode*, 2 Bibb 273, 5 Am. Dec. 603; *Mercantile T. Co. v. South Park R. Co.*, 94 Ky. 271; *Bender v. Fromberger*, 4 Dall. 441, 1 L. ed. 900; *Staats v. Ten Eyck*, 3 Cai. 111, 2 Am. Dec. 254.

Attorney's fees cannot be recovered. *Citizens' Bank v. Jeansonne*, 120 La. 393.

⁴⁵ *Mercantile Trust Co. v. South Park R. Co.*, *Roake v. Sullivan*, *supra*.

The cost of perfecting the title has been assumed to be the measure of recovery. *Castor v. Dufur*, 133 Iowa 535.

⁴⁶ *Doom v. Curran*, 52 Kan. 360.

does not put his vendee in possession of the land he is liable for the expense incurred in obtaining possession⁴⁷ or in unsuccessfully defending his title.⁴⁸ There cannot be a recovery for the loss of a contract to sell the property because the building on the land encroached on the land of another, nor of the sum paid a broker for effecting such contract.⁴⁹ In the absence of an agreement as to price, on an exchange of lands the agreed value or, if none, the market value of the land given in exchange is the measure of damages.⁵⁰ The damages are to be computed according to the law of the state in which the deed was executed and in which suit is brought although the lands are situated in another state,⁵¹ at least if it is not shown what the law of the other state is.⁵²

§ 594. **Same subject; proof of consideration.** What the consideration of the sale is, as a basis of recovery for breach of these covenants, as well as of all the others, is open to proof as a fact *in pais*; the statement of it in the deed is only *prima facie* evidence of the amount. The recital does not preclude other proof or even parol evidence of the actual consideration although it may establish a different one in kind or amount from that mentioned in the deed.⁵³ It may be thus shown that

⁴⁷ *Coleman v. Clark*, 80 Mo. App. 339.

⁴⁸ *Grantier v. Austin*, 66 Hun 157.

⁴⁹ *Stearn v. Hesdorfer*, 9 N. Y. Misc. 134.

⁵⁰ *Looney v. Reeves*, 5 Kan. App. 279; *Hodges v. Thayer*, 110 Mass. 286; *Lacey v. Marnan*, 37 Ind. 168; *Evans v. Fulton*, 134 Mo. 653.

⁵¹ *Looney v. Reeves*, *supra*. See § 592, n.

⁵² *Hazelett v. Woodruff*, 150 Mo. 534. See § 579.

⁵³ *Rook v. Rook*, 111 Ill. App. 398; *Doyle v. Brundred*, 189 Pa. 113; *Larkin v. Trammel*, 47 Tex. Civ. App. 548; *Louisville, etc. R. Co. v. Neafus*, 93 Ky. 53; *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Barns v. Learned*, 5 N. H.

264; *Nutting v. Herbert*, 35 id. 120, 37 id. 346; *Bingham v. Weiderwax*, 1 N. Y. 509, 514; *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Swafford v. Whipple*, 3 G. Greene 261, 54 Am. Dec. 498; *Hallum v. Todhunter*, 24 Iowa 166; *Williamson v. Test*, id. 138; *Byrnes v. Rich*, 5 Gray 518; *Harlow v. Thomas*, 15 Pick. 66; *Hodges v. Thayer*, 110 Mass. 286; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Cushing v. Rice*, 46 Me. 303, 71 Am. Dec. 579; *Martin v. Gordon*, 24 Ga. 533; *Moore v. McKie*, 5 Sm. & M. 238; *Guinotte v. Chouteau*, 34 Mo. 154; *Rawle on Cov. Tit.* (4th ed.) 258; *Gavin v. Buckles*, 41 Ind. 528; *Henderson v. Henderson*, 13 Mo. 151; *Bircher v. Watkins*, id. 521; *Pecare v. Chouteau*,

one of several parcels included in the deed was inserted by mis-

id. 527; *Lambert v. Estes*, 99 Mo. 604; *Jones on Ev.* (2d ed.) § 469; *Engleman v. Craig*, 2 Bush 424.

In *Yelton v. Hawkins*, 2 J. J. Marsh. 1, relief in equity was granted on grounds which imply that such evidence is inadmissible at law. A bill was filed for relief against an excessive judgment for damages on a covenant of warranty. The judgment had been taken for the amount of the consideration stated in the deed, 86*l.*, alleged in the bill to be penalty and inserted in the deed through mistake, 43*l.* being the actual consideration. The relief was granted, enjoining the collection of one-half of the judgment. The court thus explains: "The chancellor had power to relieve against the mistake. Hawkins could not have resisted a judgment at law for the amount of consideration mentioned in the deed, because he would not have been able to prove the mistake; therefore he could make no defense on this ground at law, and consequently, as he has clearly established the mistake, it was the duty of the chancellor to grant him relief to the extent of the mistake. If he could have proved the mistake on the trial at law, still, as he did not defend the suit and rely on that ground, the chancellor will relieve him as readily as if there had been fraud." See *Trumbo v. Curtright*, 1 A. K. Marsh. 582; *Burke v. Beveridge*, 15 Minn. 205; *Steel v. Worthington*, 1 Ohio 350; *Maigley v. Hauer*, 7 Johns. 341; *Jackson v. Delancy*, 4 Cow. 427.

In *Mayne on Damages* (8th Eng. ed.), 258, the author says: "Where the damages are to be calculated

upon the basis of the purchase-money, its amount, if stated in the deed of conveyance, cannot be contradicted by parol evidence. Where any consideration is mentioned, if it is not said also, 'and for other considerations,' you cannot enter into any proof of any other; the reason is, it would be contrary to the deed; for when the deed says it is in consideration of a particular thing, that imports the whole consideration, and is negative to any other." He cites Lord Hardwicke in *Peacock v. Monk*, 1 Ves. Sr. 128; *Rowntree v. Jacob*, 2 Taunt. 141; *Baker v. Dewey*, 1 B. & C. 704. But, as Mr. Rawle correctly remarks, "none of these cases (nor *Lampon v. Corke*, 5 B. & Ald. 606) directly support the proposition." Rawle on *Cov. Tit.* (5th ed.), § 173, note 3. This author says: "On this side of the Atlantic it may be considered as settled that although (apart from the question of fraud) evidence to contradict or vary the consideration clause is inadmissible to defeat the conveyance as such; as, for example, by showing it void for want of consideration, as in *Wilt v. Franklin*, 1 Bin. 502, 2 Am. Dec. 474; *Farrington v. Barr*, 36 N. H. 89; *Hurn v. Soper*, 6 Har. & J. 276; *Betts v. Union Bank*, 1 Har. & G. 175, 18 Am. Dec. 283; *Clagett v. Hall*, 9 Gill & J. 91; *Cole v. Albers*, 1 Gill 423; *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392; *Henderson v. Henderson*, 13 Mo. 151; yet that for any purpose short of affecting the title, this clause is not conclusive, but only *prima facie* evidence of the amount therein named. *Bullard v. Briggs*, 7 Pick. 533, 19 Am. Dec.

take, and that nothing was paid for it; ⁵⁴ that the consideration was property; and then its value at the date of the conveyance,

292; *Wade v. Merwin*, 11 Pick. 280; *Clapp v. Tirrell*, 20 id. 247; *McCrea v. Purmort*, 16 Wend. 460; *Burbank v. Gould*, 15 Me. 118; *Meeker v. Meeker*, 16 Conn. 383; *Beach v. Packard*, 10 Vt. 96, 33 Am. Dec. 185; *Bingham v. Weiderwax*, 1 N. Y. 509; *Watson v. Blaine*, 12 S. & R. 131; *Bolton v. Johns*, 5 Pa. 145, 47 Am. Dec. 404; *Higdon v. Thomas*, 1 Har. & G. 139; *Wolfe v. Hauver*, 1 Gill 84; *Duval v. Bibb*, 4 Hen. & M. 113, 4 Am. Dec. 506; *Harvey v. Alexander*, 1 Rand. 219, 10 Am. Dec. 519; *Wilson v. Shelton*, 9 Leigh 343; *Curry v. Lyles*, 2 Hill (S. C.) 404; *Jones v. Ward*, 10 Yerg. 160; *Park v. Cheek*, 2 Head 451; *Garrett v. Stuart*, 1 McCord 514; *Gulley v. Grubbs*, 1 J. J. Marsh. 388; *Hartley v. McAnalty*, 4 Yeates 95, 2 Am. Dec. 396; *Hayden v. Mentzer*, 10 S. & R. 329; *Dexter v. Manley*, 4 Cush. 26; *Jack v. Dougherty*, 3 Watts 151, where the language of *Parker, C. J.*, in *Bullard v. Briggs*, is approvingly quoted; *Monahan v. Colgin*, 4 Watts 436; *Strawbridge v. Cartledge*, 7 W. & S. 399; *Click v. Green*, 77 Va. 827. In other words, the only effect of the consideration clause is to estop the grantor from alleging that the deed was executed without consideration, and that for every other purpose it is open to explanation, since the origin and purpose of the acknowledgment in a deed were merely to prevent a resulting trust to the grantor, the claim being merely formal and nominal, and not designed to fix conclusively the amount paid or to be paid. *Belden v. Seymour*, 8 Conn. 312," 21 Am. Dec. 661.

In *Shorthill v. Ferguson*, 44 Iowa

249, the defendant had sold land and conveyed it with covenants of warranty and of right to convey, and stated the consideration in the deed to be \$500, although in fact it was much less. The grantee sold and conveyed to the plaintiffs. On a total breach, by which the plaintiffs were entitled to full damages, the question was raised whether the damages were limited to the real consideration received by the defendant from his grantee, or whether the plaintiffs were entitled to the amount of the consideration expressed in the deed. And the court say: "Parol proof of consideration to contradict that expressed in the deed is admissible between the original parties, but it is not admissible in a suit against the original grantor by one to whom his grantee has transferred the land. *Greenvault v. Davis*, 4 Hill 643. We are of the opinion, therefore, that the plaintiffs are entitled to recover upon tender of conveyance to defendant, the sum of \$500, and interest thereon at six per cent. from the date of the deed. * * * The consideration in the defendant's deed is to be taken as a conclusive admission by defendant." *Hunt v. Orwig*, 17 B. Mon. 73, 16 Am. Dec. 144; *Hanson v. Buckner*, 4 Dana 251, 29 Am. Dec. 401.

⁵⁴*Rook v. Rook*, 111 Ill. App. 398; *Leland v. Stone*, 10 Mass. 459; *Nutting v. Herbert*, 35 N. H. 121, 37 id. 346; *Barns v. Learned*, 5 id. 264; *Stewart v. Hadley*, 55 Mo. 235; *Lloyd v. Sandusky*, 95 Ill. App. 593.

Leland v. Stone, *supra*, has been criticized on the point to which it is cited, and is disapproved in *Spurr v. Andrews*, 6 Allen 420; *Harlow v.*

with interest, will be the measure of damages.⁵⁵ But it has been held that if the parties at the time of executing the deed agreed upon its value as a consideration such value, rather than that which might be ascertained by evidence on the trial, will be adopted as the basis of recovery.⁵⁶ A warrantor may show, as against his immediate grantee, that the consideration was less than that recited in the deed; but this cannot be proven as against a remote grantee who purchased without notice of the actual consideration.⁵⁷

§ 595. Same subject; when consideration not the measure of damages. In cases where the rule of damages measured by the consideration cannot be applied, as where the consideration cannot be ascertained,⁵⁸ or where it is paid by a third person on whose request the conveyance with the covenants is made,⁵⁹ so

Thomas, 15 Pick. 66; Bruns v. Schreiber, 43 Minn. 468.

In *Semple v. Whorton*, 68 Wis. 626, 637, an action to recover for the breach of the covenant of seizin as to part of the land conveyed, *Leland v. Stone* was cited to sustain the proposition that the value of the land was not to be determined from the actual and visible conditions of the several tracts at the time of the purchase, but from the conditions then supposed to exist or contemplated by the parties, or one of them. In other words, that the tract to which the title failed should be considered in estimating values the same as though it was, when sold, unimproved, as were the other tracts, instead of an improved farm, which the parties did not know it to be. This contention, it was conceded by the court, derived some support from that case; and while it was held that the testimony did not warrant the application of the rule contended for, if it is a rule, doubt is thrown upon the authority of the case, and consequently upon the cases which follow it.

As between persons not parties to it the consideration stated in a deed is not *prima facie* evidence of the value of the land. *Allen v. Kennedy*, 91 Mo. 324; *Rose v. Taunton*, 119 Mass. 100.

⁵⁵ *Coleman v. Lucksinger*, 224 Mo. 1, 26 L.R.A. (N.S.) 934; *Holmes v. Seaman*, 72 Neb. 300, disapproving *Williamson v. Test*, *infra*; *Hodges v. Thayer*, 110 Mass. 286; *Bonnon's Est. v. Urton*, 3 G. Greene, 128; *Lacey v. Marnan*, 37 Ind. 168; *Mayer & Schmidt v. Wooten*, 46 Tex. Civ. App. 327. See *Davis v. Hall*, 2 Bibb 590.

⁵⁶ *Williamson v. Test*, 24 Iowa 138; *Chenault v. Thomas*, 119 Ky. 130.

⁵⁷ *Blackwell v. McBride* (Ky. Super. Ct.), 14 Ky. L. Rep. 760, citing *Hunt v. Orwig*, 17 B. Mon. 73, 66 Am. Dec. 144; *Allison v. Pilkins*, 11 Tex. Civ. App. 655. *Contra*, *Gavin v. Buckles*, 41 Ind. 528.

⁵⁸ *Smith v. Strong*, 14 Pick. 128.

⁵⁹ *Byrnes v. Rich*, 5 Gray 518.

that the damages must be determined according to the circumstances of the particular case, the value of the land at the time of the intended conveyance with interest from that date will be the measure of damages.⁶⁰ It does not matter that the consideration is in fact paid or delivered to another person than the grantor; or that it is itself before delivery the property of another than the grantee, provided it is agreed upon between the grantor and the grantee as the consideration upon which the deed is given. Their contract creates the privity between them in relation to the consideration, and constitutes it the price of the agreed conveyance. It thereby becomes the measure of the grantee's loss.⁶¹ Shaw, C. J., said:⁶² "The rule of damages is perfectly well settled in this commonwealth; it is the amount of the consideration actually paid by the grantee to the grantor, with interest from the time of the payment. We say paid by the grantee to the grantor, which is the most common case. But there may be anomalous cases, especially where it is not a direct negotiation between the parties to the deed, but where, in a negotiation between two, there is a stipulation by one with the other, upon a certain consideration, to execute a deed and convey certain land to a third person, and a deed is given accordingly." He stated the case under consideration, to which his observations applied: "The plaintiff agreed to receive of one L. a certain lot of land in M. in full satisfaction and discharge of a debt. L. then agreed with the defendant to purchase of him the same land, and then requested the defendant to make the deed direct to the plaintiff with warranty; he executed it accordingly, upon a large nominal consideration expressed, and handed it to L., who delivered it to the plaintiff in satisfaction of his debt. Then what was the actual consideration as between the plaintiff and defendant? It is very clear that the consideration expressed in the deed is no criterion; the actual consideration may be always inquired into by evidence *aliunde*. Nor is it the sum agreed to be paid to

⁶⁰ *Id.*

⁶² *Byrnes v. Rich, supra.*

⁶¹ *Hodges v. Thayer*, 110 Mass.
286.

the defendant by L.; to that the plaintiff is a stranger. It seems, therefore, to be a case to which the ordinary general rule cannot apply, and which must be determined according to its particular circumstances upon the general principle applicable to breaches of contracts; the party shall recover a sum in damages which will be a compensation for the loss. The case is very similar in principle, and considerably so in its facts, to that of *Smith v. Strong*.⁶³ It was there laid down that in such case the measure of damages is the consideration paid with interest from the date of the deed; but if the consideration cannot be ascertained the value of the land at the time of the intended conveyance with interest from the date of the deed will be the measure of damages. It appears to us that this rule will afford indemnity in the present case. If the failure of title extended to the whole of the land then the entire value of the land is the measure; if to part only, and the plaintiff does not tender a reconveyance of the part upon which the conveyance operated to give title to the grantee, then the value of the part the title to which failed with interest will be taken as the measure of damages.”⁶⁴

§ 596. Same subject; effect of recovery on a total breach.

Where there is a breach of these covenants extending to the entire subject of the purchase and the plaintiff has never got into possession, and, in consequence of the want of title, never can, the recovery of the purchase-money and interest is clearly and uniformly held to be the proper measure of damages. The action on the covenant then comes in place of an action for money had and received on failure of consideration.⁶⁵ The action on the covenant does not, however, proceed, as an action for money had and received does, upon the theory of rescission, though practically the result is the same. The recovery of damages for such a breach is a bar to any further recovery;⁶⁶ and hence the covenant would have no validity

⁶³ 14 Pick. 128.

⁶⁴ See *Staples v. Dean*, 114 Mass. 128; *Rechos v. Younglove*, 8 Baxter 385.

⁶⁵ *Baber v. Harris*, 9 A. & E. 532;

Mayne on Dam. (8th Eng. ed.) 251.

⁶⁶ *Dutchess of Kingston's Case*, 2 Smith's L. Cas. (7th ed.) 778; *Outram v. Morewood*, 3 East 346; *Don-*

afterwards. On a breach its force is spent, and the covenantee has but a right of action. Satisfaction of the judgment for damages may, moreover, well have the effect to preclude the assertion of any right under the conveyance. It would be manifestly unjust that a grantee should recover either the purchase-money or the value of the land against the grantor upon an alleged breach of covenant that nothing passed by the deed, and yet that he should be considered the owner of the land under the very deed which he had alleged to be inoperative.⁶⁷ When a warrantee in *warrantia chartæ* recovers and has a seizin of other lands of the warrantor to their value he cannot afterwards recover of the warrantor the lands warranted; for although the warrantor cannot aver against his own deed, yet the warrantee may aver against that deed; and if his averments are verified by matter of record the warrantor may afterwards avail himself of that record against the warrantee, the record being of a higher nature than a deed.⁶⁸

§ 597. Same subject; only a nominal sum recovered if actual loss not shown. Any recovery beyond nominal damages is dependent upon proof of actual loss, and is restricted to it. In *Hartford and Salisbury Ore Co. v. Miller*,⁶⁹ the court say: "The general rule is in actions upon contracts that the plaintiff shall recover the actual damages sustained. An action for breach of the covenant of seizin in a deed is not an exception to the rule. It is doubtless true that in such actions generally the actual damage is in fact the consideration paid and interest, because the party takes nothing by his deed. It is in its inception, and continues to be, a nullity. But if the party takes anything by his deed, directly or indirectly, by its own force or by its co-operation with other instruments or other cir-

nell v. Thompson, 10 Me. 174, 25 Am. Dec. 216; Nosler v. Hunt, 18 Iowa 212; Markham v. Middleton, 2 Str. 1259; Rawle on Cov. Tit. (5th ed.), § 178 and note.

⁶⁷ Stinson v. Sumner, 9 Mass. 143, 6 Am. Dec. 49; Parker v. Brown, 15 N. H. 176; Porter v. Hill, 9 Mass. 34; Blanchard v. Ellis, 1

Gray 202; Kincaid v. Brittain, 5 Sneed 119. See Johnson v. Simpson, 36 N. H. 96.

⁶⁸ Porter v. Hill, 9 Mass. 34; Foss v. Stickney, 5 Me. 390.

⁶⁹ 41 Conn. 112; Coleman v. Luck-singer, 224 Mo. 1, 26 L.R.A.(N.S.) 934.

cumstances, whether it be the entire thing purchased or a part of it, its value must be considered in estimating the damages." The whole consideration money and interest cannot be the criterion of damages except in those cases where the purchaser derives no benefit from the conveyance. The consideration and interest is *prima facie* the damage resulting from the breach; but this may be varied by circumstances.⁷⁰ If the grantor is in actual possession, but without any title, in theory at least he can confer no benefit on his grantee by the ceremony of making a deed to him and delivering possession. The deed would vest no title and, the possession being wrongful, the purchaser would incur a liability to the true owner for his occupation. Such a transaction, at best, would only give the purchaser an opportunity by continuous wrong to acquire title by virtue of the statute of limitations. In such a case may not the purchaser, although in actual possession, elect to consider himself an actual loser in respect to the whole subject of the purchase? His actual possession is no objection except as it affects the amount of damages; for as we have seen, eviction is not necessary to give him a cause of action. It is no defense that he is in the undisturbed possession of the premises.⁷¹ If he so elects and recovers full damages as upon a total breach the grantor may resume possession, and the parties are in *statu quo*, except that the purchaser has had possession, with its practical benefits, and there is only a possibility of being made to pay damages for it to the true owner; but this possession is deemed

⁷⁰ Kimball v. Bryant, 25 Minn. 496; Cockrell v. Proctor, 65 Mo. 41; Smith v. Hughes, 50 Wis. 620; McLennan v. Prentice, 85 Wis. 427; Lloyd v. Sandusky, 95 Ill. App. 593; Bowne v. Wolcott, 1 N. D. 415, citing the text; Curtis v. Brannon, 98 Tenn. 153, 69 L.R.A. 760. See De Long v. Spring Lake, etc. Co., 65 N. J. L. 1, 8.

It is said in the Tennessee case: We see no good reason for limiting

the vendee's liability for rents to the interest on the purchase-money if they have in fact been of greater value. He should account for all the benefits he has derived from the possession, and, if not responsible therefor to some other person, his vendor should have an abatement therefor to that extent.

⁷¹ Bolinger v. Brake, 57 Kan. 663; Akerly v. Vilas, 21 Wis. 109.

only the equivalent of interest on the purchase-money and hence is to be considered only in that connection.⁷²

A grantor may, before the eviction of his grantee, buy in the outstanding title and relieve himself from liability upon his covenants.⁷³ The grantee is possessed of the same right, and may recover the amount paid for such purpose if it was reasonable and not in excess of the purchase price. A grantee cannot convey a greater right than this to his grantee.⁷⁴ If a remote grantee exercises such right and it does not appear what sum he paid, no more than nominal damages can be recovered.⁷⁵ In states where the covenant is held to run with the land if the grantee has taken possession under his deed he can recover only nominal damages until he has been compelled, by the assertion of the paramount title, to yield possession to the claimant. He has no right to abandon the possession and claim substantial damages.⁷⁶

Although there has been some hesitation with text-writers to regard such a case as one for recovery of full damages, measured by the consideration money,⁷⁷ yet it is believed that in those jurisdictions at least where these covenants are not

⁷² *Recohs v. Younglove*, 8 Baxter 385, 387.

⁷³ *Sayre v. Sheffield L. I. & C. Co.*, 106 Ala. 440; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *King v. Gilson*, 32 Ill. 356.

This exception to the general rule as to damages rests upon the fact that when the covenant is taken the money is paid with the design of acquiring title to the land and not to make a loan, and when the vendee has obtained that which he bought he has sustained no injury. Technically there has been a breach of the covenant for which there is a right of recovery, but only nominal damages can be recovered.

⁷⁴ *Cobb v. Klosterman*, 58 Ore. 211; *Conrad v. Trustees Grand Grove, etc.*, 64 Wis. 258; *Bank v.*

Johnston, 105 Tenn. 521. See § 601.

⁷⁵ *Snell v. Iowa H. Co.*, 59 Iowa 701.

⁷⁶ *Werner v. Wheeler*, 142 App. Div. (N. Y.) 358; *Boon v. McHenry*, 55 Iowa 202; *Hencke v. Johnson*, 62 Iowa 555; *Norman v. Winch*, 65 Iowa 263; *Wilson v. Irish*, 62 Iowa 260; *Axtel v. Chase*, 77 Ind. 74; *Cockrell v. Proctor*, 65 Mo. 41; *Egan v. Martin*, 71 Mo. App. 60; *Smith v. Hughes*, 50 Wis. 620.

⁷⁷ *Dane's Abridgment*, p. 340; *Mayne on Damages* (8th Eng. ed.), 251. This author says: "Where the plaintiff has never got into possession, and in consequence of the want of title never can, the above is clearly the proper measure of damages. * * * But it may be doubted whether the same rule would hold

regarded as continuing and running with the land, the consideration money with interest, less any benefit the grantee has obtained from possession, is generally accepted as the proper measure of damages.⁷⁸ In *Parker v. Brown*,⁷⁹ Parker, C. J., said: "No wrong is done by the maintenance of the action; for if the grantee recovers damages for the breach of the covenant of seizin, on the ground that the grantor had no title whatever, the operation of it must be to estop the grantee from setting up the deed afterwards as a conveyance of the land against the grantor. We see not why the grantor may not again enter, if he chooses, as against the grantee. A recovery in trespass or trover, with satisfaction, vests the property in the party against whom the damages were assessed. The defendants may re-enter if they think proper and will hold under their former possession against all persons who cannot show a better right. We are not aware of anything in the nature of the feudal investiture, or in the principles which regulate the title to land at the present time, that should require a different rule in relation to real estate. The record of the recovery will furnish as good an estoppel as that which arises from a disclaimer."⁸⁰ * * * The measure of damages for the breach of the covenant of seizin is

good as a matter of law where the plaintiff had got into possession, and in fact continued so still. A case may be easily imagined, and indeed constantly occurs, in which there is such a defect in the title as makes it strictly unsalable, though there is little or no chance of the occupant ever being turned out. In such a case it would not be fair to allow the whole purchase-money to be recovered. The vendor has not given a salable title as he engaged; but he has given up his possessory title, which was worth something to him, and is worth something to the purchaser."

In the first edition of *Rawle on Covenants for Title* (p. 83) it was said: "If nothing had been paid,

and no pecuniary loss had been suffered, and the possession had not been disturbed, it is believed that nominal damages only would in general be allowed. The technical rule, therefore, that the covenant of seizin is broken, if at all, at once and completely, is, as respects the damages, little more than a technical one." See 4th following note; *Collier v. Gamble*, 10 Mo. 472; *Mason v. Cooksey*, 51 Ind. 519.

⁷⁸ *Werner v. Wheeler*, 142 App. Div. (N. Y.) 358; *Curtis v. Brannon*, 98 Tenn. 153, 69 L.R.A. 760; *Tone v. Wilson*, 81 Ill. 529; *Flint v. Steadman*, 36 Vt. 210.

⁷⁹ 15 N. H. 176, 188.

⁸⁰ *Hamilton v. Elliot*, 4 N. H. 182, 17 Am. Dec. 408.

the value of the land at the time of the conveyance, which may be determined by the consideration paid. This was stated to be the rule in this case, and it is not controverted that the consideration expressed in the deed was the evidence of value."⁸¹

§ 598. **Same subject.** Possession without title may compensate for the interest on the purchase-money if there be no liability which will be enforced to the real owner.⁸² But the question whether such owner will ever claim the land must remain open until he is precluded by lapse of time; and the mere fact that the purchaser presently obtains no title renders his conveyance nugatory—valueless—unless so much time of adverse possession has elapsed as to afford assurance of the continued silence and inaction of that owner. The purchaser derives no property or value in the land. It does not become his; he cannot safely improve it; his claim to it has no other value than such as attaches to it in view of the possible extinction of the superior right by non-claim. That the absence of title is an element of damage which may be the basis of recovery, although there is no disturbance of possession, and indeed can be none, is evident from these cases in which the

⁸¹ *Park v. Cheek*, 4 Cold. 20; *Tone v. Wilson*, 81 Ill. 529; *Frazer v. Supervisors*, 74 id. 282; *Kincaid v. Brittain*, 5 Sneed 119; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Lawless v. Collier*, 19 Mo. 480; *Harris v. Newell*, 8 Mass. 262; *Bickford v. Page*, 2 id. 455; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Horsford v. Wright*, Kirby 3; *Castle v. Peirce*, 2 Root 294; *Caulkins v. Harris*, 9 Johns. 324. See *Tarpley v. Poage*, 2 Tex. 139; *Copeland v. Gorman*, 19 id. 253; *Cooper v. Singleton*, id. 260, 70 Am. Dec. 333. In the fourth edition of *Rawle on Covenants for Title* in note 3, p. 281 (see 4th preceding note) the author says: "Upon subsequent consideration the opinion was formed that * * * (the passage quoted in the preceding note) did not cor-

rectly express the law, and it was omitted in the second edition. * * * It is believed * * * that if the breach of the covenant has occurred, affecting the whole title (for where it touches part only, *Morris v. Phelps*, 5 Johns. (N. Y.) 56, is a distinct authority that the purchaser has no authority to rescind), the plaintiff has a right to recover damages measured by the consideration money." See *Hacker v. Blake*, 17 Ind. 97; *Cockrell v. Proctor*, 65 Mo. 41.

⁸² *Curtis v. Brannon*, 98 Tenn. 153, 69 L.R.A. 760, quoting the text, and holding that a vendee in possession under a deed conveying a life estate, the life tenant living, is liable to his vendor for the rental value of the premises from the time his possession began.

grantor undertook to convey a fee and covenanted accordingly, having only a less estate in possession. In such cases the rule has been applied to merely deduct the value of the less estate conveyed from the amount which would be recoverable for a total breach⁸³ or to allow to be recovered the difference between the covenanted and the conveyed estate.⁸⁴

Where, however, there have been such forms of conveyance to the grantor that the defect of title is only a technical one and there has been long possession under the conveyance, though not for the period required to quiet the title under the statute of limitations, if nothing has been paid or done to extinguish or acquire the paramount title it is perhaps an unanswered question in the books whether full damages could be recovered, in the absence of any actual assertion of that title. Would there not be wanting the element of actual loss or danger of actual loss which is essential to justify the assessment of damages on that basis? If the outstanding title has been bought in by the covenantee and there was none in the covenantor recovery might be had for the amount paid for it, to the limit recoverable for a total breach of these covenants.⁸⁵

⁸³ *Tanner v. Livingston*, 12 Wend. 83; *Guthrie v. Pugsley*, 12 Johns. 126; *Lockwood v. Sturdevant*, 6 Conn. 373; *Terry v. Drabenstadt*, 68 Pa. 400; *Mills v. Catlin*, 22 Vt. 98.

⁸⁴ *Gray v. Briscoe*, Noy 142.

⁸⁵ *Lawless v. Collier*, 19 Mo. 480, is instructive upon the point here suggested. The opinion contains a valuable summary of the law relating to damages for breach of the covenant of seizin and applies it to a novel state of facts. Scott, J.: "On the 29th day of September, 1831, George Collier, for the sum of \$800, conveyed to H. R. Gamble, in fee, sixteen and a fraction acres of land, with a covenant that he was seized of an indefeasible estate therein. On the 8th of November, 1834, Collier conveyed to Gamble

twenty-four and ninety-one one-hundredths acres of land for the sum of \$1,868, with a like covenant as in the first deed. These two tracts were contiguous and made one parcel; and on the 14th day of March, 1836, were conveyed by Gamble to Adam L. Mills, for the sum of \$12,000, by a deed containing the covenants expressed by the words 'grant, bargain and sell,' and a general warranty. Afterwards doubts began to be entertained about the validity of the title of Collier to the land conveyed to Gamble, and by Gamble to Mills; and Gamble, on the 16th day of March, 1842, purchased from Luke E. Lawless, who claimed, under the heirs of Ames Stoddard, one undivided fifth of a tract of three hundred and fifty arpens, which entirely

The supreme court of Kansas has considered the effect of the statute of limitations upon the vendee's right of recovery in a quite satisfactory way. Conceding that where the defect in the title has been cured by adverse possession, estoppel or

covered the land conveyed by Collier to Gamble. In a conflict between the title of Collier and the heirs of Stoddard, the latter prevailed, Collier claiming under a New Madrid location, and Stoddard's heirs under a concession by the Spanish government, confirmed by the act of congress of July 4, 1836. The consideration of the conveyance from Lawless to Gamble was \$1,000 and an assignment of the covenants contained in the deeds of Collier to Gamble, in trust for Virginia Lawless, the plaintiff, and wife of Luke E. Lawless. The title of Collier having been defeated by that of the heirs of Stoddard, Gamble, by means of the one-fifth part of the claim of the said heirs, which he had purchased from Lawless, was enabled to perfect the title to the land he had conveyed to Mills, and by suitable conveyances between all interested, Mills and those to whom he had conveyed were made secure in the possession of the land they had purchased from Gamble. Neither Mills nor those claiming under him have been actually evicted, nor has Gamble been compelled to pay any damages, by reason of any covenants contained in his deed to Mills. On this state of facts, Virginia Lawless, the beneficiary assignee of Gamble, instituted an action for the breach of the covenants of seizin contained in the deed from Collier to Gamble, claiming damages to an amount equal to the purchase-money received by Collier, with interest from the time of payment. The defendant maintained that the plain-

tiff was only entitled to nominal damages. The court directed the jury that the measure of damage was the sum paid by Gamble to Lawless for the interest he acquired in the claim of Stoddard's heirs, together with interest. There was a verdict accordingly.

"1. As the title under which Collier held the land has been defeated, and as Mills and those claiming under him no longer hold by the title originally obtained from Collier, but by means of the purchase made by Gamble from Lawless of an interest in an adverse title, the rule which limits a recovery in an action on the covenant of seizin to a nominal sum until there has been an eviction has no application under the circumstances of this case. Where the title conveyed has been defeated, and the grantee or his assigns hold by an adverse title to that acquired from their grantor, there can be no necessity for submitting to the form of an eviction, in order to be entitled to a recovery of full damages for a breach of the covenant of seizin. The reason of the rule, as laid down in *Collier v. Gamble*, 10 Mo. 472, shows that it is inapplicable to the circumstances of this case as now presented. Rawle, speaking on this subject, says: 'Cases may, of course, occur in which, although the purchaser may have paid nothing to buy in the paramount title, and may still be in possession, yet, when the failure of title is so complete, and the loss so morally certain to happen, that a court might feel

otherwise, without detriment to the vendee, his recovery cannot exceed a nominal sum, it was said in answer to the contention that where the vendee is not disturbed in his possession and has not incurred expense by reason of the outstanding title he

authorized in directing the jury to assess the damages by the consideration money.' P. 83.

"2. The weight of American authority has determined that the covenant for seizin is broken, if broken at all, so soon as it is made, and thereby the immediate right of action accrues to him who has received it. But, in such case, the grantee is not entitled, as matter of course, to recover back the consideration money. The damages to be recovered are measured by the actual loss at that time sustained. If the purchaser has bought in the adverse right, the measure of his damages is the sum paid. If he has been actually deprived of the whole subject of his bargain, or a part of it, they are measured by the whole consideration money in the one case, and a corresponding part of it in the other. Rawle, 44.

"3. Under the peculiar circumstances of this case, what is the measure of damages? Can it be said that the purchase-money paid by Gamble to Lawless is the just measure? Was it by the payment of the sum of \$1,000 only that Gamble was enabled to secure the title or possession of his grantee, and thereby prevent a recourse against him on his covenant? Such an assertion is not warranted by the facts. We cannot say that Lawless in making a sale of his land did not regard the covenants of Collier as worth the full sum which they were given to secure. He did not convey to Gamble the identical land which

Gamble had conveyed to Mills. His conveyance of itself did operate but partially to secure Gamble, and thereby destroy his recourse against Collier for his purchase-money. It was by the acts of Gamble subsequent to Lawless' conveyance that his vendee's title was perfected. What right had Gamble then to adopt a course of conduct which would have impaired the recourse of Lawless' trustee on the covenants which had been assigned to him for the benefit of Virginia Lawless? In so doing he would have injured the plaintiff and have destroyed a part of the consideration he had given to Lawless for his interest in the Stoddard claim. Would not Gamble then have been liable to Virginia Lawless for the destruction of the right which he had assigned for her benefit? This is the consequence flowing from holding that the \$1,000 paid by Gamble to Lawless should be the measure of damages in this action. This would be unjust to Gamble. It would be placing him in the attitude of a wrong-doer to the plaintiff, whilst performing an act dictated by considerations of justice to himself and to those whom he was under obligations to indemnify. Is it not more just that Collier should refund the money he has received from Gamble, the consideration of which has entirely failed, than that Gamble should be placed in the condition of enriching himself at the expense of another? No one can say that without the assignment of the covenants in Collier's deeds Gamble ever would

can recover nominal damages only on account of the admitted breach of the covenant of seizin,⁸⁶ that to so declare would be to construe away the force and efficacy of that covenant. "It is said that no matter how bad the title conveyed may be, yet the true owner may not assert his right until after the statute of limitation has barred it, and thus the grantee may obtain a good title by adverse possession; therefore he ought not to be allowed to maintain an action on the covenant of seizin until after he has been evicted or has purchased in the outstanding title. In other words, the risk of disturbance by the true owner is shifted from the grantor, who has for a consideration expressly assumed it, and it is thrown upon the grantee for whose benefit the covenant was made. According to our Kansas doctrine a right of action accrues immediately upon the execution of the deed with the covenant of seizin if the title be bad, and therefore it will be barred within five years thereafter. An adverse claimant may bring his action within fifteen years and sometimes even later, and if he should succeed therein the grantee under the covenant of seizin is without remedy. A construction of the covenant of seizin, broken at the delivery of the deed, which requires that the covenantee must wait until his right of action is barred, unless the adverse claimant brings his suit before that time, is apparently so unreasonable as to carry its own refutation with its statement. We are not authorized to construe away the covenant of seizin because there was also a covenant of warranty in the same deed, for the grantee was entitled to the benefit of both. Under

have been enabled to obtain Lawless' interest in the Stoddard claim. We know not how those covenants were estimated. No rule is known by which their value can be reduced below the sums they were given to secure.

"4. It was maintained that before there could be a recovery of the entire consideration money received by Collier, there should be a reconveyance of the title derived from him. The want of such reconvey-

ance is no bar to the action. This matter rests in the discretion of the court. Under the circumstances of this case a court would impose no terms to prevent a recovery of the entire consideration money. A reconveyance here would be a nugatory act and totally unavailing for any purpose. Rawle, 84." Hooper v. Sac County Bank, 72 Iowa 280.

⁸⁶ Hammerslough v. Hackett, 48 Kan. 700.

the former he had a personal right of action against the grantors as soon as the deed was made; under the latter there could be no breach until an eviction under a title paramount or something equivalent to it. By the former he was under no obligation to wait until the latter should also be broken, and the grantors perhaps dead or insolvent, before commencing his action for damages. To illustrate this principle take an example: A. and B. own a tract of land in equal undivided shares A., without the knowledge of B., in consideration of \$1,000, the full value of the land, makes a deed to C. with a covenant of seizin, and C. goes into possession. He afterwards learns that he has the title to the undivided one-half only, and while undisturbed in his possession, he brings his suit against A. to recover the \$500 paid without consideration on the faith of the covenant that A. was seized of the full title; but he is met with the answer that the breach is only technical, and he can recover no more than nominal damages until B. asserts his title or he buys it in. C. is not prepared to pay for the half interest a second time; he dismisses his action or takes a judgment for nominal damages. Years thereafter, B. commences his action against C. for partition and ejectment and recovers one-half in value of the land. C. then commences his action against A. to recover damages for breach of the covenant of seizin. If he dismissed his former suit without prejudice, he is met with the plea of the bar of the statute of limitations; if he took judgment for nominal damages, he is confronted with the further plea of *res judicata*. Thus, by a sort of legal jugglery, C. loses his \$500 and A. keeps that much for nothing. Counsel say, however, that B. may never assert his title, or may do so too late, and that A. for the sum of \$500, by his covenant of seizin, expressly assumed the risk, should be relieved of it, and the court should impose it upon C., who paid his \$500 to be assured against it. This is a manifest perversion of the law of contracts respecting the real estate as established by the decisions of this court. If a grantor does not desire to be bound by a covenant of seizin he ought not to enter into it. When he does so, the courts ought not to annul it for

his profit and to the injury of the grantee for whose benefit it was made.”⁸⁷

Where personal covenants are connected with the covenants of warranty and the covenant of seizin is broken if the grantee has sold the property, has never been disturbed in his ownership, paid anything for the paramount title, nor become liable to pay anything therefor his recovery cannot exceed a nominal sum.⁸⁸ The same rule has been applied where the deed conveyed the full equitable and beneficial title, no paramount or hostile title being asserted and the grantee not being disturbed, as where the naked legal title to land remains in the government, the entryman having all the evidence of title except the patent. It was considered that a statute declaring that the detriment caused by the breach of the covenant of seizin is to be deemed the price paid to the grantor was not in the way of the modified rule.⁸⁹

If the defect in the title is remedied by the grantee he may recover the expense actually incurred and a reasonable compensation for his services, but nothing further.⁹⁰ He cannot be compelled to pursue equities to which he might be subrogated for the purpose of making himself whole.⁹¹ The vendor cannot offset against the amount paid by the vendee money paid for taxes on the land before it was conveyed.⁹²

§ 599. **Same subject.** There is something incongruous in allowing in any case full damages as for actual loss, and yet requiring a reconveyance. This is so where no title whatever is conveyed; but if some title passes, though so far short of that covenanted for that the grantee is clearly not bound to retain it for a proportional part of the purchase-money, on tendering a reconveyance and surrendering possession recovery may be had of the entire consideration and interest, together

⁸⁷ *Bolinger v. Brake*, 57 Kan. 663 (one judge dissenting), affirming 4 Kan. App. 180. On a motion for rehearing the judgment of the court was reaffirmed 58 Kan. 818.

⁸⁸ *Scoffins v. Grandstaff*, 12 Kan. 467; *Hammerslough v. Hackett*,

supra, citing numerous cases; *O'Meara v. McDaniel*, 49 Kan. 685.

⁸⁹ *Bowne v. Wolcott*, 1 N. D. 415.

⁹⁰ *Morrison v. Underwood*, 20 N. H. 369.

⁹¹ *Royer v. Foster*, 62 Iowa 321.

⁹² *Hooper v. Sac County Bank*, 72 Iowa 280.

with taxes paid, less the value of rents received or that would have been received,⁹³ and such damages as may be sustained by reason of the plaintiff removing and appropriating any permanent improvements the defendant may have made on the premises.⁹⁴ The grantor in such case may elect to consider the title as wholly failing.⁹⁵ The want of reconveyance is no bar to the action, and a release by the covenantee to a third person is not nor would it on principle affect the right of the covenantee to full damages when no title passed,⁹⁶ except where the covenant is held to run with the land.⁹⁷ The doctrine laid down in *Bickford v. Page*⁹⁸ would seem to oppose any abatement of damages where there had been a sale for a consideration even exceeding the purchase-money paid when the covenant was made. The action was on the covenant of good right to convey. The defendant pleaded that before the plaintiff commenced the action, before he had improved the premises or added any value, he transferred them to T. R. for the consideration of \$100 in fee, without covenants rendering the plaintiff answerable for any defect of title; averring that thereby all the plaintiff's right, title, and interest thereon and in the covenants passed to T. R. On demurrer this was held no bar. Parsons, C. J., said: "As the defendant in his bar has not traversed this breach (of the covenant of good right to convey), nor confessed and avoided it we must consider this covenant as having been broken by him. It must therefore have been broken immediately on the execution of the deed containing it; and the damages accruing from the breach must have been suffered by the plaintiff before his release to T. R. This covenant, having been broken before the

⁹³ *Frazer v. Supervisors*, 74 Ill. 282; *Curtis v. Brannon*, 98 Tenn. 153, 69 L.R.A. 760, quoting the text.

⁹⁴ *Park v. Cheek*, 4 Cold. 28, quoted from in *Curtis v. Brannon*, *supra*.

Restoration of possession is an indispensable ingredient of a decree in equity in favor of a vendee for breach of the covenant of seizin caused by an outstanding contingent remainder, the deed conveying at

least a life estate, and possession being held under it. *Curtis v. Brannon*, *supra*.

⁹⁵ *Kincaid v. Brittain*, 5 Sneed 119; *Recohs v. Younglove*, 8 Baxter 385.

⁹⁶ *Cornell v. Jackson*, 3 Cush. 506.

⁹⁷ *Cockrell v. Proctor*, 65 Mo. 41; *Schofield v. Iowa H. Co.*, 32 Iowa 317, 7 Am. Rep. 197.

⁹⁸ 2 Mass. 455.

release, was at that time a mere *chose in action* not assignable. Neither could it have passed by the release; because no estate passing to the plaintiff by the defendant's deed, there was no land to which this covenant could be annexed so as to pass to the releasee. * * * But he (the plaintiff) is entitled to his damages for the breach of the defendant's covenant that he had a good right to convey. The rule for assessing the damages arising from his breach is very clear. No land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of the covenant; he has lost only the consideration which he paid for it, amounting to 6s. 5d. This he is entitled to recover back with interest to this time."

Whatever the covenantee realizes as a benefit from the conveyance to him will diminish his actual loss. If the title is made good by the statute of limitations and there has been no actual disturbance or injury the damages would be merely nominal.⁹⁹ Though in these cases the cause of action accrues upon the execution of the deed the damages are assessed with reference to the state of facts existing at the time when the assessment is made; and any facts occurring afterwards, even down to the actual assessment of the damages, tending to increase or diminish them may be given in evidence and considered by the jury.¹ At least nominal damages are allowed for any breach of these covenants when no actual injury is sustained. The law always infers some injury and awards this minimum of damages for every violation of contract.²

§ 600. **Same subject; where covenant runs with land.** In *Eaton v. Lyman*³ there is a forcible protest, in the dissenting opinion of Dixon, C. J., against nominal damages for a mere technical breach of such covenants when they are held to run with the land and are available to those claiming under the covenantee. He says: "In those courts which hold that cove-

⁹⁹ *Smith v. Hughes*, 50 Wis. 620;
Wilson v. Forbes, 2 Dev. 30.

¹ *Morrison v. Underwood*, 20 N. H. 369; *Miller v. Hartford & S. O. Co.*, 41 Conn. 112, 130; *Dickey v. Weston*, 61 N. H. 23.

² *Werner v. Wheeler*, 142 App. Div. (N. Y.) 358; *Morrison v. Underwood*, 20 N. H. 369; § 9.

³ 30 Wis. 41.

nants of seizin and against incumbrances (for both stand upon the same footing and are regarded as of the same nature by all courts) are purely personal and *de præsenti*, and so are complete and perfect, or broken and impaired, as soon as made, the doctrine of nominal breach and nominal recovery is very consistent and proper. Such doctrine necessarily results from the nature of the covenants as held by them, the same being broken as soon as made and so converted into mere choses in action or rights to sue in the hands of the covenantee, and so deprived of all capacity to run with the land, so as to pass the benefit of them to the grantee of the covenantee. In those courts the recovery is reduced to a merely nominal one where there was seizin in fact or in deed of the land in the covenantor, which passed to the covenantee, who has entered and enjoyed according to the deed; and where the breach complained of is merely a paramount title in a stranger, or an outstanding incumbrance that has not yet been either asserted or extinguished. And the reason why, in such cases, the damages are only nominal is that if for such breach the covenantee is permitted to recover the consideration and interest he may get both the purchase-money and retain possession of the land under a title which is defeasible, but which in fact may never be defeated. The entire learning of those courts holding to the *de præsenti* nature of the covenants is very concisely exhibited in the numberless citations made in *Morrison v. Underwood*.⁴ * * * But this court having in * * * [*Mecklem v. Blake*]⁵ * * * as well as others, adopted and declared the rule of interpretation that covenants of seizin and against incumbrances are real and *de futuro*, and not personal and *de præsenti*, so that they run with the land and pass the benefits of them to the grantees of the covenantee, it follows as clearly and undeniably as one proposition can follow from another that there can be no nominal breach or nominal recovery where the covenantee or those holding under him take and retain undisturbed possession of the land without molestation or loss from the paramount outstanding title or incum-

⁴ *Bryant v. Mosher*, 96 Neb. 555, ⁵ 22 Wis. 495.
20 N. H. 369.

brance. This follows necessarily and logically from the premises respecting the nature and operation of the covenants. They are thus placed upon the same footing as other covenants which inhere in and attach to the realty and run with it until the breach ensues. They belong to the same category or class with the covenants for further assurance, of quiet enjoyment and of warranty, which are dependent upon posterior events, and of which there can be no breach until such events happen. Such is the logical sequence of the doctrine we have adopted and such it will be found are the decisions of those courts in which the same doctrine prevails." Nominal damages are denied in Ohio.⁶ They are recoverable in Missouri though it may not appear that the consideration has been paid;⁷ and substantial damages may be recovered only as they accrue; the covenantee may bring separate actions for different breaches of the covenant.⁸ A grantee who has been wrongfully prevented from using a water power may recover the cost of substituting steam power, and such right was not affected because of the destruction of the mill and machinery existing at the time the conveyance was made, another mill being built in the place of that destroyed and new machinery being put into it.⁹

§ 601. How damages may be prevented or mitigated. Between the execution of the deed, when these covenants are supposed to be broken, and the assessment of damages, the defect of title which constituted the breach of the covenant of seizin may have been remedied by time or accident, the acts of strangers or of the grantor without the interference in any way of the grantee or his assignee; as by the death of a tenant for life, the performance of a condition or the like, or by the release or purchase of opposing claims. The grantee at the time damages are assessed may, consequently, have the property and interest for which he contracted free of any defect, and this without trouble

⁶ Backus v. McCoy, 3 Ohio 211, 17 Am. Dec. 585; Foote v. Burnett, 10 Ohio 318, 36 Am. Dec. 90; Devore v. Sunderland, 17 Ohio 52. See Schofield v. Iowa H. Co., 32 Iowa 317, 7 Am. Rep. 197.

⁷ Jones v. Haseltine, 124 Mo. App. 674.

⁸ Leet v. Gratz, 124 Mo. App. 394.

⁹ Hottell v. Farmers' P. Ass'n, 25 Colo. 67, 71 Am. St. 109.

or expense to himself; and he would in such case, therefore, be equitably entitled to recover nothing more than nominal damages which are implied by law from every breach of covenant and which give to the grantee a right of action of which he will not be deprived without some act or neglect of his own.¹⁰ If, after a breach of these covenants, and before action brought to recover damages, the covenantor acquires the paramount title and, by virtue of other covenants in the deed, or under the law of the state any benefit results to the grantee that title or benefit inures to him, this fact will go in mitigation of damages and may reduce them to nominal.¹¹ The rule is generally stated thus in the cases because the facts do not call for an adjudication upon the effect of a title acquired by the grantor pending the suit against him; but no reason is apparent why his liability may not be mitigated by such title inuring to the benefit of the grantee before judgment in his favor. "The exception to the general rule that the plaintiff is entitled to recover all the damages he has apparently sustained at the commencement of the suit seems to be based upon the fact that when the covenant is taken the covenantee pays his money with the design of acquiring title to the premises, and not to make a loan, and when he has obtained what he has purchased he has sustained no injury. Technically, there has been a breach of the covenant for which the law gives a right of recovery; but having the title for which he contracted, he can recover only nominal damages."¹² A grantor

¹⁰ *Morrison v. Underwood*, 20 N. H. 369.

¹¹ *Werner v. Wheeler*, 142 App. Div. (N. Y.) 358; *Hartford & S. O. Co. v. Miller*, 41 Conn. 112; *McLennan v. Prentice*, 85 Ill. 427; *Singleton v. Allen*, 2 Strobh. Eq. 166; *Building, L. & W. Co. v. Fray*, 96 Va. 559; *Looney v. Reeves*, 5 Kan. App. 279; *Kimball v. Bell*, 49 Kan. 173; *Croft v. Thornton*, 125 Ala. 391; *Sayre v. Sheffield L., I. & C. Co.*, 106 Ala. 440; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Knowles v. Kennedy*, 82 Pa. 445; *King v. Gilson*, 32 Ill. 348, 83 Am.

Dec. 269; *Burke v. Beveridge*, 15 Minn. 205; *Kimball v. Bryant*, 25 Minn. 496, 500; *McCarty v. Leggett*, 3 Hill 134; *Noonan v. Ilsley*, 21 Wis. 138; *Ogden v. Ball*, 38 Minn. 237; *Smith v. Hughes*, 50 Wis. 620; *Huntsman v. Hendricks*, 44 Minn. 423. See *Blanchard v. Ellis*, 1 Gray 193; *Burton v. Reeds*, 20 Ind. 87; *Bingham v. Weiderwax*, 1 N. Y. 509; *Tucker v. Clark*, 2 Sandf. Ch. 96; *Boulter v. Hamilton*, 15 Up. Can. C. P. 125; *Doedwine v. Webster*, 2 Up. Can. Q. B. 224; *Cornell v. Jackson*, 3 Cush. 506.

¹² *King v. Gilson*, *supra*, citing

who obtains a good title cannot compel his grantee, after eviction by title paramount, to accept such after-acquired title in satisfaction of the covenants in his deed or in mitigation of damages for their breach.¹³ It is held in Missouri that equity will compel the acceptance of such title and enjoin the prosecution of a suit for damages;¹⁴ but this is contrary to the rule in New York.¹⁵ The cases are generally to the effect that the recovery of damages to the amount of the consideration and interest thereon operates to revest the title in the covenantor or give him the right of possession as against the covenantee and estop the latter from claiming any title or interest in the premises under or by virtue of the conveyance.¹⁶ The rule is established in Indiana that the grantor cannot claim a set-off on account of the *mesne* profits enjoyed by the grantee,¹⁷ though the true owner fails in his action to evict to obtain a judgment for them.¹⁸ The covenantee cannot recover interest if he has had possession and has not responded to his evictor for *mesne* profits, and then only for such time as he shall have accounted for them.¹⁹ The rule is that for a total breach the measure of damages is the consideration and interest; and that for a mere technical breach a nominal sum only can be recovered. Between these extremes the recovery may be proportionate to the actual injury; this is the invariable criterion and measure.²⁰ Thus,

Baxter v. Bradbury, 20 Me. 260;
Cotton v. Ward, 3 Mon. 304; Reese
v. Smith, 12 Mo. 344; Cornell v.
Jackson, 3 Cush. 506.

¹³ Nichol v. Alexander, 28 Wis.
118; McInnis v. Lyman, 62 id. 191;
Blanchard v. Ellis, 1 Gray 199, 61
Am. Dec. 414; Bingham v. Weider-
wax, 1 N. Y. 513; Burton v. Reeds,
20 Ind. 93.

¹⁴ Reese v. Smith, 12 Mo. 344.

¹⁵ Tucker v. Clarke, 2 Sandf. Ch.
96.

¹⁶ Noonan v. Ilsley, 21 Wis. 138,
citing Porter v. Hill, 8 Mass. 36;
Stinson v. Sumner, id. 150; Blanch-
ard v. Ellis, 1 Gray 202; Parker v.
Brown, 15 N. H. 188.

¹⁷ Wilson v. Peelle, 78 Ind. 384;
Wright v. Nipple, 92 id. 310.

¹⁸ Rhea v. Swain, 122 Ind. 272.

¹⁹ Hutchins v. Roundtree, 77 Mo.
500.

²⁰ Herndon v. Harrison, 34 Miss.
486, 69 Am. Dec. 399; Nutting v.
Herbert, 37 N. H. 346; Miller v.
Hartford & S. O. Co., 41 Conn. 130;
Whiting v. Dewey, 15 Pick. 428;
Brown v. Allen, 73 Hun 291.

Where the title was in the gov-
ernment and the vendee was obliged
to erect buildings on the land and
transfer his residence thereto in or-
der to acquire title under the home-
stead law, his recovery was
measured by the consideration paid

where the covenant was of seizin in fee and the estate possessed and conveyed was copyhold, the covenant was broken and the covenantee was held entitled to damages according to the difference in value between a fee-simple and a copyhold estate.²¹ So where a fee-simple has been covenanted for and the title conveyed was subject to a life estate, the value of the latter is recoverable,²² and may be computed from life tables.²³ Any injury done the premises while they were held adversely to the grantee may be recovered for in addition to interest during the interim between eviction and restoration of title.²⁴

§ 602. Same subject. Where a deed of the entirety in fee was made with covenants of seizin, power to sell and of warranty and the grantors owned only an undivided two-sixths and a life estate in the other four-sixths the plaintiff recovered damages in an action for breach of the former covenants only in proportion to the value of the part for which the title had failed; that is, four-sixths of the consideration money and interest; but, as the life estate of the defendants in the four-sixths passed to the plaintiff by the deed the value of such life estate was deducted; nor was interest allowed during the life of the defendants, as, during that time the plaintiff could not be called on for *mesne* profits.²⁵ If A. conveys land to B., with covenant of seizin, and the title to part only of the land fails, the sale will not be rescinded by a recovery at law so as to give the vendee a right of action to recover the whole consideration money; but the plaintiff is only entitled to recover in proportion to the extent of the defect of title, or the value of the part lost. The measure of damages is the value of the part to which the title

and interest, less the value of the rights acquired from the grantor. *Efta v. Swanson*, 115 Minn. 373.

²¹ *Gray v. Briscoe*, Noy 142.

²² *Curtis v. Brannon*, 98 Tenn. 153, 69 L.R.A. 760; *Guthrie v. Pugsley*, 12 Johns. 126; *Tanner v. Livingston*, 12 Wend. 83; *Lockwood v. Sturdevant*, 6 Conn. 373; *Recohs v. Younglove*, 8 Baxter 385. See *Blanchard v. Blanchard*, 48 Me. 174; *Rickert v. Snyder*, 9 Wend. 416.

²³ *Mills v. Catlin*, 22 Vt. 98; *Donaldson v. M. & M. R. Co.*, 18 Iowa 280, 14 Am. Neg. Cas. 609, 87 Am. Dec. 391. See § 455.

²⁴ *Singleton v. Allen*, 2 Strobb. Eq. 166.

²⁵ *Tone v. Wilson*, 81 Ill. 529; *Scantlin v. Allison*, 12 Kan. 851; *Guthrie v. Pugsley*, 12 Johns. 126; *Ela v. Card*, 2 N. H. 175, 9 Am. Dec. 46; *Downer v. Smith*, 38 Vt. 464.

has failed with reference to the value of the residue. In a New York case ²⁶ Kent, C. J., said: "Another question is whether the defendant ought not to have been permitted to show that the lands in the deed of 1795, of which there was a failure of title, were of inferior quality to the other lands conveyed by the same deed. This appears to be reasonable; and the rule would operate with equal justice as to all the parties to a conveyance. Suppose a valuable stream of water, with expensive improvements upon it, with ten acres of adjoining barren land, was sold for \$10,000; and it should afterwards appear that the title to the stream with the improvements on it failed, but remained good as to the residue of the land; would it not be unjust that the grantor should be limited in damages under his covenants to an apportionment according to the number of acres lost, when the sole inducement to the purchase was defeated and the whole value of the purchase had failed? So, on the other hand, if only the title to the nine barren acres failed, the vendor would feel the weight of extreme injustice if he was obliged to refund nine-tenths of the consideration money. This is not the rule of assessment. The law will apportion the damages to the measure of value between the land lost and the land preserved. * * *

The recovery in value upon the warranty at common law was regulated by the same rule. The *capias ad valentiam* was issued to take as much land of the warrantor as was equal to the value of the lands lost. *Cape de terra in balliva tua ad valentiam tantæ terræ quod B. clamat ut jus suum*; and if the lands of the warrantor lay in another county, different from that in which the lands in controversy lay, then the lands in question were first appraised by a sheriff's inquest and afterwards the writ went to the sheriff of the other county to take lands of equal value, which value was specified in the writ.²⁷ If the recovery in the present case had been of an undivided part of all the lands conveyed by the deed, then the rule of apportionment of damages according to the relative value could not have applied, and this distinction runs through the authorities on the subject. But

²⁶ Morris v. Phelps, 5 Johns. Williamson, 50 Pa. Super. 100.
49, 4 Am. Dec. 323; Mengel v. ²⁷ Bracton, 384, a, b.

the plaintiff's title failed only to an undivided part of a specified tract, and remained good to another and larger tract conveyed by the same deed and included in the same consideration. The apportionment according to the relative value is therefore strictly and justly applicable."²⁸ The prevailing rule is clearly expressed by Cassoday, J., in a Wisconsin case: "In the absence of fraud, we conclude that where the title fails to only a part of the land conveyed the grantee may recover in an action on the covenants of seizin and right to convey, or upon an agreement to convey, such a fractional part of the whole consideration paid as the value, at the time of the purchase, of the piece to which the title fails bears to the value of the whole piece purchased and interest thereon during the time he has been deprived of the use of such fractional part, but not exceeding six years."²⁹ On the failure of the right to cut timber the purchaser may recover the difference in the value of the land with such right for the purpose for which it was granted and without it. But a second grantee cannot voluntarily incur the statutory penalty for cutting timber and recover it from his grantor's vendor by abatement of the purchase-money.³⁰ Where there is a failure of title to a part and the paramount title is extinguished by the grantee the measure of damages is the amount paid if it does not exceed the value of that part as found by the jury. If it does exceed it the jury are to be guided, not by the

²⁸ *Clapp v. Herdman*, 25 Ill. App. 509; *Hunt v. Raplee*, 44 Hun 149; *Moses v. Wallace*, 7 Lea 413; *Blanchard v. Hoxie*, 34 Me. 376; *Hubbard v. Norton*, 10 Conn. 422; *Partridge v. Hatch*, 18 N. H. 494; *Cornell v. Jackson*, 3 Cush. 506. See *Wright v. Nipple*, 92 Ind. 310; *Wilson v. Peelle*, 78 id. 384; *Wood v. Bibbins*, 58 id. 392. Compare *American C. C. Co. v. Seitz*, 101 id. 182.

An apportionment has been made where there was a failure of title to crops which had so far matured as to be valuable as part of the

land. *Newburn v. Lucas*, 126 Iowa 85 citing the text.

²⁹ *Semple v. Whorton*, 68 Wis. 626. Taylor, J., expressed, in a dissenting opinion, the conviction that the rule stated is a general one applicable to ordinary cases, and should not be applied where the part to which the title fails is of more value than any of the other parts of the tract purchased by reason of facts which neither of the parties knew at the time of the bargain, and which, therefore, had no influence in fixing the price.

³⁰ *Turner v. Lawson*, 144 Ala. 432.

quantity of land, but by the value that such part proportionately bears to the value of the whole tract as estimated by the consideration in the deed.³¹ A peculiar case has recently been decided by the Maine court. The defendant held a mortgage as security for the mortgagor's note. The latter arranged with the plaintiff to furnish him money on a new mortgage to discharge that held by the defendant. In lieu of such mortgage the defendant assigned his mortgage to plaintiff as security for the mortgagor's note. In the assignment there was a covenant that there was no incumbrance on the mortgage and that the assignor had a right to sell and convey. Some years before the mortgagee had released a portion of the mortgaged premises to the mortgagor, a fact which was not in his recollection when the assignment was made. At the date of the transaction between the parties to this action the mortgage covered property worth more by several hundreds of dollars than the amount advanced by plaintiff; between then and the time of the foreclosure it depreciated so as to leave a considerable sum due on the note. It was held in an action on defendant's covenant that he was liable only for nominal damages.³²

SECTION 4.

COVENANTS OF WARRANTY AND FOR QUIET ENJOYMENT.

§ 603. **Their scope, and the remedy for a breach.** These covenants are usually treated as synonymous, since a concurrence of the same circumstances is necessary to constitute a breach, since they equally possess the capacity to run with the land, and the rule in respect to the measure of damages is the same as to both.³³ They are assurances to the purchaser and his assigns against a future loss of title to and possession of the granted

³¹ Price v. Deal, 90 N. C. 290.

³² People's Sav. Bank v. Hill, 81 Me. 71.

³³ Simons v. Diamond M. Co., 159 Mich. 241; Jacobs v. Fowler, 135 App. Div. (N. Y.) 713; Morrow v. Baird, 114 Tenn. 552; Bostwick v.

Williams, 36 Ill. 65, 85 Am. Dec.

385; Rea v. Minkler, 5 Lans. 196;

Fowler v. Poling, 2 Barb. 300, 6 id.

165; Mitchell v. Warner, 5 Conn.

497; Herrin v. McEntyre, 1 Hawks

410; Rawle on Cov. Tit. 208, 215.

premises; in other words, their meaning is that neither the grantee nor his heirs or assigns shall be deprived of the possession by force of a paramount title.³⁴ But if, when a deed is executed, the grantor had neither title nor seizin the covenant cannot be enforced by the heirs of the grantee or his assignee; the right of action is in the personal representative of the grantee.³⁵ The purchaser may rely on the covenants although he bought the land with knowledge that the title was defective,³⁶ and although the deed and the mortgage back were a part of the same transaction and contained the same covenants, and the relation of mortgagor and mortgagee subsisted between the parties when suit was instituted.³⁷ A deed conveying land as a gift, there being no valuable consideration whatever, will not support an action on the covenant of warranty.³⁸ The only remedy open to the covenantee is to sue for a money judgment on the covenant;³⁹ he cannot have other lands owned by his grantor set aside to make up a deficiency in those to which he was entitled.⁴⁰

³⁴ *Hardy v. Pecot*, 113 La. 350; *Quick v. Walker*, 125 Mo. App. 257; *Leet v. Gratz*, 124 Mo. App. 394; *Wiggins v. Pender*, 132 N. C. 628, 61 L.R.A. 772 (though "assign" not used in deed); *Rindskopf v. Farmers' L. & T. Co.*, 58 Barb. 36; *King v. Kerr*, 5 Ohio, 154, 22 Am. Dec. 777; *Thomas v. Bland*, 91 Ky. 1, 11 L.R.A. 240; *Walton v. Campbell*, 51 Neb. 788; *Rutherford v. Montgomery*, 14 Tex. Civ. App. 319; *Beasley v. Phillips*, 20 Ind. App. 182; *Loving v. Groomer*, 142 Mo. 1.

The parties to a partition, whether coparceners, joint tenants or tenants in common, are liable upon an implied warranty of title if a loss occurs; but such warranty does not run with the land. *Jones v. Bigstaff*, 15 Ky. L. Rep. 821.

³⁵ *Prestwood v. McGowin*, 128 Ala. 267.

³⁶ *Newburn v. Lucas*, 126 Iowa 85, citing local cases; *Wadhams v. Swan*, 109 Ill. 46; *Edwards v. Clark*, 83 Mich. 246, 10 L.R.A. 659; *Demars v. Koehler*, 62 N. J. L. 203; *Jones v. Jones*, 87 Ky. 82. But in *Saunders v. Rowe*, 20 Ky. L. Rep. 1082, it is held that one who bought land knowing that the mineral rights therein had been sold could not recover on the covenant of warranty.

³⁷ *Harrington v. Bean*, 89 Me. 470; *Hardy v. Nelson*, 27 Me. 526; *Hubbard v. Norton*, 10 Conn. 422.

³⁸ *Calcote v. Elkin*, 3 Tenn. Cas. 319. But see *Hanson v. Buckner*, 4 Dana 251, 29 Am. Dec. 401.

³⁹ *Smyth v. Boroff*, 156 Mo. App. 18.

⁴⁰ *Willbarger County v. Robinson*, 5 Tex. Civ. App. 10; *Doyle v. Brundred*, 187 Pa. 113, 120.

§ 604. **What is a breach.** These covenants are only broken by an eviction or something equivalent thereto.⁴¹ Formerly they were not broken unless there was an expulsion by the assertion of a paramount title and by process of law. The rule now is that there is a breach whenever there is an involuntary loss of possession by reason of the hostile assertion of an irresistible title. The eviction may be constructive, as where the purchaser is unable to obtain possession by reason of the paramount title being in a third person,⁴² or where the holder of that title demands his interest in such a way and under such

⁴¹ Callahan v. Goldman, 216 Mass. 238; Burns v. Vereen, 132 Ga. 349; Mauzy v. Flint, 42 Ind. App. 386; Brooks v. Mohl, 104 Minn. 404, 124 Am. St. 629, 17 L.R.A.(N.S.) 1195; Smyth v. Boroff, 156 Mo. App. 18; Werner v. Wheeler, 142 App. Div. (N. Y.) 358; Overby v. Johnston, 42 Tex. Civ. App. 348; Savage v. Cauthorn, 109 Va. 694; Durbin v. Shenners, 133 Wis. 134; Oliver v. Bush, 125 Ala. 534; Jones v. Jones, 87 Ky. 82; Wagner v. Finnegan, 54 Minn. 251; Watkins v. Gregory, 69 Miss. 469; Pence v. Gabbert, 63 Mo. App. 302; Griffin v. Thomas, 128 N. C. 310; Bostwick v. Williams, 36 Ill. 65, 85 Am. Dec. 385; Owen v. Thomas, 33 Ill. 320; Giddings v. Canfield, 4 Conn. 482, 10 Am. Dec. 162; McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456; Woodward v. Allan, 3 Dana 164; Rickets v. Dickens, 1 Murph. 343, 4 Am. Dec. 555; Norton v. Jackson, 5 Cal. 262; Booker v. Merriweather, 4 Litt. 212; Rickert v. Snyder, 9 Wend. 416; Innes v. Agnew, 1 Ohio 179; Post v. Campau, 42 Mich. 90; Davis v. Smith, 5 Ga. 274, 48 Am. Dec. 279; Hannah v. Henderson, 4 Ind. 174; Woodford v. Leavenworth, 14 id. 311; Simpson v. Hawkins, 1 Dana 303; Stewart v. Drake, 9 N. J. L.

139; Sisk v. Woodruff, 15 Ill. 15; Crutcher v. Stamp, 5 Hayw. 100; Meek v. Bearden, 5 Yerg. 467; Gilman v. Haven, 11 Cush. 330; Park v. Bates, 12 Vt. 381, 36 Am. Dec. 347; Noonan v. Lee, 2 Black 499; Swazey v. Brooks, 34 Vt. 451; Knapp v. Marlboro, id. 234; Evans v. Lewis, 5 Harr. 162; Stewart v. West, 14 Pa. 336; Patton v. McFarlane, 3 P. & W. 419; Fulweiler v. Baugher, 15 S. & R. 45; Knepper v. Kurtz, 58 Pa. 480; Clark v. McNulty, 3 S. & R. 364; McCoy v. Lord, 19 Barb. 18; Greenvault v. Davis, 4 Hill 643; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 322; Curtis v. Deering, 12 Me. 499; Mitchell v. Warner, 5 Conn. 497; Witty v. Hightower, 12 Sm. & M. 478; Carter v. Denman, 23 N. J. L. 260; Tufts v. Adams, 8 Pick. 547; Flanagan v. Ward, 12 Tex. 209; Peck v. Hensley, 20 id. 673; McCormick v. Marey, 165 Cal. 386; Brooks v. Winkles, 139 Ga. 732; Grant v. McArthur, 153 Ky. 356; Mathews v. Sylvester, 15 Ohio C. C. (N. S.) 237.

A public easement is not a breach. *Burke v. Trabue*, 137 Ky. 580.

⁴² *Sarrils v. Beckman*, 55 Ind. App. 638; *Mahoney v. Simms*, 86 Misc. (N. Y.) 484; *Simons v. Diamond M. Co.*, 159 Mich. 241; *Keyes*

conditions that the purchaser is compelled to yield and buy the outstanding paramount title to avoid an ouster.⁴³ If possession is yielded to such person the vendee assumes the risk of showing his right thereto.⁴⁴ The eviction must be alleged and shown to be by a paramount title existing before or at the time the defendant made his covenant.⁴⁵ Where the grantor had title at law and in equity to the land conveyed and the breach assigned was the making of a subsequent conveyance which, by being first recorded, enabled the grantee under the registry laws to hold the land, the court held that "the covenant of warranty relates solely to the title as it was at the time the conveyance was made; that it merely binds the grantor to protect the

& M. Realty Co. v. Trustees, 146 App. Div. (N. Y.) 796; Cain v. Fisher, 57 W. Va. 492; Butt v. Riffe, 78 Ky. 352; Pryse v. McGuire, 81 Ky. 608; Cheney v. Straube, 43 Neb. 879; Jennings v. Kiernan, 35 Ore. 349; Eustis v. Cowherd, 4 Tex. Civ. App. 343; Fritz v. Pusey, 31 Minn. 368; Murphy v. Price, 48 Mo. 247; Clark v. Conroe's Est., 38 Vt. 469; Russ v. Steele, 40 id. 310; Sheffey v. Gardiner, 79 Va. 313; Duvall v. Craig, 2 Wheat. 62, 4 L. ed. 185; Prestwood v. McGowin, 128 Ala. 267, 272.

⁴³ Shaw Bros. v. Guthrie, 14 Ga. App. 303; Beasley v. Phillips, 20 Ind. App. 182, 191; West Coast Mfg. & I. Co. v. West Coast I. Co., 25 Wash. 627, 62 L.R.A. 763; Leet v. Gratz, 92 Mo. App. 422, 431; Hayden v. Patterson, 39 Colo. 15; Joyner v. Smith, 132 Ga. 779; Brooks v. Mohl, 104 Minn. 404, 124 Am. St. 629, 17 L.R.A.(N.S.) 1195; Morrow v. Baird, 114 Tenn. 552; Morgan v. Haley, 107 Va. 331, 13 L.R.A.(N.S.) 732. See Cotting v. Commonwealth, 205 Mass. 523.

⁴⁴ Cheney v. Straube, 35 Neb. 521; Lambert v. Estes, 99 Mo. 604; Clark v. Munford, 62 Tex. 531.

⁴⁵ Seldon v. Jones, 74 Ark. 348; McKillop v. Burton, 82 Vt. 403; Bedell v. Christy, 62 Kan. 760; Ravenal v. Ingram, 131 N. C. 549; Wade v. Comstock, 11 Ohio St. 71, and cases cited in first note to this section.

In Knapp v. Marlboro, 34 Vt. 451, the plaintiff and his grantors had been in possession of the premises in controversy for more than half a century, when he was evicted by a third person; in an action against his covenantor such long continued possession raised a conclusive presumption that he was not evicted by title paramount.

In Woodward v. Allan, 3 Dana 164, while the necessity of eviction by a paramount title is admitted, it is held that an allegation that the eviction was by an adverse superior title was sufficient, and that it need not be averred to be an older title if stated to be adverse and not derived from the plaintiff himself. See Pence v. Duvall, 9 B. Mon. 48; Curtis v. Deering, 12 Me. 499; Staples v. Flint, 28 Vt. 794; Lukens v. Nicholson, 4 Phila. 22; Maeder v. Carondelet, 26 Mo. 112; Scott v. Scott, 70 Pa. 244.

grantee and his assigns against a lawful and better title existing before or at the date of the grant," and that an action would not lie on a general covenant of warranty in such a case.⁴⁶ The decisions are not entirely in accord as to what shall be deemed an eviction for the purpose of recovery on these covenants; but an eviction, or what is deemed equivalent, by paramount title is essential to the right to damages and is universally required.⁴⁷

An outstanding title in either the federal or state government is generally held to constitute an eviction.⁴⁹ If land is actually occupied by another at the time of the execution of the conveyance under an adverse and better title the covenant is broken without action by either party.⁵⁰ But if the grantee permits the possession of another to ripen into a good title by lapse of time he has no remedy on the covenant.⁵¹ If a purchaser does not investigate the title to vacant land which is already occupied and fails to take possession of it until the occupier has acquired title he cannot recover on the covenant of warranty although he sues thereon immediately after his failure to establish his title, and no superior title was theretofore asserted.⁵² A vendee cannot claim damages because of an eviction which was the result of his acts.⁵³ A judgment merely establishing an adverse paramount title does not constitute an eviction unless, at least, the land is vacant and unoccupied.⁵⁴ It is otherwise where a judgment is rendered against the covenantee in possession of the land for its recovery, notice of the pendency of the action hav-

⁴⁶ *Wade v. Comstock*, *supra*; *Duroe v. Stephens*, 101 Iowa 358. But compare *Curtis v. Deering*, *supra*; *Maeder v. Carondelet*, 26 Mo. 114.

⁴⁷ See *Larkin v. Trammel*, 47 Tex. Civ. App. 548.

⁴⁹ *Mahoney v. Simms*, 86 Misc. (N. Y.) 484; *Seldon v. Jones*, 74 Ark. 348; *Jackson N. S. Co. v. Tootle*, 96 Miss. 486; *Holloway v. Miller*, 84 Miss. 776; *Green v. Irving*, 54 Miss. 462; *McGary v. Hastings*, 39 Cal. 360; *Brown v. Allen*, 57 Hun 219; *McLennan v. Prentice*,

85 Wis. 427; *Pevey v. Jones*, 71 Miss. 647, 42 Am. St. 486; *Harrington v. Clark*, 56 Kan. 644.

⁵⁰ *Shattuck v. Lamb*, 65 N. Y. 499, 22 Am. Rep. 656, overruling *Kortz v. Carpenter*, 5 Johns. 120; *Moore v. Vail*, 17 Ill. 185.

⁵¹ *Rindskopf v. Farmers' L. & T. Co.*, 58 Barb. 36.

⁵² *Clafin v. Case*, 53 Kan. 560.

⁵³ *Sarrls v. Beckman*, 55 Ind. App. 638; *Hester v. Hunnicutt*, 104 Ala. 282.

⁵⁴ *Wagner v. Finnegan*, 54 Minn. 251.

ing been given the grantor.⁵⁵ If the action is based on the covenant against incumbrances and also on the covenant of warranty the exercise of an outstanding right to flow a portion of the land which was covered with water, the plaintiff being thereby deprived of its use and possession, constitutes a substantial eviction, and is an eviction *pro tanto*.⁵⁶ Eviction under a paramount title may not be shown unless the warrantor had notice of the proceedings in which it was established and an opportunity to defend.⁵⁷

§ 605. The rule of damages; what law controls; remote losses.

The measure of compensation is not the same in all the states. In a majority the consideration, or the value of the land at the time of the sale as then agreed upon by the parties or as determined by the price paid, with interest for such time as the purchaser has been deprived of, or is accountable to the superior owner for, the *mesne* profits, together with the costs and expenses incurred in defense of the action by which the injured party was evicted is the measure for a total failure of title.⁵⁸

⁵⁵ *Carpenter v. Carpenter*, 88 Ark. 169; *Scoggin v. Hudgins*, 78 Ark. 531, 115 Am. St. 60.

⁵⁶ *Harrington v. Bean*, 89 Me. 470.

⁵⁷ *Brooks v. Winkles*, 139 Ga. 732.

⁵⁸ *Diggs v. Henson*, 180 Mo. App. 34; *Arbuthnot v. Big Pine Lumber Co.*, 134 La. 529; *Coleman v. Luetcke*, — Tex. Civ. App. —, 164 S. W. 1117; *Campbell v. Bentley*, 159 App. Div. (N. Y.) 522; *Conrad v. Effinger*, 87 Va. 59, 24 Am. St. 646; *Coleman v. Lucksinger*, 224 Mo. 1, 26 L.R.A. (N.S.) 934; *Mayer v. Wooten*, 46 Tex. Civ. App. 327; *Donlon v. Evans*, 40 Minn. 501, citing the text; *Efta v. Swanson*, 115 Minn. 373; *Hoffman v. Bosch*, 18 Nev. 360; *Allen v. Miller*, 99 Miss. 75; *McCormick v. Marcy*, 165 Cal. 386; *Boice v. Coffeen*, 158 Iowa 705; *Hunt v. Hay*, 156 App. Div. (N. Y.) 138 (consideration and interest only); *Adams v. Cox* (Tex. Civ.

App.), 150 S. W. 1195; *Taylor v. Allen*, 131 Ga. 416; *Mauzy v. Flint*, 42 Ind. App. 386; *Allen v. Miller*, 99 Miss. 75; *Yazoo, etc. R. Co. v. Banister*, 89 Miss. 808 (if land is wild and no rent received); *Mengel B. Co. v. Ferguson*, 124 Tenn. 433; *Larkin v. Trammel*, 47 Tex. Civ. App. 548; *Morgan v. Haley*, 107 Va. 331, 13 L.R.A. (N.S.) 732; *West Coast M. & I. Co. v. West Coast I. Co.*, 31 Wash. 610; *Patterson v. Cappon*, 125 Wis. 198; *Webb v. Holt*, 113 Mich. 338; *Craven v. Clary*, 8 Kan. App. 295; *Blackwell v. McBride*, 14 Ky. L. Rep. 760 (Ky. Super. Ct.); *Matheny v. Stewart*, 108 Mo. 73; *Cheney v. Straube*, 35 Neb. 521, citing the text; *Rash v. Jenne*, 26 Ore. 169 (the measure of recovery is not affected by any agreement between the covenantor and his agent, nor because the purchase-money never reached the covenantor); *Hunt v. Nolen*, 46 S. C.

This measure of damages does not harmonize with the rule which is applied in other cases, nor conform to the principle that a party injured by the breach of a contract shall receive compensation to such an amount as will place him in as good

551; *Kempner v. Beaumont L. Co.*, 20 Tex. Civ. App. 307; *Roller v. Effinger*, 88 Va. 641; *Taylor v. Wallace*, 20 Colo. 211, *Prestwood v. McGowin*, 128 Ala. 267, 277, 80 Am. St. 136; *Kingsbury v. Milner*, 69 Ala. 502; *Click v. Green*, 77 Va. 827; *Sheffey v. Gardiner*, 79 id. 313; *Moreland v. Metz*, 24 W. Va. 119, 138, 49 Am. Rep. 246; *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *Cook v. Curtis*, 68 Mich. 611; *Lambert v. Estes*, 99 Mo. 604; *Stebbins v. Wolf*, 33 Kan. 765; *Hoffman v. Bosch*, 18 Nev. 360; *Brown v. Dickerson*, 12 Pa. 372; *Cox v. Henry*, 32 id. 18; *Wood v. Kingstons C. Co.*, 48 Ill. 356, 95 Am. Dec. 554; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Dalton v. Bowker*, 8 Nev. 190; *Talbot v. Bedford*, *Cooke* 447; *Threlkeld v. Fitzhugh*, 2 Leigh 451; *Jackson v. Turner*, 5 id. 127; *Lowther v. Commonwealth*, 1 Hen. & Mun. 202; *Crenshaw v. Smith*, 5 Munf. 415; *Stout v. Jackson*, 2 Rand. 132; *Williamson v. Test*, 24 Iowa 138; *Hallum v. Todhunter*, id. 166; *Earle v. Middleton*, 1 Cheves 127; *Armstrong v. Percy*, 5 Wend. 535; *Bond v. Quattlebaum*, 1 McCord 584, 10 Am. Dec. 702; *McMillan v. Ritchie*, 3 T. B. Mon. 348, 16 Am. Dec. 107; *Morris v. Rowan*, 17 N. J. L. 304; *Hanson v. Buckner*, 4 Dana 251, 29 Am. Dec. 401; *Kennedy v. Davis*, 7 T. B. Mon. 376; *Taylor v. Holter*, 1 Mont. 688; *Cox v. Strobe*, 2 Bibb 277, 5 Am. Dec. 603; *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309; *Harding v. Larkin*, 41 Ill. 413; *Booker v. Bill*, 3 Bibb 173, 6 Am. Dec. 641;

Robards v. Netherland, 3 Bibb 529; *Davis v. Hall*, 2 id. 590; *Marshall v. McConnell*, 1 Litt. 419; *Cummins v. Kennedy*, 3 id. 118; *Pence v. Duvall*, 9 B. Mon. 48; *Robertson v. Lemon*, 2 Bush 301; *McClure v. Gamble*, 27 Pa. 288; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Phillips v. Reichart*, 17 Ind. 120, 79 Am. Dec. 463; *Burton v. Reeds*, 20 Ind. 87; *Cincinnati, etc. R. Co. v. Pearce*, 28 Ind. 502; *Foster v. Thompson*, 41 N. H. 373; *Staats v. Ten Eyck*, 3 Cai. 111, 2 Am. Dec. 254; *Bennett v. Jenkins*, 13 Johns. 50; *Wallace v. Talbot*, 1 McCord 466; *Grist v. Hodges*, 3 Dev. 198; *Lloyd v. Quinby*, 5 Ohio St. 262; *Wade v. Comstock*, 11 id. 71; *Tong v. Matthews*, 23 Mo. 437; *Swafford v. Whipple*, 3 G. Greene 261; *Pearson v. Davis*, 1 McMull. 37; *Elliott v. Thompson*, 4 Humph. 99, 40 Am. Dec. 630; *Gridley v. Tucker*, *Freem. Ch.* 209; *Clark v. Burr*, 14 Ohio 118, 45 Am. Dec. 529; *Whitlock v. Crew*, 28 Ga. 289; *Cathcart v. Bowman*, 5 Pa. 317; *Conrad v. Trustees Grand Grove, etc.*, 64 Wis. 258.

On the breach of the covenant of warranty and an eviction substantial damages are recoverable. *Comstock v. Son*, 154 Mass. 389.

In Louisiana there may be a recovery of the purchase price, of the amount of fruits and revenues, if these have been recovered from the vendee with the property; the costs of the suit on warranty or of that bought by the original buyer; the damages suffered, if any, besides

condition as if the contract had been performed. It is founded on the same consideration of justice and policy as that for breach of the covenants of seizin and good right to convey. It is not, however, as logical as in case of the latter; for there the damages are fixed by the value at the time of the breach and the consideration paid is adopted as the value fixed by the parties. In an early case in Virginia it was said: "The measure of damages is and ought to be the same in case of eviction, whether they be claimed in an action upon a warranty, or covenant of seizin or of power to convey, or for quiet enjoyment; that this measure was settled by the common law, upon principles of justice and sound policy, to be the value at the time of the contract, without regard to the increased or diminished value, or to improvements, and the rents and profits for which the tenant is responsible to the successful owner."⁵⁹ The value of the land cannot be recovered although the tract to which the title failed was much more valuable than that which passed by the conveyance, and the latter was bought only to secure the former, and the price paid for that which was conveyed was largely in excess of its value.⁶⁰

The law of the jurisdiction in which the property is situated determines the measure of damages,⁶¹ and the rights of parties generally under conveyances.⁶² The right to recover attorneys'

the price paid; but there cannot be a recovery based upon the increased value of the property, nor of counsel fees. *Lamerlec v. Barthelmy*, 2 McGloin, 106, and local cases cited.

In the absence of liability for *mesne* profits interest will be allowed only from the date of eviction. *McGuffey v. Humes*, 85 Tenn. 26.

The expense of completing an imperfect abstract of title may be recovered. *Smyth v. Boroff*, 156 Mo. App. 18.

⁵⁹ *Stout v. Jackson*, 2 Rand. 132. See *Rawle on Cov.* (5th ed.), § 164.

⁶⁰ *Kempner v. Beaumont L. Co.*, 20 Tex. Civ. App. 307.

⁶¹ *Tillotson v. Pritchard*, 60 Vt. 94, 6 Am. St. 95. But see *Looney v. Reeves*, 5 Kan. App. 279, holding that the recovery was governed by the laws of the state in which the deed was executed and the action brought.

⁶² *Riley v. Burroughs*, 41 Neb. 296; *Kling v. Sejour*, 4 La. Ann. 128; *Succession of Lavendon*, 39 La. Ann. 952; *Succession of Casidy*, 40 La. Ann. 827. Compare *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650; *Crary v. Donovan*, 63 Ind. 513; *Fisher v. Parry*, 68 Ind. 465; and see *Worley v. Hine-man*, 6 Ind. App. 240.

fees will be governed by the laws of the state in contemplation by the parties when the conveyance was made and in which the land was situated.⁶³ Unless the laws of such state are proven the court will presume them to be the same as those of the forum.⁶⁴

There cannot be a recovery for losses resulting to the purchaser from breaking up his business and preparing to move upon the land purchased;⁶⁵ nor for the expense of removal therefrom after eviction when he buys with knowledge of the existence of a paramount title which he might have extinguished by the expenditure of a less sum than that owing on the purchase price.⁶⁶ Where the conveyance was made in good faith by the actual owner in possession, subject to a mortgage, but in consequence of the failure of the record to show a deed in his chain of title the grantee was unable to borrow money on the land and in consequence was evicted by a foreclosure of the mortgage, the grantor was not liable for the loss of the land, that being a consequence too remote, he having subsequently procured a deed to supply the missing link in his chain of title.⁶⁷ A vendee who made improvements, paid taxes and instalments of the purchase-money after his entry, on being evicted by reason of the existence of a paramount title was entitled after his removal of the buildings he erected and the recovery of damages against him by the holder of such title for the detention of the land, to recover from his vendor for the loss of the bargain and the improvements, such loss being measured by deducting the purchase price of the land and all unpaid interest up to the time of eviction from the value of the land at that time; and, in addition to such difference, the taxes and instalments of the purchase-money paid and the costs and damages awarded against him in the ejectment suit; but from these amounts was to be deducted the value, for the purpose of removal, of the buildings removed; he could recover interest on the purchase-money and on taxes paid only from the time of removal. He could not

⁶³ Matheny v. Stewart, 108 Mo. 73. Mo. 1, 26 L.R.A.(N.S.) 934.

⁶⁵ Gunter v. Beard, 93 Ala. 227.

⁶⁴ Hazelett v. Woodruff, 150 Mo.

⁶⁶ Id.

534; Coleman v. Lucksinger, 224

⁶⁷ Lamb v. Buker, 34 Neb. 485.

recover for loss of machinery bought to use on the land, that damage being too remote.⁶⁸ Improvements made on property pursuant to a preliminary contract for its purchase may not be recovered for after the execution of a deed; the contract being merged therein.⁶⁹ The cost of plans for the erection of a house on the premises can be recovered only to the extent that they are valueless to the purchaser; he is not bound to use them in the erection of a house on other land.⁷⁰ The consequences of the failure to secure the location of a railroad station on the land are too remote and speculative to be recovered for.⁷¹ An unusual case has recently been determined in Idaho. When the conveyance was made the vendor had good title; thereafter he gave paper title to an innocent third party who purchased the land and who recorded his deed before the plaintiff's deed was recorded. No question of intentional fraud was involved, but merely the effect of gross negligence, which was made the basis for imputing a fraudulent intent. The first purchaser was not in fault for failing to record his deed; he was entitled to remain in possession of the land until evicted by a judgment notwithstanding knowledge of the later conveyance; was entitled to recover the value of the land when evicted, including improvements put upon it to the extent they added to the value, and attorney's fees necessarily incurred in defense of the title.⁷² The cases are not in accord as to the right to recover for improvements made by the purchaser; the grantor's liability for them has been denied on the ground that they inure to the benefit of the evictor and he, if anybody, must pay for them.⁷³

⁶⁸ *Fleckten v. Spicer*, 63 Minn. 454.

Neither the loss of the rents and profits, the inability to sell the land nor its depreciation in value are involved. *Adams v. Cox* (Tex. Civ. App.), 150 S. W. 1195.

An adjustment of a demand between others than the defendant growing out of a deficiency in the quantity of land conveyed is not binding upon him he having taken

no part therein. *Davis v. Fain* (Tex. Civ. App.), 152 S. W. 218.

⁶⁹ *West Coast M. & I. Co. v. West Coast I. Co.*, 31 Wash. 610.

⁷⁰ *Curtley v. Security Sav. Soc.*, 46 Wash. 50.

⁷¹ *Mauzy v. Flint*, 42 Ind. App. 386.

⁷² *Madden v. Caldwell L. Co.*, 16 Idaho 59, 21 L.R.A. (N.S.) 332.

⁷³ *Copeland v. McAdory*, 100 Ala. 553.

§ 606. Same subject; where property is the consideration.

If the amount of the consideration is not expressly agreed upon and has been paid in property it would follow that the value of that property should be adopted as the basis of damages on a breach of the covenant of warranty, if the consideration paid is adopted as the criterion, as we have seen is the case in assessing damages for breach of the covenant of seizin and power to convey;⁷⁴ but in some cases the value of the land to which the covenant refers is adopted as the standard.⁷⁵ And it has been made a question whether the value for this purpose shall be ascertained at the date of the grant and covenant or at some earlier date when the contract of sale may have been made. By some of the early cases in Kentucky a very rigid rule was laid down, making the value of the land lost, estimated at the date of the grant, the basis of recovery though contracted to be conveyed at a much earlier time. If the consideration was stated in the deed that was conclusive;⁷⁶ not because it was the measure of damages, but because it was the value of the granted land fixed by the parties.⁷⁷ In one case a bond was accepted in 1784, conditioned to convey five hundred acres of land as soon as a patent should issue; it contained also a provision for the conveyance of other land, equal in value, if that should be lost. It was held that the object of the bond was to provide for the contingency of the land being lost before a deed should be executed, and did not extend to an eviction after the execution of a deed with general warranty. In this case there was a breach of the condition of the bond by failing to execute a deed; suit was brought, and in 1805 a compromise made, and a deed with general warranty executed. The value of the land in 1805, when

⁷⁴ See § 575; *McGuffey v. Humes*, 85 Tenn. 26; *Cook v. Curtis*, 68 Mich. 611; *Holmes v. Seaman*, 72 Neb. 300; *Mayer & Schmidt v. Wooten*, 46 Tex. Civ. App. 327; *Donlon v. Evans*, 40 Minn. 501.

⁷⁵ *Howard v. Hurst*, 156 Mo. App. 205; *Evans v. Fulton*, 134 Mo. 653, 662, 56 Am. St. 543, quoting the text; *Byrnes v. Rich*, 5 Gray 518;

Hodges v. Thayer, 110 Mass. 286; *Looney v. Reeves*, 5 Kan. App. 279.

⁷⁶ *McMillan v. Ritchie*, 3 T. B. Mon. 348, 16 Am. Dec. 107; *Wolff v. Love*, 78 Wash. 561.

⁷⁷ *Marshall v. McConnell*, 1 Litt. 419; *Howes v. Axtell*, 74 Iowa 400; *Fagan v. Hook*, 134 Iowa 381, citing the text; *Howard v. Hurst*, *supra*.

the deed was executed, and not in 1784, with interest, was held to be the measure of damages. The consideration paid was evidence of its value. The deed was deemed to have been received in satisfaction of the bond by the compromise and to have extinguished all right to proceed upon the bond. The court said: "In deciding upon the amount which should be recovered * * * we must look to the covenants of warranty contained in the deeds of conveyance. It would no doubt have been competent for the parties when the deeds were executed, by a clause to that effect, to have referred to the condition of the bond and, by adopting it as part of the covenant of warranty contained in the deeds, made the stipulations in that condition control the recovery on the covenant of warranty. But this they have not done. * * * The amount to be recovered * * * must be regulated by the value of the land at the date of the deeds, and not by the value when the bond was executed; * * * for it is incontrovertibly settled, by repeated decisions of this court, that the value of the land at the date of the covenant of warranty forms the criterion of damages to be recovered for a breach of the covenant. We know it has been said, and no doubt said correctly, that the consideration given for lands forms a proper inquiry in actions founded on a breach of the covenant of warranty. It is not, however, because the consideration in itself constitutes the measure of damages that it is inquired into; but it is resorted to as a means to ascertain the value of the land. The value of the land at the date of the warranty with interest forms the measure of damages, and the consideration given for the land constitutes evidence of that value; and where the amount of the consideration is definite and certain it forms evidence of a very persuasive and satisfactory character of the true value. It ought, perhaps, in such a case to be conclusive on the parties; for as it shows the value which the parties themselves put on the land, if they should be concluded by it, they can have no cause to complain. But where the consideration is not of that fixed and certain character, and consists, as in the present case, in the compromise of a contest between the parties it can form no rational means of ascertaining the value of the land. The amount of that consideration is

itself uncertain; it cannot be defined by any precise rule, and forms no inquiry in ascertaining the value of the land; but the value of the land must, in such a case, be ascertained by the introduction of other evidence.⁷⁸ But in a later case it was held, on a breach of the covenant of warranty, that restitution to the extent of the failure of consideration is the fixed and only stable and consistent rule; that the true criterion is not the value of the land at the time of the eviction, but the amount received for the lost land and all costs incurred in resisting the eviction.⁷⁹ It is believed that the general rule is to make the consideration paid the basis of recovery, and if that is paid in property at an agreed value, the value so agreed upon is taken at the actual value.⁸⁰ The grantor, being indebted to the grantee, issued to the latter bonds, secured by a mortgage, each

⁷⁸ In *Cummins v. Kennedy*, 3 Litt. 118, the court said: "The general rule, settled by a current of authorities, is, that, as the conveyance completes the sale, the value of the land conveyed, at the date of conveyance, with interest and costs, forms the criterion of damages; and also that the price stipulated is the best evidence of that value. And where the parties have shown that price in the conveyance, it would not perhaps be going too far to say that they ought to be concluded by it. Hence, if the consideration was paid a long time before the date of the deed, still, if it is expressed, it would fix the criterion, though the land, when conveyed, had greatly risen in value. In this case, however, the parties have shown what constituted the consideration; but still, its then value is uncertain, because it consisted in land, the price of which was not fixed. It is not necessary now to say that in every case parties, where the deed did not fix the price, should be confined to its date, and could in no case travel back

and show that the consideration had passed long before, and, of course, was of less value; for in this case there are circumstances that show that the warranty ought to be measured by the general rule, notwithstanding the contract was made in 1783 with the testator of the defendant." *Marshall v. McConnell*, 1 Litt. 419.

In *Pence v. Duvall*, 9 B. Mon. 48, Judge Breck said: "The criterion of damages in a case of this kind is the value of the land at the time of the sale and interest; and the best evidence of that value is held to be the price given, or the purchase-money—not the amount actually paid at the time, but the amount secured or stipulated to be paid. We do not perceive any principle upon which the failure of the grantee to pay the stipulated price can absolve the grantor from his covenants."

⁷⁹ *Robertson v. Lemon*, 2 Bush 301.

⁸⁰ *Howard v. Hurst*, 156 Mo. App. 205; *McGuffey v. Humes*, 85 Tenn. 26; *Williamson v. Test*, 24 Iowa

of which expressed that it was at all times receivable, with accrued interest thereon, at par in payment for lands held by the grantor at the market price. The vendee accepted such bonds for the purpose of acquiring lands from the vendor and in pursuance of that purpose the deed thereto was made. In an action on the covenant of warranty it was determined that by these acts the respective parties in effect declared the true value of the bonds and the lands conveyed to be equal—the face

138; *White v. Street*, 67 Tex. 177; *Parish v. White*, 5 Tex. Civ. App. 71, 74.

In *Koestenbader v. Pierce*, 41 Iowa 204, the breach consisted of a previous condemnation of a strip of land granted for the use of a railroad. Day, J., said: "When the parties have, by their agreement, fixed the value of the premises without the incumbrance the sum so fixed is to be regarded as such value and must be made the basis of estimating the value with the incumbrance. This rule is just to both parties. In an action on a covenant of warranty the grantee is entitled to recover such sum as will place him in as good condition as if the covenant had not been broken. *Funk v. Cresswell*, 5 Iowa 62. Suppose, for illustration, the land in question to have been sold for \$1,500, and that in fact at the time of sale it was worth unincumbered only \$1,000, and that the incumbrance depreciates its value \$500. Then, if the actual value of the land at the time of sale, incumbered and unincumbered, is to be made the basis of damages the grantee could recover only one-third of the consideration paid although the land is depreciated in value one-half. This does not place him in the condition he would have occupied if no incumbrance existed. Upon the

other hand, suppose the price paid is \$1,000 and that the actual value of the land unincumbered is \$1,500, and the value as incumbered is but \$500, making the depreciation \$1,000. Then, upon the basis of the actual incumbered and unincumbered value the grantee would recover the whole consideration paid and he would have the land for nothing. The true rule is this: If the land is worth \$1,500 without incumbrance, and \$1,000 with it, it is damaged to the extent of a third of its value, and if sold for \$1,000, the purchaser is damaged \$333 $\frac{1}{3}$." *Cook v. Curtis*, 68 Mich. 611.

Wade v. Merwin, 11 Pick. 280, was an action for the breach of an officer's covenant of compliance with the law concerning the sale of an equity of redemption. The purchaser at such sale was entitled to recover the sum actually paid with interest; in fact he bid to the extent of his claim against an insolvent debtor who had no other property which could be subjected to the claims of creditors. The value of the debtor's estate was the measure of the recovery.

The value of the property given may be shown by parol. *Mayer v. Wooten*, 46 Tex. Civ. App. 327. At least in the absence of an agreement. *Howard v. Hurst*, 156 Mo. App. 205.

value of the bonds, and that they were bound by their acts.⁸¹ An exception to the general rule has been made where the agreement as to the value of the properties to be exchanged was made for some ulterior purpose. In such a case the agreement was rescinded with the result that the stipulation as to value became ineffective and the rights of the parties were adjusted on the basis of a *quantum meruit*.⁸²

§ 607. **Same subject; in England and Canada.** In England and her Canadian provinces the consideration does not appear to be fixed as the measure of recovery. In *Bunny v. Hopkinson*⁸³ a sale of building lots was made with covenants for title to one who erected buildings thereon and sold them. His purchaser was evicted from a part at the suit of a grantee under a prior deed from the covenantor. This covenantor having died, the evicted party was permitted to claim as a specialty creditor the value of the property, including improvements. The master

⁸¹ *Northern Pac. R. Co. v. Montgomery*, 30 C. C. A. 17, 86 Fed. 251.

⁸² *Fagan v. Hook*, *supra*.

⁸³ 27 Beav. 565.

In the last English edition of *Mayne on Damages* it is said: I conceive that the doctrine laid down by Kent, C. J., is clearly the equitable rule, where the improvements arise from the causes of an entirely collateral nature, such as the growth of a town, the formation of a railway, or the like. The occupier has had all the benefit of this increased value, so long as it lasted, without paying anything for it. Even supposing that he had sold again after the land had risen in value, and been forced to pay back to his purchaser according to that additional value, still he would be only repaying money which he had actually received, and no more. (But in *Lock v. Furze*, 19 C. B. (N. S.) 96, affirmed in Ex. Ch. L. R. 1 C. P. 441, the plaintiff really

recovered damages for a rise in the value of the land.) But the same obvious equity seems by no means to exist when the additional value arises from the outlay of the plaintiff's own capital upon the land. No doubt cases might be put in which a claim for damages on this account would be clearly inadmissible; as, for instance, if a person bought a moor or a mountain for shooting over, and chose to reclaim the one, or build a mansion with pleasure grounds on the other. But suppose he purchased building ground at so much per foot in London or Manchester for the express object of building, ought he not to be repaid for money laid out in this way, the benefit of which is seized by a stranger? In this case the damage incurred is the direct result of the breach of contract, and a result which must have been contemplated by the party entering into the covenant, pp. 256, 257.

of the rolls said: "I am of opinion that the measure of the damages upon these covenants includes the amount expended in converting the land into the purposes for which it was sold."⁸⁴

⁸⁴ In *Hodgins v. Hodgins*, 13 Up. Can. C. P. 146, the plaintiff's father, by indenture of bargain and sale, conveyed to him certain land, the dower of the grantor's wife, the plaintiff's stepmother, not being barred in the deed, whereby he (the grantor) covenanted for quiet enjoyment in consideration, among other things, of five shillings. Upon the grantor's death his widow brought an action for dower against the grantee and recovered judgment, and this action was brought by the covenantee against the grantor's executors for breach of the covenant for quiet enjoyment. Upon a special case it was held that the measure of damages in an action founded on a breach of a covenant for quiet enjoyment was not to be governed by the consideration money in the deed of conveyance, and therefore that the plaintiff was entitled to substantial damages, and was entitled to the value of the crops lost by reason of the eviction. But because the plaintiff should have satisfied the demand for dower upon receiving notice, the costs of her action against the plaintiff and of the defense of the same were disallowed. Draper, C. J., in the course of his opinion said: "The widow of the testator brought an action of dower against the now plaintiff, who was testator's son by a former wife, and recovered judgment. He defended the action. The damages he claims now consist of the following items:

	£	s.	d.
The demandant's costs,			
etc., in her action of			
dower	24	2	0

The now plaintiff's costs of defending that action..10 7 1
 The value of plaintiff's growing crops upon the portion of land assigned by metes and bounds to demandant 27 10 0
 The value of the life interest of the demandant in the land purchased by plaintiff100 0 0
 "The court is to decide what part, if any, of the above sums should be disallowed. It further appeared that the consideration mentioned to have been paid by the plaintiff to the testator in the deed containing the covenants sued on was only 5s., and the court is called upon also to determine whether this affects, and if so to what extent, the plaintiff's right to recover and to reduce the verdict accordingly. So far as I can gather from the English decisions, and they are not numerous, the consideration actually paid or expressed in the deed does not affect the amount of damages recoverable in an action for breach of covenant for quiet enjoyment; and upon the principle of some of the cases to which I refer to below I think it clear that the plaintiff has a right to recover for the crops he has lost and the price he has had to pay to secure quiet enjoyment for the future of all the land which the testator conveyed to him. These damages have been ascertained.

"No consideration was proved except what appeared on the face of the deed, which, according to the pleadings, appears to be 'in consideration, among other things, of

"Where the plaintiff, who was the lessee of a term, was evicted, it was held that in actions on the covenant for title or quiet enjoyment the measure of damage was the value of the unexpired part of the term, and the amount of damage recovered against

five shillings.' This is obviously a merely nominal consideration, and consequently cannot be treated as the price agreed upon between the vendor and vendee as the actual value of the land. The foundation, therefore, of the alleged rule recognized or established in the case of *McKinnon v. Burrows*, 3 Up. Can. Q. B. (old series) 590, is wanting. When it is shown that the grantor was father to the grantee, * * * we may fairly assume that the true consideration was natural love and affection, coupled probably with a desire to provide at once for the child of his first wife. Suppose such a consideration to have been expressed without even a nominal money consideration, with full covenants for title, and the vendor's own title to have proved defective, the plaintiff would either have been entitled to the indemnity now sought as to the dower or the covenants would be wholly nugatory. The plaintiff's cause of action does not arise from a latent defect in the vendor's title which existed when he acquired it. The right of dower was, at the date of the conveyance to the plaintiff, only inchoate, and springs from the vendor's own act against which he expressly covenants. The action is upon the covenant for quiet enjoyment, which differs from that of title. The latter is broken as soon as entered into, and the damages for that breach are, not without sufficient reason, referred to the time of the breach. Hence, the purchase-money and interest thereon have

been held to form the true measure of damages, and the value of the improvements made by the purchaser have been generally excluded from consideration. In this case there was no breach until the vendor died; for till then the right of dower was not consummated. If the time of the breach is to be referred to as affecting the measure of damages, then the plaintiff is entitled to the amount by which the value of the estate granted is diminished, which amount may be given him without conflicting with the decisions that he shall not recover for improvements made by himself before the breach. None of those decisions, I believe, was in a case where the eviction was made by a dowress, deriving her right from the vendors, and as the authorities seem to establish that she has a right to be endowed of the value at the death of her husband, there would be some ground for a distinction as to the amount of damages recoverable in such a case by the husband's vendee for the eviction and for taking into account the value of his improvements; but it is not necessary to decide this question, as the parties have not raised it." After stating the doctrine laid down in *Bunny v. Hopkinson*, the judge continues: "Here the plaintiff seeks only an amount which will satisfy him for not obtaining what the testator covenanted to give him, viz., uninterrupted quiet enjoyment. He asks satisfaction for a partial and temporary interruption. If the vendor had cov-

the plaintiff by the ejector as *mesne* profits, without interest.⁸⁵ And where an action is brought against the occupier by a person with superior title and the former compromises by paying money he is entitled in an action upon the covenant for title to recover the whole sum so paid and his costs as between attorney and client, even though he gives the covenantor no notice of his intention to compromise. The only effect of want of notice is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms if the opportunity had been given him. And any other damages which are the natural consequences of the wrongful breach of covenant may be recovered in addition to the value of the term so lost, if it was of value; as, for instance, the expense of setting up in a new place.⁸⁶ Where a trustee, who was not liable on

enanted that in the event of his wife surviving him a sum equal to the value of her dower should be paid the plaintiff as an indemnity, the plaintiff's right to that sum could not have been questioned. Looking at all the circumstances of the present case, I think the covenant for quiet enjoyment entitles the plaintiff to a similar indemnity, and that the sum paid to compromise the widow's claim and the value of the crops lost by the plaintiff should be allowed to him." Compare *Empire G. M. Co. v. Jones*, 19 Up. Can. C. P. 245, 257; *Platt v. Grand Trunk R. Co.*, 12 Ont. 119.

In the last case affirmed in 19 Ont. App. 403, the defendant granted the plaintiff lands with the right and easement of erecting a dam at a designated point. No power to grant such right existed; but it was shown that a dam could not be maintained at such point. The defendant was not liable for the full purchase-money, less the actual

value of the land without the supposed right, but only the actual practical value of such right, which was nothing.

⁸⁵ *Williams v. Burrell*, 1 C. B. 402.

"So, where a lessor, being tenant for life, with power to grant leases in possession, granted to a lessee in possession a reversionary lease, which, on the lessor's death, reversioner refused to ratify, the lessee recovered from the lessor's executor the premium which he had paid to the lessor and the difference in value between the term professed to be granted by the lessor and that ultimately granted by the reversioner, together with the excess of the costs of the second lease over that of the void lease. *Lock v. Furze*, 19 C. B. (N. S.) 96, affirmed L. R. 1 C. P. 441; *Jenkins v. Jones*, 9 Q. B. Div. 128; *Henty v. Wray*, 19 Ch. Div. 492, reversed on another point, 21 Ch. Div. 332."

⁸⁶ *Mayne on Dam.* (8th Eng. ed.) 253; *Smith v. Compton*, 3 B. & Ad.

his covenants, conveyed an undivided moiety of land and the beneficial owner of the other undivided moiety conveyed it to the same grantee, the liability of such owner for a breach of the covenant of quiet enjoyment by reason of the existence of rights of way was limited to one-half the damages sustained by the vendee, which were measured by the difference in the value of the land free from and fettered with the rights of way and the costs incurred by the vendee in defending an action brought to establish the right of way and the costs of an appeal from the judgment in such action.⁸⁷

§ 608. Same subject; rule in some of the older states and under the Torrens Act. It is not surprising that in a country where the value of real estate fluctuates very little and is seldom suddenly increased by expensive improvements, that damages for breach of these covenants should be measured by the value of the land at the time of the loss by failure of title and eviction. This rule obtained an early and firm footing in New England, and was for a time in some degree recognized in the early days of other older states.⁸⁸ In Maine,⁸⁹ Vermont,⁹⁰ Massachusetts,⁹¹ and Connecticut,⁹² it has been adhered to. In Massachusetts no exception is made to the liability for improve-

407; *Rolph v. Crouch*, L. R. 3 Ex. 44; *Grosvenor H. Co. v. Hamilton* [1894] 2 Q. B. 836.

⁸⁷ *Sutton v. Baillie*, 65 L. T. Rep. 528.

⁸⁸ *Liber v. Parsons*, 1 Bay 19; *Guerard v. Rivers*, id. 265; *Eveleigh v. Stitt*, id. 92; *Witherspoon v. McCalla*, 3 Desaus. 245; *Nelson v. Matthews*, 2 Hen. & Munf. 164, 3 Am. Dec. 620; *Mills v. Bell*, 3 Call 277.

The rule in South Carolina was changed by *Furman v. Elmore*, 2 N. & McC. 189, 10 Am. Dec. 586, and in Virginia by *Threlkeld v. Fitzhugh*, 2 Leigh 451.

⁸⁹ *Cushman v. Blanchard*, 2 Me. 268, 11 Am. Dec. 76; *Swett v. Patrick*, 12 Me. 9; *Hardy v. Nelson*, 27 id. 525; *Elder v. True*, 30 id. 104; *Doherty v. Dolan*, 65 id. 87, 20 Am.

Rep. 677; *Williamson v. Williamson*, 71 Me. 442.

⁹⁰ *Drury v. Shumway*, D. Chip. 111; *Park v. Bates*, 12 Vt. 381, 36 Am. Dec. 347; *Keith v. Day*, 15 Vt. 660; *Keeler v. Wood*, 30 id. 242; *Farwell v. Bean*, 82 Vt. 172; *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. 95.

⁹¹ *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Caswell v. Wendell*, 4 Mass. 108; *Bigelow v. Jones*, id. 512; *Norton v. Babcock*, 2 Mete. (Mass.) 516; *White v. Whitney*, 3 id. 81. See *Sumner v. Williams*, 8 Mass. 221, 5 Am. Dec. 83. See next section for some limitations to the rule.

⁹² *Beecher v. Baldwin*, 55 Conn. 419, 3 Am. St. 57; *Horsford v. Wright*, Kirby 3; *Sterling v. Peet*,

ments because, prior to their completion, a bill in equity had been brought to restrain the grantee from making them. He may rely upon the warranty and will be protected if he proceeds in good faith.⁹³ The rule also prevails in Louisiana, but will not be applied to improvements made after the vendee has notice of a suit begun by the owner of the paramount title unless they added to the value of the land or benefited the warrantor.⁹⁴ In the newer portions of this country the value of real estate rapidly advances with a general or local increase of population; and such increase has been steady and widespread. The regions thus occupied are dotted with cities and villages, built where but lately land was worth little more than government price. A parcel of land sold for five hundred dollars has not unfrequently been so built upon and so surrounded with improvements that before an adverse title would be barred by the statute of limitations it has been worth a million dollars. If the purchaser is evicted by a paramount title it seems unjust that he should have a legal demand against the vendor who received the five hundred dollars to make good the loss. The parties had equal means of learning the actual state of the title. The sudden increase of value was not in the contemplation of the vendor. So far as it was the result of improvements, he did not consciously become a guarantor. The party making them proceeded on his own judgment and with a view to his own advantage, with equal knowledge of the title. The rule of damages generally adopted is a reasonable limitation of the vendor's responsibility and equalizes and apportions between the parties, according to their respective interests, the hazard of loss from failure of title.⁹⁵ Under the English Torrens act where the certified title fails the purchaser's damages are to be fixed as

14 Conn. 245; *Butler v. Barnes*, 61 id. 399 (with the costs of defending the title).

⁹³ *Cecconi v. Rodden*, 147 Mass. 164.

⁹⁴ *Coleman v. Ballard*, 13 La. Ann. 512.

⁹⁵ See *King v. Kerr*, 5 Ohio 154, 72 Am. Dec. 777; *Stebbins v. Wolf*, 33 Kan. 765, quoting the text. In *Wade v. Comstock*, 11 Ohio St. 71, the court says the rule rests on principles of public policy.

of the time the failure occurred, including the value of buildings erected intermediate the time the certificate issued.⁹⁶ A plaintiff who has improved the premises and can recover the value of the improvements under a statute known as the "occupying claimant's act" may not recover for them in an action for the breach of warranty.⁹⁷

§ 609. Same subject; rule in case of partial breach and where lien is satisfied. For a partial breach damages will be assessed *pro tanto*, according to the recognized standard for a total breach. Thus, for example, if a conveyance is made of several parcels and the grantee is evicted by paramount title from one of them the value of that parcel, measured by the consideration, or the valuation at the date of eviction, as the rule may be, will be the measure of damages.⁹⁸ Applying the same rule to a case where a part of one parcel is lost by failure of title, or the title to the undivided part of the whole, the measure of damages is a ratable part of the consideration or value of such parcel, or of the entirety, ascertained in the same manner.⁹⁹ If the breach results from an unexpired term or lease the measure of damages will be the value of the use of the

⁹⁶ *Spencer v. Registrar*, (1908) App. Cas. 235.

⁹⁷ *Webb v. Wheeler*, 80 Neb. 438, 17 L.R.A.(N.S.) 1178.

⁹⁸ *Quick v. Walker*, 125 Mo. App. 257; *Olmstead v. Rawson*, 110 App. Div. (N. Y.) 809; *Lemly v. Ellis*, 146 N. C. 221; *Mengel B. Co. v. Ferguson*, 124 Tenn. 433; *Larkin v. Trammel*, 47 Tex. Civ. App. 548; *Whitzman v. Hirsh*, 87 Tenn. 513; *Mette v. Dow*, 9 Lea 93; *Scheible v. Stagle*, 89 Ind. 323; *Butcher v. Peterson*, 26 W. Va. 447, 53 Am. Rep. 89; *Clarke v. Hargrove*, 7 Gratt. 399; *Dickins v. Sheppard*, 3 Murph. 526; *Raines v. Calloway*, 27 Tex. 678; *Griffin v. Reynolds*, 17 How. 609, 15 L. ed. 229; *Morris v. Harris*, 9 Gill 19; *Dougherty v. Duvall*, 9 B. Mon. 57; *Hunt v. Orwig*, 17 id. 73, 66 Am. Dec. 144; *Boyle v. Ed-*

wards, 114 Mass. 373; *Williams v. Beeman*, 2 Dev. 483; *Major v. Donovan*, 25 Ill. 262; *Hoot v. Spade*, 20 Ind. 326; *Dimmick v. Lockwood*, 10 Wend. 142; *Blackwell v. McBride*, 14 Ky. L. Rep. 760 (Ky. Super. Ct.). See *King v. Ryle*, 8 S. & R. 166; *Adams v. Conover*, 22 Hun 424; *Mischke v. Baughn*, 52 Iowa 528; *Long v. Sinclair*, 40 Mich. 569; *Winnipiseogee P. Co. v. Eaton*, 65 N. H. 13.

The value of the part to which the title has failed must be fixed as of the time of the sale. In the absence of evidence it will be assumed that its value is not greater than the average value of all the land sold. *Bonvillain v. Bodenheimer*, 117 La. 793.

⁹⁹ *Id.*; *Aiken v. McDonald*, 43 S. C. 29, 49 Am. St. 817; *Hynes v.*

premises during the time the purchaser is deprived of them.¹ The amount agreed to be paid by the tenant will ordinarily be considered to be such value.² If a partial eviction results from the existence of an easement the recovery is to be measured by the depreciation in the value of the land, if any, resulting from the burden,³ with interest from the time of the eviction and the plaintiff's costs in the action which resulted in the establishment of the right thereto.⁴ Where there was an existing right on the part of a city to open a street through a tract of land the purchaser was entitled to such sum as would compensate him for any loss or diminution in the value of the whole lot resulting from the making of the street in a reasonable manner considering the natural conditions. Such damage could not be less than the intrinsic value of the land actually taken within the price paid for the whole tract; no allowance should be made for the enhancement of the value of the land because of the opening of the street, nor for the result of negligence in doing so.⁵ The plaintiff might show that the strip taken had a peculiar value for particular purposes, and also the manner in which the

Packard, 92 Tex. 44; Southern W. Mfg. & C. Co. v. Davenport, 50 La. Ann. 505; Hunt v. Nolen, 46 S. C. 356; Downer v. Smith, 38 Vt. 464; Rust L. & L. Co. v. Wheeler, 189 Fed. 321; Landes v. Matthews, 136 Mo. App. 637; Sweet v. Howell, 96 App. Div. (N. Y.) 45, applying the rule to the loss of an easement; Chambers v. Reinhold, 33 Pa. Super. 266; Mayer v. Wooten, 46 Tex. Civ. App. 327; West Coast M. & I. Co. v. West Coast I. Co., 31 Wash. 610; Conrad v. Effinger, 87 Va. 59, 24 Am. St. 646; Dubay v. Kelly, 137 Mich. 345; Doyle v. Brundred, 189 Pa. 113 (with interest from the date of the deed); Loiseau v. Threlstad, 14 S. D. 257; Cameron v. Burke, 61 Wash. 203; Brawley v. Copelin, 106 Ark. 256; Davis v. Fain (Tex. Civ. App.), 152 S. W.

218; Smith v. White, 71 W. Va. 639, 48 L.R.A.(N.S.) 623.

In Louisiana if it does not appear how much was paid for the parcel lost the grantee, being subrogated to all the rights of his grantor, may recover the price paid for it by the latter. Vinton v. Lyons, 131 La. 673.

¹ Fritz v. Pusey, 31 Minn. 368; Moreland v. Metz, 24 W. Va. 119, 139, 49 Am. Rep. 246.

² Chase v. Barnes, 82 Kan. 28; Moreland v. Metz, *supra*.

³ Talbert v. Mason, 136 Iowa 373, 14 L.R.A.(N.S.) 878, 125 Am. St. 259.

⁴ Hymes v. Esty, 133 N. Y. 342; Harrington v. Bean, 89 Me. 470. Compare Sweet v. Howell, *supra*.

⁵ Louisville P. W. Co. v. James, 139 Ky. 434; James v. Louisville P. W. Co., 23 Ky. L. Rep. 1216.

street was opened,⁶ and was entitled to interest on the sum which represented the difference in its value from the time possession of the strip was taken.⁷ On the failure of the covenant for quiet enjoyment to a part of a tract the timber on which was sold by the acre, the purchase price per acre as stated in the conveyance governs the damages, regardless of whether the stumpage is of equal value per acre.⁸ The object of the law being compensation according to the standard which has been indicated any partial compensation realized as an occupant rendering the eviction less than a total loss, may reduce the recovery; as where the plaintiff has recovered from the evictor a sum for betterments which passed to the covenantee with the land at the time of the sale.⁹ The location of the improvements on the land is a matter of great importance in adjusting their rights if they are on the part the title to which has not failed.¹⁰ The value of the land lost is ascertained, for the purpose of mitigating the recovery, as of the time the deed was executed.¹¹

If the eviction is by some paramount charge or lien which may be discharged by payment of a sum not larger than the damages which would be recoverable if the eviction were under an absolute paramount title, as where a mortgagee enters for the purpose of foreclosure, the measure of damages

⁶ Louisville P. W. Co. v. James, *supra*.

⁷ S. C., 139 Ky. 434.

⁸ Ackley v. Hunter, 154 Ala. 416; Folk v. Graham, 82 S. C. 66.

⁹ Booker v. Bell, 3 Bibb 173, 6 Am. Dec. 641; King v. Kerr, 5 Ohio 154, 22 Am. Dec. 777; Drury v. Shumway, D. Chip. 111; Mason v. Kellogg, 38 Mich. 132.

In Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309, it was held that a grantee under a deed containing covenants of warranty, who goes into possession, owes no duty to the grantor to remain in possession for the purpose of litigating a question of the increased value of the estate from betterments while

in possession of those under whom he claims, but may at once surrender to any one having the paramount title; and no deduction will be made from the damages to which he would otherwise be entitled by reason of any such claim of betterments of which he might have availed himself. This seems to ignore the duty of a plaintiff to exert himself to lessen damages. See § 88; Weed v. Larkin, 49 Ill. 99; Franklin v. Smith, 21 Wend. 624; Barmon v. Lithauer, 4 Keyes 317.

¹⁰ Patton v. Schneider, 139 Ky. 643.

¹¹ Smith v. Ward, 66 W. Va. 190, 33 L.R.A. (N.S.) 1030.

is the amount of the debt so secured.¹² In *Tufts v. Adams*¹³ land was granted by A. to T. with covenants against incumbrances and of general warranty, but incumbered by a mortgage to C., on which C. subsequently recovered conditional judgment and obtained possession. While the land continued in T.'s possession he mortgaged it for a smaller amount than C.'s mortgage. After C. thus obtained possession T. brought an action against A. for breach of the covenants. And it was held: 1st. That the covenant against incumbrance was broken when the deed was executed, but that T. could recover only nominal damages, as he had paid nothing to remove the incumbrance. 2d. That the covenant of warranty was broken, and that the damages recoverable in the action was the amount of C.'s judgment for debts and costs, deducting the amount of the mortgage which T. had himself made; also, that if T., before judgment, paid off the mortgage made by himself he could recover the whole amount without such deduction. In such cases the recovery is limited to the sum which would be sufficient to extinguish the adverse claim if the action on the covenant is brought while such claim is defeasible. But it has been held that a covenantee so evicted is not obliged to redeem, and that after the redemption expires and the title under the foreclosure becomes absolute he may recover full damages.¹⁴ But it would be otherwise if the covenantee owed purchase-money, presently payable to the covenantor, and sufficient in amount to discharge the incumbrance or redeem the land.¹⁵ So if the covenantor leave in the hands of the covenantee money sufficient to remove the incumbrance and the latter undertakes

¹² *Allen v. Miller*, 99 Miss. 75; *Donohoe v. Emery*, 9 Metc. (Mass.) 63; *Tufts v. Adams*, 8 Pick. 547; *White v. Whitney*, 3 Metc. (Mass.) 81; *Winslow v. McCall*, 32 Barb. 241; *Holbrook v. Weatherbee*, 12 Me. 502; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Leet v. Gratz*, 92 Mo. App. 422.

¹³ 8 Pick. 550.

¹⁴ *Elder v. True*, 32 Me. 104; *Lloyd v. Quinby*, 5 Ohio St. 262;

Stewart v. Drake, 9 N. J. L. 139; *Miller v. Halsey*, 14 id. 48; *Burk v. Clements*, 16 Ind. 132; *Chapel v. Bull*, 17 Mass. 213; *Norton v. Babcock*, 2 Metc. (Mass.) 510. See *Smith v. Dixon*, 27 Ohio St. 471.

¹⁵ *Harper v. Jeffries*, 5 Whart. 26; *McGinnis v. Noble*, 7 W. & S. 454; *Mellon's App.*, 32 Pa. 121; *Copeland v. Copeland*, 30 Me. 446; *Pitman v. Connor*, 27 Ind. 337.

to procure a discharge of it, the covenant of warranty is satisfied.¹⁶ If the grantee has made improvements on the portion of the property title to which has not failed and the grantor is not financially able to take a reconveyance and place the grantee *in statu quo* the decree in a suit foreclosing the purchase-money mortgage may allow a deduction from the amount due to the extent of the damages sustained by the grantee because of the partial failure of the title.¹⁷ If the grantee of standing timber has cut all that was on the land when his deed was made he can recover only nominal damages on the covenant of warranty.¹⁸ One evicted from an undivided part of land appurtenant to which is the right to use a division wall may recover the value of such part with that right.¹⁹ If the title to the land is in a municipality the grantee may not recover taxes paid on it.²⁰

§ 610. **Same subject; where covenantee has extinguished adverse title.** Where the grantee purchases the land upon the foreclosure of a mortgage existing prior to the grant, this will give him a right of action on the covenants to the extent of the amount paid by him to relieve the land.²¹ He cannot increase his recovery by assigning his bid to another and permitting him to obtain a deed.²² So in other cases; if the covenantee has extinguished the adverse title his recovery on any of the covenants will be limited to the amount paid by him for that purpose, including the incidental expenses and reasonable compensation for his trouble, not exceeding in all the limit of damages for a total breach.²³ In *Dale v.*

¹⁶ *Blood v. Wilkins*, 43 Iowa 565.

¹⁷ *Rockwell v. Wells*, 104 Mich. 57. See *Comegys v. Davidson*, 154 Pa. 534.

¹⁸ *Britton v. Nuffin*, 120 N. C. 87.

¹⁹ *Boyle v. Edwards*, 114 Mass. 373.

²⁰ *Vinton v. Lyons*, *supra*.

²¹ *McGinnis v. Noble*, 7 W. & S. 454; *Andrews v. Appel*, 22 Hun 429; *Cowdrey v. Coit*, 3 Robert. 210, 44 N. Y. 383, 4 Am. Rep. 620; *Burk v.*

Clements, 16 Ind. 132. See *Whitney v. Dinsmore*, 6 Cush. 124.

²² *Cowdrey v. Coit*, *supra*.

²³ *Brooks v. Mohl*, 104 Minn. 404, 124 Am. St. 629, 17 L.R.A. (N.S.) 1195; *Lemly v. Ellis*, 146 N. C. 221; *Eames v. Armstrong*, 146 N. C. 1; *Tatun v. Kincannon*, 54 Tex. Civ. App. 633 (the legal right to the title is equivalent to the thing itself); *James v. Lamb*, 2 Tex. Civ. App. 185; *McClelland v. Moore*, 48 Tex. 363; *Craven v. Clary*, 8 Kan.

Shively²⁴ the holders of the paramount title were Indians, and had to be searched for and their conveyances had to be approved by the secretary of the interior; it was held that the party so procuring the adverse title was entitled to pay for his time and trouble, traveling expenses and the amount paid for the title.

In *Leffingwell v. Elliott*²⁵ counsel fees paid were disallowed, but the court held that if the plaintiff was put to trouble and expense in extinguishing the paramount title he was entitled to compensation therefor; that he might recover for time thus employed, for expense of horses and carriages and for board, as well as the expense of preparing for trial and attendance at court. This action was brought on the covenants against incumbrances and of warranty, and the plaintiff presented three classes of claims. The first was for expenses incurred and money paid to extinguish the outstanding title before the commencement of the action. Of this class the auditor stated an

App. 295; *Cheney v. Straube*, 35 Neb. 521, citing the text; *Roller v. Effinger*, 88 Va. 641; *Dillahunt v. Railway Co.*, 59 Ark. 629, 28 id. 657, 43 Am. St. 93; *Allen v. Miller*, 99 Miss. 75, citing the text; *Leet v. Gratz*, 92 Mo. App. 422, 433; *Blackwell v. McBride*, 14 Ky. L. Rep. 760 (Ky. Super. Ct.); *Leffingwell v. Elliott*, 10 Pick. 204, 8 id. 457, 19 Am. Dec. 343; *Thayer v. Clemence*, 22 Pick. 490; *Estabrook v. Smith*, 6 Gray 572, 66 Am. Dec. 445; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Lewis v. Harris*, 31 Ala. 689; *Swett v. Patrick*, 12 Me. 9; *Kelly v. Low*, 18 id. 244; *Fawcett v. Woods*, 5 Iowa 400; *Dale v. Shively*, 8 Kan. 276; *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595; *Hurd v. Hall*, 12 Wis. 112; *Claycomb v. Munger*, 51 Ill. 373; *Bailey v. Scott*, 13 Wis. 619; *Loomis v. Bedel*, 11 N. H. 74; *McKee v. Bain*, 11 Kan. 569; *Yokum v. Thomas*, 15 Iowa 67; *Dickson v. Desire*, 23 Mo. 151, 66

Am. Dec. 661; *Lane v. Fury*, 31 Ohio St. 574; *Allis v. Nininger*, 25 Minn. 525; *Richards v. Iowa H. Co.*, 44 Iowa 304, 24 Am. Rep. 745; *Jones v. Lightfoot*, 10 Ala. 17; *Mercantile T. Co. v. South Park R. Co.*, 94 Ky. 271 (no recovery for attorney's fees or expenses); *Pharr v. Gall*, 104 La. 700; *Long v. Sinclair*, 40 Mich. 569. See *Brady v. Spurck*, 27 Ill. 478.

A contrary rule is favored in *Thiele v. Axell*, 5 Tex. Civ. App. 548, 556. No authorities are referred to and the view expressed is opposed to that which has been announced in several cases in that state. See *McClelland v. Moore*, 48 Tex. 355; *Denson v. Love*, 58 id. 471; *James v. Lamb*, 2 Tex. Civ. App. 185. The Arkansas court has declined to follow the case first cited. *Dillahunt v. Railway Co.*, *supra*.

²⁴ 8 Kan. 276.

²⁵ 10 Pick. 204.

account in which, besides the sums paid to extinguish the adverse titles, with interest from the time of the payments, there were charges for the plaintiff's time employed in extinguishing the titles, with interest from the service of the writ; for incidental expenses for horses and carriages, board and lodgings while the plaintiffs were from home, and interest from the time the same were paid; and for sums paid for advice and services of counsel. The second class was for expenses incurred and payments made, similar to those in the first class, subsequently to the service of the writ, not, however, including counsel fees. The third class was for expenses and charges incurred in preparing the case for trial, including the summoning of witnesses, attendance at court, personal services of the plaintiffs, and counsel fees since the commencement of the suit. The court allowed in full the sums reported by the auditor in the first and second classes, except counsel fees but not those in the third class.²⁶ But it has been

²⁶ In *McKee v. Bain*, 11 Kan. 569, a deed of a vacant lot had been given by defendant to the plaintiff in 1868, containing covenants for title and good right to convey, for the consideration of \$6,500, of which \$2,050 was paid down, the balance being secured by notes and a mortgage of the lot payable in one and two years. McKee took possession of the lot and made permanent and valuable improvements on it. Afterward, Thomas, claiming the paramount title, brought ejectment against McKee, and recovered judgment in 1870. Bain had notice of the pendency of this suit. The defendant obtained the benefit of the occupying claimant law and the lot was valued at \$5,000; and the improvements at \$14,700. Thomas elected to take \$5,000 for the lot, and the court ordered McKee to pay it. This sum being paid, a deed to McKee was made by Thomas in 1872. In the defense of that action

McKee incurred \$500 for counsel fee, and the costs recovered in that suit by Thomas were \$196.25. The court trying the action upon the covenants found that the counsel fee was excessive beyond \$400. McKee brought an equitable action against Bain on the covenants of seizin and warranty in the deed, asking judgment for the amount paid down, for the amount paid in costs and counsel fees, and interest on those several amounts; also that the notes and mortgage be canceled, and that the apparent incumbrance resting upon the title by virtue of the mortgage be removed. Valentine, J., said: "The covenant of seizin is broken as soon as made if the title attempted to be conveyed is bad; and when the vendee afterwards buys in the paramount title, the measure of his damages as against the vendor is, as a rule, the amount, with interest, it necessarily cost to obtain the paramount title up to

held²⁷ that a vendee who is legally evicted and who thereupon repurchases the property from the evictor is

the amount of the purchase-money and interest. In some cases the vendee may also recover the costs and attorneys' fees necessarily paid by him in prosecuting or defending a suit, with reference to the land attempted to be conveyed. In the present case we think Mrs. McKee is entitled to recover from the Bains just the excess of what she has necessarily and actually paid over and above what she agreed to pay to the Bains. For instance: She agreed to pay as follows: cash down, \$2,050; two notes, \$4,000, interest on the notes to March 19, 1872, \$1,555.55;—total agreed to be paid up to March 19, 1872, \$7,605.55. She actually and properly paid as follows: Cash down, \$2,050; attorneys' fees, \$400; costs, \$196.25; for paramount title March 19, 1872, \$5,000;—total paid March 19, 1872, \$7,646.25. She therefore paid \$40.70 more than she agreed to pay for the lot. The judgment in this case was rendered November 16, 1872, for \$43.50, a little more than \$40.70 and interest. * * * The title of the Bains to said lot was derived through judicial proceedings, and although defective on account of irregularities, * * * yet it cannot be wholly ignored. The title was apparently good. The Bains acted in good faith in selling, and Mrs. McKee acted in good faith in purchasing and defending. Mrs. McKee obtained possession of said lot under and by virtue of Bain's title, and she held possession thereunder for nearly four years without paying anything therefor to the Bains, or to any one else, except what she paid as consideration for the lot; and she still continues to hold such

possession, never having been in fact dispossessed. Bain's title, though defective, rested as a cloud upon the paramount title. By virtue of said conveyance from Bain to McKee, this cloud was extinguished, or rather transferred from the Bains to Mrs. McKee. This was something of value. And after the action between Mrs. Thomas and Mrs. McKee was determined, the right of Mrs. McKee to compel Mrs. Thomas to purchase Mrs. McKee's improvements on said lot, and pay therefor \$14,700, or to sell the lot to Mrs. McKee, under the occupying claimant law, for \$5,000, was founded solely upon the title which Mrs. McKee obtained from the Bains. The title, therefore, which she got from Mrs. Thomas had its origin in the title she got from the Bains. Besides, Mrs. McKee appeals to a court of equity to cancel said notes and mortgage. Said mortgage was a cloud, and an apparent if not a real incumbrance upon the title to said lot. Is the removal of said cloud and said apparent incumbrance of no value? Now, by virtue of the conveyance from the Bains to Mrs. McKee, and the judgment in this case, Mrs. McKee has obtained a good title to her lot, free and clear from all incumbrances or clouds, all she bargained for or expected to get, and all that she had any right to expect, and she has paid to all persons in the aggregate, only what she agreed to pay to the Bains. She has lost nothing by the failure of the Bains' title." See *Chambers v. Reinhold*, 33 Pa. Super. 266.

²⁷ *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 403; *Boyer v. Amet*, 41 La. Ann. 721.

in under a new title, and the price last paid is no criterion of the damages sustained by the failure of the vendor's title.²⁸ If the covenantee is a mortgagee, on a total breach the mortgage debt is the measure of damages.²⁹ And so in every variety of circumstances the recovery will be graduated to the actual injury.³⁰ Where the vendee retained possession of land, title to which was in the United States, and the improvements thereon and obtained title he recovered the sums paid and other damages sustained, exclusive of the purchase price paid his grantor.³¹ The sums necessarily expended in obtaining possession from a tenant may be recovered from a grantor who agreed to deliver possession.³² The expense of securing a supply of water resulting from the grantor's interference with a pipe leading to the granted premises may be recovered though the pipe was partially on the land of the grantor.³³ In order that there may be a recovery of money paid in acquisition or extinguishment of a superior title the desired result must be accomplished. If the effort of the covenantee is abortive, resulting in merely securing temporary immunity from disturbance, without assurance that the immunity will be permanent, he cannot be reimbursed because the holder of the better title may again assert his rights against the present covenantee or some later grantee, thereby subjecting the warrantor to another action on his covenant.³⁴ The covenantee must show that the title or incumbrance purchased was paramount to that which he received under his deed.³⁵

§ 611. **Mitigation of damages.** The damages for which the vendor is liable may be diminished by any profit which

²⁸ Compare *Claycomb v. Munger*, 51 Ill. 373, and *Hunt v. Orwig*, 17 B. Mon. 73, 85, 66 Am. Dec. 144; *Long v. Sinclair*, 40 Mich. 569.

²⁹ *Curtis v. Deering*, 12 Me. 499; *Wetmore v. Green*, 11 Pick. 462.

³⁰ *Richards v. Iowa H. Co.*, *supra*; *Dillahunt v. Railway Co.*, *supra*, the latter case quoting the text.

³¹ *Holloway v. Miller*, 84 Miss.

776, following *Frink v. Hoke*, 35 Ore. 17.

³² *Williams v. Frybarger*, 9 Ind. App. 558.

³³ *Turner v. DeWitt*, 4 Ohio C. C. (N. S.) 434.

³⁴ *Leet v. Gratz*, 92 Mo. App. 422, 432; *Dyer v. Britton*, 53 Miss. 279; *Allen v. Miller*, 99 Miss. 75.

³⁵ *Allen v. Miller*, 99 Miss. 75; *Cobb v. Klosterman*, 58 Ore. 211.

the vendee has recovered for from the owner in the action in which the judgment of eviction was rendered. The covenantor held under a tax deed; the covenantee recovered from the owner of the paramount title all taxes paid by the former with interest to the time of his eviction. It was ruled that the vendor was not merely entitled to the amount which he had paid as taxes, but also to the statutory interest thereon. The benefit of the statutory rate of interest on the money so paid accrued to the evicted party directly as the result of the imperfect title, and he not being bound to account to any other person for it, the vendor should be credited with it.³⁶ Where, after an eviction, possession has been restored the right of action is not thereby destroyed, but such restoration will go in mitigation.³⁷ And so payments on account of such damages may be shown to lessen the vendor's liability.³⁸ The title obtained by the husband of the covenantee from the government inures to the benefit of the latter and mitigates her recovery to the sum necessary to reimburse him.³⁹ The recovery by the warrantee is not to be lessened because the *mesne* profits exceed his liability for taxes and improvements.⁴⁰ Where the vendee is entitled to an interest in an undivided portion of the land and is liable to the owner of the remaining interest for the market value of it the vendor has no claim against him for any proportion of the value of the use of the land.⁴¹ The consequences of an eviction by the grantee because of the nonpayment of taxes by the grantor need not be lessened by payment thereof by the grantee.⁴² If, after the conveyance took effect, the purchaser accepted an existing tenancy and received rent from the tenant the amount thereof should be deducted from his recovery against his grantor; but no deduction is to be made unless the rent was

³⁶ Stebbins v. Wolf, 33 Kan. 765;

Danforth v. Smith, 41 Kan. 146.

³⁷ Baxter v. Ryerss, 13 Barb. 267.

³⁸ Ferris v. Mosher, 27 Vt. 218,
65 Am. Dec. 192.

The grantee is under no duty to buy the outstanding title. Miller v. Halsey, 14 N. J. L. 48; Brawley v. Copelin, 106 Ark. 256.

³⁹ Wade v. Barlow, 99 Miss. 33.

⁴⁰ British & A. M. Co. v. Todd, 84 Miss. 522.

⁴¹ Brooks v. Mohl, 104 Minn. 404,
124 Am. St. 629, 17 L.R.A.(N.S.)
1195.

⁴² Cain v. Fisher, 57 W. Va. 492.

received under a tenancy he recognized.⁴³ Any pecuniary advantage resulting to the grantee from the conveyance lessens his recovery,⁴⁴ and so also any rights he has or may exercise against the successful claimant of the property, as where there has been or may be a recovery for improvements under a statute.⁴⁵ All the cases recognize that the vendor may reduce his liability to the extent of the rent and profits derived from the land by the vendee. In addition thereto he may prove such damages as he has sustained by the plaintiff's removal and appropriation of any permanent improvements he found upon the property.⁴⁶

§ 612. **Where defect is a dower right.** Where there is an eviction by a dowress the measure of damages is the value of the particular right estimated according to the expectation of life of the tenant in dower on the basis of the amount paid being the value of the fee-simple.⁴⁷ The cases show many ways of expressing and arriving at this value; as, that it is the amount that the fee-simple interest is diminished in value by carving out the life estate, estimating the value of the fee-simple interest according to the consideration money paid to the covenantor; ⁴⁸ that is, the present value of an annuity equal to the interest on one-third of the consideration money for the time that the tenant in dower has a probable expectation of life.⁴⁹ The amount reasonably paid for release of the right of dower or the amount assessed in lieu of it under statutes

⁴³ *Edwards v. Clark*, 83 Mich. 246, 10 L.R.A. 659.

⁴⁴ *Aiken v. McDonald*, 43 S. C. 29, 49 Am. St. 817; *Huntsman v. Hendricks*, 44 Minn. 422; *Kimball v. Bryant*, 25 Minn. 496; *Ogden v. Ball*, 38 Minn. 237; *Efta v. Swanson*, 115 Minn. 373.

⁴⁵ *Webb v. Wheeler*, 80 Neb. 438, 17 L.R.A.(N.S.) 1178; *Booker v. Bell*, 3 Bibb 173, 6 Am. Dec. 641. See *Mason v. Kellogg*, 38 Mich. 132; *King v. Kerr*, 5 Ohio 154.

⁴⁶ *Park v. Cheek*, 4 Colo. 20.

⁴⁷ *Stewart v. Mathieson*, 23 Up. Can. Q. B. 135; *Western v. Short*,

12 B. Mon. 153; *Davis v. Logan*, 5 id. 341; *Terry v. Drabenstadt*, 68 Pa. 400; *Hill v. Golden*, 16 B. Mon. 551; *Bender v. Fromberger*, 4 Dall. 436, 1 L. ed. 898; *Brown v. Dickerson*, 12 Pa. 372; *Patterson v. Stewart*, 6 W. & S. 527, 40 Am. Dec. 286.

⁴⁸ *Johnson v. Nyce*, 17 Ohio 66, 49 Am. Dec. 444.

⁴⁹ *Wager v. Schuyler*, 1 Wend. 553. In this case the widow was fifty years of age, healthy and of good habits, and her expectation of life was put at seventeen years.

which provide for such commutation, will also constitute the basis of recovery for breach of the covenants where the defect of title is thus cured.⁵⁰ Where the eviction was by paramount title for a term of years the plaintiff was held entitled to the annual value of the land of which he was dispossessed or the interest on the consideration paid for it.⁵¹ Where the premises are of such a nature that a portion of them cannot be set off to the dowress and a sale of them as a whole is had the grantee may recover the amount allowed her, with interest from the time of the sale, and if the grantor is vouched in to defend the action he cannot be heard to allege that the dower right was fixed at an excessive sum. The grantee was not bound to accept an offer to allow a gross sum in lieu of dower.⁵²

§ 613. **By and against whom recovery may be had.** As these covenants run with the land they are available to any person succeeding the covenantee by purchase or descent.⁵³ It is not necessary that a conveyance be made with warranty in order that the covenants pass; they will pass by release or quitclaim.⁵⁴ Consequently, the action should be brought by him in whose time the breach occurs.⁵⁵ The covenants are divisible, and their benefits will go to each recipient of any part or

⁵⁰ *Hodgins v. Hodgins*, 13 Up. Can. C. P. 146; *Jeter v. Glenn*, 9 Rich. 374; *Maguire v. Riggins*, 44 Mo. 512; *Welsh v. Kibler*, 5 S. C. 405. See *Cuthbert v. Street*, 9 Up. Can. C. P. 115.

⁵¹ *Rickert v. Snyder*, 9 Wend. 416.

⁵² *Olmstead v. Rawson*, 188 N. Y. 517.

⁵³ *Quitman Furniture & Hardware Co. v. Rountree*, 14 Ga. App. 382; *Felly v. Greany*, 216 Mass. 296; *Deason v. Findley*, 145 Ala. 407 (a deed cannot be presumed to support an action for the breach of a covenant); *Patterson v. Cappon*, 125 Wis. 198; *Roe v. Hayley*, 12 East 464; *Rawle on Cov. for Title*, 561; *Lowrance v. Robertson*, 10 S. C. 8; *Beasley v. Phillips*, 20 Ind. App. 182; *Morrow v. Baird*, 114 Tenn.

552 (intermediate vendor found liable to his vendee).

⁵⁴ *Walton v. Campbell*, 51 Neb. 788; *Ravenal v. Ingram*, 131 N. C. 549; *Beddoe v. Wadsworth*, 21 Wend. 120; *Wilson v. Widenham*, 51 Me. 566; *Hunt v. Middlesworth*, 44 Mich. 448. See *Claycomb v. Munger*, 51 Ill. 373.

⁵⁵ *Kane v. Sanger*, 14 Johns. 89; *Bickford v. Page*, 2 Mass. 455, 460; *Keith v. Day*, 15 Vt. 660; *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233; *Thompson v. Sanders*, 5 T. B. Mon. 358; *Cunningham v. Knight*, 1 Barb. 399; *Claycomb v. Munger*, 51 Ill. 373; *Crooker v. Jewell*, 29 Me. 527; *Hunt v. Middlesworth*, *supra*; *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. 95.

interest in the lands to which they relate and may be sued on separately in respect of any breach as to the portion taken by him.⁵⁶ If the covenantee has sold a portion of the land conveyed to him he can recover only for the failure of the title to the portion from which he was evicted, although the subsequent vendees are barred by the statute of limitations.⁵⁷ The evicted grantee may bring suit against the first or any intermediate covenantor; he may bring separate actions against all, either at the same time or successively, and prosecute them to judgment; he is entitled, however, to but one satisfaction and his costs.⁵⁸ If the vendors warrant as to a certain proportion of the land they are liable only to that extent, and the judgment should

⁵⁶ *Whitzman v. Hirsh*, 87 Tenn. 513, quoting the text; *Dart on Vendors & P.* 365; 3 Washb. on R. P. (5th ed.) 503; *Dickinson v. Hoopes*, 8 Gratt. 406; *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277; *Kane v. Sanger*, 14 Johns. 89; *Dougherty v. Duvall*, 9 B. Mon. 57; *Twyman v. Pickard*, 2 B. & Ald. 105; *Midgley v. Lovelace*, Carthew 289; *Paul v. Witman*, 3 W. & S. 407; *Henniker v. Turner*, 4 B. & C. 157; *Swett v. Patrick*, 12 Me. 9; *Lamb v. Danforth*, 59 id. 322, 8 Am. Rep. 426.

In *Dart on Vendors & P.* 365, it is said: "Where the estate is divided, as where it becomes vested in A. for life, remainder to B. in fee, and the breach of covenant affects the entire inheritance each can sue for damages proportioned to the extent of his estate." *Noble v. Cass*, 2 Sim. 343. Compare *McClure v. Gamble*, 27 Pa. 288. And on page 780, vol. 2 (5th Eng. ed.), this author says: "Where the estate is merely equitable there can be no assignee at law, and the covenants cannot be enforced at law by an equitable assignee; so, if the conveyance, although so intended to do, do not, in fact, pass any legal es-

tate, it appears that the assignee cannot sue; but, in either case, the assignee, although unable to sue in his own name, would be entitled to sue in the name of the original covenantee. See *Riddell v. Riddell*, 7 Sim. 529; *Thornton v. Court*, 3 De G., M. & G. 393."

⁵⁷ *Whitzman v. Hirsh*, *supra*.

⁵⁸ *King v. Kerr*, 5 Ohio 154, 22 Am. Dec. 777; *Wilson v. Taylor*, 9 Ohio St. 595, 75 Am. Dec. 488; *Dougherty v. Duvall*, 9 B. Mon. 57; *Crooker v. Jewell*, 29 Me. 527; *Claycomb v. Munger*, 51 Ill. 373; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Williams v. Beeman*, 2 Dev. 483; *Hunt v. Orwig*, 17 B. Mon. 73, 66 Am. Dec. 144; *Lot v. Parish*, 1 Litt. 393; *Lowe v. McDonald*, 3 A. K. Marsh. 354, 13 Am. Dec. 181; *Birney v. Haim*, 2 Litt. 262; *Thompson v. Sanders*, 5 T. B. Mon. 358; *Birney v. Hann*, 3 A. K. Marsh. 322, 13 Am. Dec. 167; *Withy v. Mumford*, 5 Cow. 137; *Garlock v. Closs*, id. 143, note; *Suydam v. Jones*, 10 Wend. 180, 25 Am. Dec. 552; *Cummings v. Harrison*, 57 Miss. 275. But see *Smith v. Williams*, 117 Ga. 782, 97 Am. St. 220.

be against them severally.⁵⁹ A husband who joins his wife in a deed conveying her land for the purpose of releasing his dower is not liable upon the covenants therein.⁶⁰ Although the grantor's wife joins in his deed she is not liable on the covenant therein, and is not a necessary party in an action thereon.⁶¹ A remote vendor may show that the deed was not intended to convey the title and that his vendee took with notice of the fact; his liability is not affected by subsequent transfers.⁶²

§ 614. **When covenantee sues remote covenantor.** Where the action is brought by a remote grantee there is some diversity as to the criterion of damages. Is it the consideration paid to the original covenantor, who is the defendant, or that paid by the plaintiff to his grantor? In Kentucky the rule is the consideration received by the defendant.⁶³ In one case a suit was brought by a remote grantee and it was sought to limit his recovery to the amount he paid, and it was insisted in behalf of the defendant that the plaintiff should disclose that amount. In reply the court said: "It does not appear what amount he paid for it, nor was he called upon to state, nor was it shown in any other way. If it were conceded that the plaintiff's recovery ought to be limited to the amount paid by him for the superior title, were that amount manifested, it cannot be so limited, as this amount is not made to appear. Nor do we perceive that it was the duty of the plaintiff to disclose the amount in order to limit his recovery without his being called upon to do so. *Prima facie*, the plaintiff had a right to recover the consideration in the deed of (the covenantor) proportioned to the land lost, and this is the amount decreed by the court."⁶⁴ In North Carolina, Tennessee, Colorado, Minnesota, Indiana and Maryland the basis of recovery is the consideration paid by the plaintiff to his immediate grantor,⁶⁵ with interest and costs of the ejectment suit, in all

⁵⁹ Snadon v. Salmon, 135 Ky. 47;
Bullitt v. Eastern Kentucky L. Co.,
99 Ky. 324.

⁶⁰ Center v. Elgin City B. Co.,
185 Ill. 534 (one judge dissented).

⁶¹ Webb v. Holt, 113 Mich. 338.
See § 593.

⁶² Snadon v. Salmon, *supra*.

⁶³ Dougherty v. Duvall, 9 B. Mon.
57.

⁶⁴ Hunt v. Orwig, 17 B. Mon. 73,
66 Am. Dec. 144.

⁶⁵ Crisfield v. Storr, 36 Md. 129,
11 Am. Rep. 480; Williams v. Bee-

not exceeding the consideration received by the defendant.⁶⁶ In New York, Iowa, South Carolina, Texas, Wisconsin, Michigan, Georgia, Arkansas and Mississippi the warrantor is liable according to the value of the land at the time of his warranty,

man, 2 Dev. 483; *Mette v. Dow*, 9 Lea 93; *Whitzman v. Hirsh*, 87 Tenn. 513; *Taylor v. Wallace*, 20 Colo. 211, 46 Am. St. 285; *Moore v. Frankenfield*, 25 Minn. 540; *Beasley v. Phillips*, 20 Ind. App. 182, 185 (no discussion).

⁶⁶ In *Williams v. Beeman*, 2 Dev. 483, *Henderson, C. J.*, said: "In actions between the vendee and his immediate vendor upon the covenant for quiet enjoyment it is the settled law of this state that the value of the lands at the time of the sale shall be the measure of the damages; and in case of actual sales the purchase-money is conclusive evidence of that value. This is the case where a covenant of warranty is annexed to an estate in fee and the eviction is from the whole estate. What may be the rule where there is a partial eviction of the estate, as the recovery of a life estate or other interest less than a fee, or where the covenant is annexed to an estate less than a fee, is, as far as I know, not determined by our court. The interest upon the purchase-money is merely incidental, and depends on the circumstances of each case. It ordinarily runs during the time that the tenant is liable for the profits to the rightful owner. When he is not so liable the profits are set off against it. Had this action therefore been brought against Glasgow, Williams' immediate vendor, it would have presented no difficulties, governing ourselves by former decisions. Is the case varied by being brought against Beeman, a remote vendor,

and whose estate, with his covenants annexed thereto, have come to Williams? I think that it is not; for Beeman cannot be bound to pay to Williams more than Williams ought to receive. If he has money in his hands belonging to some other person there is no reason why it should be paid to Williams. Now it is settled that the purchase-money paid by Williams to Glasgow is the measure of Williams' damages, and the fact that he is substituted to the estate of Sheppard and to the covenants entered into with Sheppard for its enjoyment and protection, does not thereby substitute him to Sheppard's claim to damages in case the latter had been evicted. He is only substituted to Sheppard's covenants to redress his own, not Sheppard's, injuries in regard to the estate. But as there is no privity of contract between Williams and Beeman the injury of the former cannot exceed the liability of the latter upon his covenants. But it may fall short of it. Neither would the case be varied if the action had been brought by Sheppard, as it is said it might be. For Sheppard having sold to Glasgow, and Glasgow to Williams, he, Sheppard, could only claim an indemnity, which is the amount of the consideration money paid by him who is evicted. And on this ground alone, or that he is trustee for the person evicted, can the action be sustained in his name. In either case Williams' injury is the one to be compensated. Should it be asked what is to become of the excess left in

which is conclusively fixed at the amount of the consideration of the sale.⁶⁷ In Missouri the rule has been thus stated: "If a subsequent purchaser be evicted the damage is the value of the land at the time of the eviction, not exceeding, however, the sum for which the covenantor would have been liable to the first purchaser."⁶⁸

Mr. Warvelle thus states the difference in the views of the courts whose decisions have been referred to, and his opinion of the law. In a number of states it has been laid down that a remote vendee can only recover what he has himself paid to his own vendor, with interest and costs. On the other hand, we find the rule asserted by about an equal number of authorities that such vendee may recover the full consideration received by the remote vendor. While there is much to commend in the reasoning by which the former class of decisions is sustained it would yet seem that the latter class states the true rule and that which more nearly conforms to the general theory of the law which governs all questions of indemnity

the hands of Beeman—for it is certain that he has given nothing for it—it is answered, who can claim it? Not Williams, for under the rule established by our decisions he has no pretense to recover it. Not Sheppard, for he sustains no damage by the bad title further than he may be compelled to comply with the covenants in his deed. And it would be strange that he should be placed in a better situation by selling a bad title than a good one. For had the title been good he must have been content with his loss upon his resale. Should it turn out to be bad could he then regain his whole purchase-money? In fact, the difference between what he gave and what he got for the land is sunk, is extinguished, and there is no person who can receive it by making a resale at a reduction in the price. The first vendee submits

to the loss, and it can therefore form no part of a claim to an indemnity."

⁶⁷ *Mayer v. Wooten*, 46 Tex. Civ. App. 327; *Patterson v. Cappon*, 125 Wis. 198; *Martin v. Gordon*, 24 Ga. 533; *Barnett v. Hughey*, 54 Ark. 195, citing the text; *Hunt v. Hay*, 156 App. Div. (N. Y.) 138; *Penney v. Woody* (Tex. Civ. App.), 147 S. W. 872; *Jenks v. Quinn*, 61 Hun 427; *Petrie v. Folz*, 54 N. Y. Super. Ct. 223; *Brooks v. Black*, 68 Miss. 161, 11 L.R.A. 176; *Mischke v. Baughn*, 52 Iowa 528; *Lowrance v. Robertson*, 10 S. C. 8; *Hollingsworth v. Mexia*, 14 Tex. Civ. App. 363; *Lewis v. Ross*, 95 Tex. 358; *Cook v. Curtis*, 68 Mich. 611; *Wagner v. Van Schaick Realty Co.*, 163 App. Div. (N. Y.) 632.

⁶⁸ *Dickson v. Desire*, 23 Mo. 151; *Staed v. Rossier*, 157 Mo. App. 300; *Diggs v. Henson*, 181 Mo. App. 34.

arising out of an express obligation. The universally received doctrine as between the immediate parties is that the vendor, by his covenant, binds himself to return the purchase-money he receives for the land in the event of a failure of title thereto or eviction of his grantee by reason of a paramount claim. By operation of law this obligation passes with the land and inures to each successive grantee of the same. If the obligation becomes fixed and its full extent measured and determined at the time of acquisition by the first grantee it is difficult to perceive how it can be changed by subsequent transactions with which the original grantor is not connected. Should this view be correct, and it certainly is sustained by analogy to other well-settled principles of law, then we may properly conclude that the obligation of the covenantor remains the same to the assignee of a covenantee as it was to such covenantee, and such being the case, it will be subject to the same measure of damages.⁶⁹

⁶⁹ Warvelle on Vendors, vol. 2, § 981 (2d ed.). A strong opinion sustaining the author quoted from may be found in *Brooks v. Black*, 68 Miss. 161, 11 L.R.A. 176.

On the other hand, the Tennessee court has said: The covenant is a peculiar one and not like an ordinary covenant for so much money. It is rather in the nature of a bond with a fixed sum as a penalty, the recovery on which will be satisfied by the payment of the actual damages. Each vendor, subject to this rule, may be treated as the principal obligor to his immediate vendee and as the surety of any subsequent vendee to hold him harmless by reason of the failure of title, and the ultimate vendee, when evicted, is entitled to be subrogated to the rights of his immediate vendor against a remote vendor to the extent necessary to indemnify him. *Mette v. Dow*, 9 Lea 93.

The foregoing paragraph has been

quoted in a Colorado case, in which the following observations were made: A remote grantee may simultaneously sue his immediate grantor and all previous covenantors and recover several judgments against each of them, although entitled to but one satisfaction; and the amount of recovery against each can in no event exceed the consideration received by him. Under the rule contended for by counsel for plaintiff in error it would follow that his recovery would be, in such an event, as variable as the various amounts received by each covenantor; and in case the consideration paid by him to his immediate grantee is less than the consideration received by the original covenantor his recovery would be less against such grantee than it would be in an action against the original covenantor; while, under the rule that the amount of his recovery is the amount of consideration actually paid by

An intermediate grantee may recover against an antecedent covenantor if he has suffered actual injury though the eviction did not occur while he held the estate. If he conveyed without covenants to the evicted grantee for full value, he suffers no injury and has no right of action.⁷⁰ But if he conveyed with covenants and has satisfied them they are restored to him, and he may sue any covenantor from whom he claims for his indemnity.⁷¹

him for the land, not exceeding the original purchase price, the recovery in both cases would be the same. The rule limiting the measure of damages in a case like this, where the remote grantee elects to sue the original covenantor, to the actual loss sustained by him seems to us not only equitable, but is in principle analogous to the doctrine that applies in an action by the original covenantee. Compensation for his loss is all that any evicted grantee can reasonably ask, and when this can be obtained by the recovery of the consideration paid, with interest, the ends of justice are attained. *Taylor v. Wallace*, 20 Colo. 211.

⁷⁰ *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233; *Wyman v. Ballard*, 12 Mass. 304; *Niles v. Sawtell*, 7 id. 444.

⁷¹ *Claycomb v. Munger*, 51 Ill. 373; *Baxter v. Ryerss*, 13 Barb. 267; *Lot v. Parish*, 1 Litt. 393; *Wheeler v. Sohler*, 3 Cush. 219; *Thompson v. Sanders*, 5 T. B. Mon. 358; *Herrin v. McEntyre*, 1 Hawks 410.

In *Birney v. Hann*, 3 A. K. Marsh. 322, 13 Am. Dec. 167, *Mills, J.*, said: "The question whether an intervening grantee who had conveyed away the estate, can support the same action against a remote grantor, has never yet been decided. On this question we need not look for any aid from English precedents,

where such an action of covenant was not indulged. In this case the plaintiff below has averred that *Fields and Dunn*, who were evicted from the lot, recovered a judgment against him on his warranty for the value of the land, with interest and costs, which judgment he had fully paid and discharged before the commencement of this suit. If this statement in the declaration can be material to, or aid him in support of, his action, as it is not contradicted by any plea, it must be taken as true, and the plaintiff below is entitled to the benefit of these facts. The question remains, will they affect his case and enable him to support his action? As *Hann* would have been entitled to the action if he had never conveyed; as he has been subjected to the action because he had conveyed; as the estate passed by the title has gone into other hands; and his deed to *Fields and Dunn* can be of no more avail to them because they have once had the benefit of it, and it is now inoperative against *Hann* because it is merged in the judgment against him and discharged by payment, we see no good reason why *Hann* should not be adjudged to have the right of action revested in him, and be restored to all he parted with by his deed, as much so as if *Field and Dunn* had reconveyed. As the indorser of a commercial instrument,

A tenant who has been evicted may sue any prior covenantor and if he elects any but the first, and obtains satisfaction, such covenantor may, thereby, stand as to any prior covenantor in the place he held before he had parted with the estate and sue upon his covenant as though the breach had occurred during his ownership.⁷²

Where a grantee has been evicted by virtue of a judgment against him the judgment is admissible to prove the eviction in an action on the covenant in the deed;⁷³ but not to prove that such eviction was by paramount title unless the covenantor was vouched in to defend.⁷⁴ But if he had notice of that action and an opportunity to appear and defend the judgment is evidence and conclusive of the title.⁷⁵ The same principle has been applied in cases of judgments against the grantee in actions brought by him to recover the granted property where the covenantor had been notified to take upon himself the prosecution thereof.⁷⁶ A case of first impression has recently been ruled

who has paid its contents, can sustain his action against his remote indorser without a re-indorsement, because his own indorsement, by the act of payment, *per se*, has become *functus officio* as to him, so ought Hann, who has rendered his own deed inoperative further against him, to be restored to the situation he was in before it was made, without a conveyance formally executed." *Hunt v. Middlesworth*, 44 Mich. 448.

The right of action rests upon privity of estate, and not upon privity of contract, and hence is local. *Keys & M. Realty Co. v. Trustees*, 146 App. Div. (N. Y.) 796.

⁷² 3 Wash. R. P. 400; *Withy v. Mumford*, 5 Cow. 137; *Thompson v. Shattuck*, 2 Metc. (Mass.) 618; *Suydam v. Jones*, 10 Wend. 184, 25 Am. Dec. 552; *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233; *Markland v. Crump*, 1 Dev. & B. 94, 27 Am. Dec. 230; *Redwine v. Brown*, 10 Ga. 311.

⁷³ *Hardy v. Nelson*, 27 Me. 525; *Gaither v. Brooks*, 1 A. K. Marsh. 409; *Patton v. Kennedy*, id. 389, 10 Am. Dec. 744; *Middleton v. Thompson*, 1 Spear 67; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480.

⁷⁴ *Id.*; *Harding v. Larkin*, 41 Ill. 413; *Ryerson v. Chapman*, 66 Me. 557; *Sheetz v. Longlois*, 69 Ind. 491.

⁷⁵ *Id.*; *Hamilton v. Cutts*, 4 Mass. 349, 3 Am. Dec. 222; *Blasdale v. Babcock*, 1 Johns. 518; *Sanders v. Hamilton*, 2 Hayw. 282; *Dalton v. Bowker*, 8 Nev. 190; *Fulweiler v. Baugher*, 15 S. & R. 45; *Jeter v. Glenn*, 9 Rich. 374; *Ferrell v. Alder*, 8 Humph. 44; *Knapp v. Marlboro*, 34 Vt. 234; *Terry v. Drabenstadt*, 68 Pa. 400; *Williamson v. Williamson*, 71 Me. 442.

⁷⁶ *Dalton v. Bowker*, 8 Nev. 190; *Ryerson v. Chapman*, 66 Me. 557. But see *Ferrell v. Alder*, 8 Humph. 44; *Wilder v. Ireland*, 8 Jones 85.

in Texas which is to the effect that a grantee by making a settlement with a remote grantor, disregarding the intermediate grantors, and without their consent, releases the latter and all prior warrantors from liability on their respective warranties.⁷⁷ The consideration paid and interest governs the recovery where the grantor, in pursuance of his contract, conveys to a third person designated by the grantee, regardless of the price paid by such person. The situation was said to be analogous to one where a remote grantee sues a predecessor in title.⁷⁸

§ 615. **Notice of suit to covenantor.** One who is sued upon his covenant of warranty may vouch in his warrantor, and he, in turn, may vouch in his; and a judgment in such action, so far as the subject-matters tried are concerned, will be binding upon the rights of any such previous warrantor properly vouched in or summoned to take the defense of the suit whether he does so or not.⁷⁹ The fact that a building was erected upon

⁷⁷ *Penney v. Woody* (Tex. Civ. App.), 147 S. W. 872.

⁷⁸ *Hunt v. Hay*, 156 App. Div. (N. Y.) 138, approving *Cook v. Curtis*, 68 Mich. 611.

⁷⁹ *Sarlls v. Beckman*, 55 Ind. App. 638; *Taylor v. Allen*, 131 Ga. 416; *Samson v. Zimmerman*, 73 Kan. 654; *Olmstead v. Rawson*, 110 App. Div. (N. Y.) 809; *Farwell v. Bean*, 82 Vt. 172; *Norfolk & W. R. Co. v. Mundy*, 110 Va. 422; *Morgan v. Haley*, 107 Va. 331, 13 L.R.A. (N.S.) 732 (must be asked to defend); *Peterson v. Steinhoff*, 44 Wash. 189; *McCormick v. Marcy*, 165 Cal. 386, citing the text; *Teague v. Whaley*, 20 Ind. App. 26 (written notice preferred); *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191 (notice should be in writing); *Davenport v. Muir*, 3 J. J. Marsh. 310, 20 Am. Dec. 143 (verbal notice good); *Miner v. Clark*, 15 Wend. 426 (verbal notice good); *Dalton v. Bowker*, 8 Nev. 190, 200 (notice must be in writing); *Worley v. Hineman*, 6 Ind.

App. 240, 255; *Hollingworth v. Mexia*, 14 Tex. Civ. App. 363; *Leet v. Gratz*, 92 Mo. App. 422; *Mooris v. Petero*, 4 Hawaii 23; *Chamberlain v. Preble*, 11 Allen 373; *Boston v. Worthington*, 10 Gray 498, 71 Am. Dec. 678; *Littleton v. Richardson*, 34 N. H. 187, 66 Am. Dec. 759; *Andrews v. Dennison*, 16 N. H. 469, 17 id. 413, 43 Am. Dec. 606; *Mason v. Kellogg*, 38 Mich. 132 (notice should be in writing); *Williamson v. Williamson*, 71 Me. 442; *Bever v. North*, 107 Ind. 544; *Cummings v. Harrison*, 57 Miss. 275 (verbal notice and opportunity to defend, without demand, concludes the covenantor); *McConnell v. Downs*, 48 Ill. 271; *Walton v. Campbell*, 51 Neb. 788, 793.

The rule in North Carolina is to the contrary, and is anomalous. *Martin v. Cowles*, 2 Dev. & Batt. 101; *Wilder v. Ireland*, 8 Jones 88. See, as to the requisites of the notice, *Rawle on Cov. Tit.* (5th ed.); § 119;

a part of two parcels of land, one of which was purchased of a grantor other than the defendant, did not relieve the latter of the duty of defending the title under the covenants in his deed when notified of the bringing of an action against his grantee by a third party and being asked to come in and defend. Failing to do so, he is liable for the costs and counsel fees reasonably incurred by his grantee in defense of such action.⁸⁰ A vendor who has been made a party to the action and who successfully demurred to the complaint on the ground that he was not a proper party cannot defeat the vendee's action against him because the vendee failed to defend the action in which judgment of eviction was rendered although he might have done so successfully.⁸¹ The judgment in a suit instigated by a covenantor binds him as though he was a party to it.⁸² The offer of a grantor to assume the defense of a suit against his grantee and the latter's refusal of consent does not exonerate the former; the only effect of it was upon the force and competency of the judgment obtained in the action by the purchaser against his vendor.⁸³

§ 616. Interest and taxes as items of damage. Interest is not recoverable when the premises have been occupied by the warrantee and he has not accounted and is not accountable for the rents and profits. It would be unjust. He who buys a farm or house and lot agrees to part with the use of the consideration forever for the use of the farm or house and lot forever. As long as he has the use of either, so long should

Richmond v. Ames, 164 Mass. 467. The general subject is discussed in §§ 86, 87.

Notice is not necessary if the covenantor was a party and was advised by the pleadings that the title he assumed to convey would be attacked, though he disclaimed any interest and was dismissed as a party before judgment. *Seyfried v. Knoblauch*, 44 Colo. 86.

If the question of damages was not involved in a litigation between

the grantor and a third party the grantor is not bound by it though the judgment is conclusive as to the deficiency of the property conveyed. *Rust L. & L. Co. v. Wheeler*, 189 Fed. 321, 111 C. C. A. 53.

⁸⁰ *Charman v. Tatum*, 54 App. Div. (N. Y.) 61.

⁸¹ *Elliott v. Saufley*, 89 Ky. 52.

⁸² *Landes v. Matthews*, 136 Mo. App. 637.

⁸³ *Boyle v. Edwards*, 114 Mass. 373.

the seller have the use of the consideration.⁸⁴ In such case the use and occupation are presumed to be equal to the use of the purchase-money.⁸⁵ And if not the grantee has no ground for complaint while he is undisturbed in the enjoyment of that for which he was content to pay the purchase-money.⁸⁶

In case of eviction by the owner of the superior title the warrantee is liable for *mesne* profits for such period as is allowed by the statutes of limitation. For this period the grantee is treated as not enjoying the granted premises in virtue of the grant; and for the time he is so liable, as well as for the time succeeding actual eviction or the fact which is treated as equivalent thereto, interest is recoverable on the principal of the damages allowed.⁸⁷ Where payments have been made under

⁸⁴ *British & A. M. Co. v. Todd*, 84 Miss. 522; *Walsh v. Harang*, 48 La. Ann. 984; *King v. Kerr*, 5 Ohio 154, 22 Am. Dec. 777.

⁸⁵ *Bostom v. Gibson*, 111 Ill. App. 457, citing the text; *Thrush v. Graybill*, 128 Iowa 406, citing the text; *Staed v. Rossier*, 157 Mo. App. 300; *Hull v. Reilly* (Tex. Civ. App.), 64 S. W. 387, citing the text; *Mann v. Mathews*, 82 Tex. 98; *Walsh v. Harang*, *supra*; *Pence v. Gubbart*, 70 Mo. App. 201; *Collier v. Cowger*, 52 Ark. 322, 6 L.R.A. 107; *Stebbins v. Wolf*, 33 Kan. 765, quoting the text; *Gunter v. Beard*, 93 Ala. 227, citing the text; *Hutchins v. Roundtree*, 77 Mo. 500; *Wood v. Kingston C. Co.*, 48 Ill. 356, 95 Am. Dec. 554; *Harding v. Larkin*, 41 Ill. 413; *Cox v. Henry*, 32 Pa. 18; *Sumner v. Williams*, 8 Mass. 162, 221, 5 Am. Dec. 83.

In the last case *Sedgwick, J.*, said: "Covenants having been broken at the time of the execution of the deed, a cause of action immediately accrued. The real injury was then sustained and the amount of indemnity for it precisely the money which had been paid for a defect-

ive title. In such a case as this if the grantee cannot enter into possession he is entitled to demand immediately the money which he has paid; and if he receives it it must be deemed a satisfaction of the injury. If there is delay there must be interest on the amount of the purchase-money commensurate with the delay; and that interest the law deems a satisfaction for the delay. If the grantee enters into possession the profits of the improvements are deemed equivalent to the interest; but as he may be compelled to account for those profits and pay them over to the owner he is for that reason entitled to demand the interest, with the purchase-money, in an action upon his covenant." See *Selden v. James*, 6 Rand. 465.

⁸⁶ *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595; *Kyle v. Fauntleroy*, 9 B. Mon. 620.

⁸⁷ *Louisville P. W. Co. v. James*, 139 Ky. 434; *Roake v. Sullivan*, 69 N. Y. Misc. 429; *Mayer v. Wooten*, 46 Tex. Civ. App. 327, quoting the text; *Farwell v. Bean*, 82 Vt. 172; *Point Street I. Works v. Turner*, 14 R. I. 122; *Mette v. Dow*, 9 Lea

an antecedent contract, pursuant to which the deed was executed, the grantee is not concluded as to the damages by the execution of the deed or the recital of the consideration therein; the amount actually paid may be recovered and interest on payments made before the deed was executed.⁸⁸

Wherever the circumstances are such as to preclude any recovery for *mesne* profits interest will not be allowed until eviction.⁸⁹ Thus, where the grantee was evicted by a later patent, as he was not liable to the evictor for profits prior to the patent, there was no right to interest during that prior time.⁹⁰ So interest was denied where the right to *mesne* profits was barred by failure to claim them in the time and manner fixed by law.⁹¹ The purchaser of wild and unoccupied lands who has never derived any rents or profits or other benefits therefrom is entitled to recover interest from the date of his payment.⁹² Only simple interest at the legal rate is computed, and neither the interest nor consideration, as principal, is to be increased by the fact that it was payable by instalments at annual or any higher than the legal rate. Nor will the consid-

93; McGuffey v. Humes, 85 Tenn. 26; Hutchins v. Roundtree, 77 Mo. 500; Lambert v. Estes, 99 id. 604; Brooks v. Black, 68 Miss. 161, 11 L.R.A. 176; Gunter v. Beard, *supra*; Groesbeck v. Harris, 82 Tex. 411; Jackson v. Turner, 5 Leigh 127; Rich v. Johnson, 2 Pin. 88, 52 Am. Dec. 144; Morris v. Rowan, 17 N. J. L. 304; Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83; Stewart v. Drake, 9 N. J. L. 139; Backus v. McCoy, 3 Ohio 211, 17 Am. Dec. 585; Cox v. Henry, 32 Pa. 18; McAlpine v. Woodruff, 11 Ohio St. 120; Clark v. Burr, 14 Ohio 118, 45 Am. Dec. 529; Fernandez v. Dunn, 19 Ga. 497, 65 Am. Dec. 607; Cogswell v. Lyon, 3 J. J. Marsh. 38. See Booker v. Bell, 3 Bibb 173, 6 Am. Dec. 641; Lai Say v. Kaaahu, 10 Hawaii 499.

Interest will not be computed from the time the grantee notified the grantor that he had surrendered and abandoned the premises unless he actually did so, there being no assertion of title adverse to the grantee until long thereafter. Brown v. Allen, 88 Hun 401, affirmed without opinion, 152 N. Y. 647.

⁸⁸ Hymes v. Esty, 133 N. Y. 342; Devine v. Lewis, 38 Minn. 24.

⁸⁹ Solberg v. Robinson, 34 S. D. 55; Mayer v. Wooten, *supra*; Wead v. Larkin, 49 Ill. 99; Thompson v. Jones, 11 B. Mon. 365; Whitlock v. Crew, 28 Ga. 289.

⁹⁰ Whitlock v. Crew, *supra*.

⁹¹ Wead v. Larkin, *supra*.

⁹² Northern Pac. R. Co. v. Montgomery, 30 C. C. A. 17, 86 Fed. 251; Mengel B. Co. v. Ferguson, 124 Tenn. 433.

eration be increased by the payment of taxes.⁹³ In a case in Iowa⁹⁴ an action was brought upon a note, a part of the consideration of which was for land conveyed by the payee to the maker with warranty, and to which the title had failed. The failure of title was set up as a defense to so much of the note as was purchase-money. The note stipulated for interest at the rate of ten per cent., the ordinary legal rate being six. The plaintiff contended that the consideration for the land and interest at the ordinary legal rate was the proper measure of deduction; but the court held that it was just to abate the conventional rate as well as the principal. Originally interest was allowed for so long a time as the vendee was required to pay *mesne* profits. The theory was that on eviction the vendee recovered only what was an equivalent to the purchase-money without interest, for he received other lands equal in value to the lands sold at the time of the sale. Kent, C. J., said that such rule would have continued had not the action for *mesne* profits been introduced. In consequence of that action the recovery of interest is co-extensive in point of time with the liability for such profits.⁹⁵ But this rule has not been followed in Massachusetts.⁹⁶

§ 617. **Expenses, costs and counsel fees as damages.** The rule of damages for a total breach of the covenants in a deed of land is often stated in general terms to be the amount of the consideration money and interest. This has been done sometimes in the absence from the case of any item of expense or costs; sometimes in a direct contrast of this basis of recovery with that of the value at the time of eviction, and when, of course, other and incidental items common to both would not be mentioned; and in other instances purposely to exclude any items which would extend the recovery beyond consideration and interest.⁹⁷ It is held that the grantee has the right to

⁹³ Blake v. Burnham, 29 Vt. 437;
Mengel B. Co. v. Ferguson, *supra*.

⁹⁴ Zent v. Picken, 54 Iowa 535.

⁹⁵ Staats v. Ten Eyck, 3 Caines
111, 114, 2 Am. Dec. 254; Kelly v.
Dutch Church, 2 Hill 105; De Long

v. Spring Lake, etc. Co., 65 N. J. L.
1, 8.

⁹⁶ Whiting v. Dewey, 15 Pick.
428, 435.

⁹⁷ Crisfield v. Storr, 36 Md. 129,
11 Am. Rep. 480; Turner v. Miller,

defend; he is justified in making every fair effort to retain the land which he must be understood to have purchased for his own convenience and advantage, because an equivalent in value may not be equally satisfactory.⁹⁸ It has been declared to be his duty to defend.⁹⁹ Where, at the date of the deed, the premises are adversely possessed and the grantee or his assignee suffers that adverse possession to ripen into a title by continuance until an action to recover is barred by the statute of limitations he has no right of action as for a breach of the covenant of warranty; because in such a case the land is not lost by a paramount title existing at the date of the covenant, but by his own laches.¹ It is therefore well settled by the best authorities that in actions for breach of the covenants, where there has been an eviction by suit, the plaintiff is entitled to recover damages, not only for loss of the land, usually, as we have seen, measured by the consideration paid with interest, but also costs reasonably and in good faith incurred in defending the title and resisting the eviction.² And it does not appear to be necessary,

42 Tex. 418, 19 Am. Rep. 47; McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456; Eaton v. Lyman, 24 Wis. 438; Adams v. Cox (Tex. Civ. App.), 150 S. W. 1195.

⁹⁸ Swett v. Patrick, 12 Me. 9.

⁹⁹ Staats v. Ten Eyck, *supra*; Butler v. Barnes, 61 Conn. 399.

¹ Rindskopf v. Farmers' L. & T. Co., 58 Barb. 36.

² Brawley v. Copelin, 106 Ark. 256; Beach v. Nordman, 90 Ark. 59; Rook v. Rook, 111 Ill. App. 398; Seitz v. People's Sav. Bank, 140 Mich. 106; Dubay v. Kelly, 137 Mich. 345 (notwithstanding the abolition of the common-law remedy of voucher); Brooks v. Mohl, 104 Minn. 404, 124 Am. St. 629, 17 L.R.A.(N.S.) 1195, citing the text; Browning v. Stillwell, 42 N. Y. Misc. 346; Farwell v. Bean, 82 Vt. 172; Morgan v. Haley, 107 Va. 331, 13 L.R.A.(N.S.) 732; Madden v. Caldwell L. Co., 16 Idaho 59, 21 L.R.A.

(N.S.) 332; Meservey v. Snell, 94 Iowa 222, 58 Am. St. 391, citing the text; Alexander v. Staley, 110 Iowa 607 (act complained of tainted with fraud; such damages are not compensatory); Webb v. Holt, 113 Mich. 338 (taxable costs); Hazlett v. Woodruff, 150 Mo. 534; Walton v. Campbell, 51 Neb. 788; Dale v. Shively, 8 Kan. 276; Jewett v. Fisher, 9 Kan. App. 630; Morris v. Petero, 4 Hawaii 23; Worley v. Hineman, 6 Ind. App. 240; Teague v. Whaley, 20 Ind. App. 26; Cushman v. Blanchard, 2 Me. 266, 11 Am. Dec. 76; Swett v. Patrick, 12 Me. 9; Ryerson v. Chapman, 66 id. 557; Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309; Prescott v. Truman, 4 Mass. 627, 3 Am. Dec. 246; Delavergne v. Norris, 7 Johns. 358, 5 Am. Dec. 281; Staats v. Ten Eyck, 3 Caines 111, 2 Am. Dec. 254; Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229; Waldo v. Long, 7

on principle or authority, that such costs should be incurred by the grantee as a defendant in actions by the claimant of the superior title. They are equally recoverable if necessarily incurred in proper proceedings taken by him to ascertain and protect the title supposed to be conveyed or to obtain possession of the land.³

Where several suits and cross-suits have been brought,

Johns. 173; Bennett v. Jenkins, 13 id. 50; Funk v. Voneida, 11 S. & R. 109; Stanard v. Eldridge, 16 Johns. 254; Taylor v. Holter, 1 Mont. 688; Dalton v. Bowker, 8 Nev. 190; Morris v. Rowan, 17 N. J. L. 304; Cox v. Strode, 2 Bibb 273, 5 Am. Dec. 603; Robertson v. Lemon, 2 Bush 301; Armstrong v. Percy, 5 Wend. 535; Rickert v. Snyder, 9 id. 416; Leffingwell v. Elliott, 10 Pick. 204; Kennison v. Taylor, 18 N. H. 220; Holmes v. Sinnickson, 15 N. J. L. 313; Stuart v. Matheison, 23 Up. Can. Q. B. 135; Harding v. Larkin, 41 Ill. 413; Lot v. Parish, 1 Litt. 393; Lane v. Fury, 31 Ohio St. 574; Williamson v. Williamson, 71 Me. 442; Swartz v. Ballou, 47 Iowa 188, 29 Am. Rep. 470; Stebbins v. Wolf, 33 Kan. 765; Hoffman v. Bosch, 18 Nev. 360.

³ Ellis v. Abbott, 69 Ore. 234; Louisville P. W. Co. v. James, 139 Ky. 434; Leet v. Gratz, 137 Mo. App. 208, citing the text; Pitkin v. Leavitt, 13 Vt. 379; Haynes v. Stevens, 11 N. H. 28; Kingsbury v. Smith, 13 id. 109; Gregg v. Richardson, 25 Ga. 570, 71 Am. Dec. 190; White v. Williams, 13 Tex. 258; Yokum v. Thomas, 15 Iowa 67; Lane v. Fury, 31 Ohio St. 574; Merritt v. Morse, 108 Mass. 270. See Ferrell v. Alder, 8 Humph. 44.

In Kingsbury v. Smith, *supra*, the action was brought on an implied warranty of the title in the sale of a chattel. K. purchased it

of C., who previously had purchased and got possession of it from S. by fraud. In an action of trover by K. against S., who had repossessed himself of the chattel, C. was offered as a witness, and he was objected to as incompetent on the ground of interest, being liable to K. on his warranty of title for the costs incurred in that action if the plaintiff should fail. Woods, J., after citing many cases, said: "The principle deducible from the cases cited would seem to be that the grantee, in an action upon a covenant of warranty, express as in a deed, or implied as upon a sale of personal property, is entitled to recover, as part of his damages sustained by reason of the failure of the title conveyed, the reasonable and necessary expenses incurred in a proper course of legal proceedings for the ascertainment and protection of his rights under the purchase, as well as reasonable compensation for his trouble and expenses to which he may have been put in extinguishment of a paramount title. And it seems to us that there can be no sound distinction between the case in which the expenses are incurred in the necessary and proper prosecution of a suit for the ascertainment and protection of the purchaser's rights, and the case of a defense for the same purpose. In the case under consideration it would, in our view, fall little short

involving the title to the property conveyed, and these were properly and in good faith prosecuted or defended by the grantee the costs and expenses of all have been allowed as proper damages in addition to compensation for loss of the land. This proposition is very clearly declared and maintained in a case in Maine,⁴ in which Peters, J., delivering the opinion, said: "The foundation of a claim for damages under it (the covenant of warranty) must be that an eviction, or something equivalent thereto, has properly taken place. The covenantee, who has been evicted, is entitled to have repaid to him all reasonable outlay which he in good faith expends for the assertion or defense of the title warranted to him. Weston, C. J., says: 'He (the covenantee) was justified in making every fair effort to retain the land.'⁵ If he is assaulted with ever so many suits he must defend them unless it is clear that a defense would avail nothing. If he defends but one and lets the others go by default he might get himself into inextricable trouble. It is as essential that he should defend all the suits as well as any one of them. A defender of a walled city might as well plant all his means of defense at a single gate and leave all the others undefended, to be entered by the enemy. The covenantee becomes the agent of the covenantor in making a defense against suits. He should do for his warrantor what the warrantor should do for himself if in possession. It is no more expensive for the war-

of absurdity to hold that if the plaintiff had kept possession of the horse, and the defendant had brought suit, the plaintiff would be entitled to recover as damages in a suit against Chandler on the implied warranty of title, the expenses of the defense, and at the same time to hold that when the defendant had got possession of the horse, and the only means left the plaintiff for the ascertainment and protection of his rights is the very suit he has brought, he would not be entitled, in an action on the warranty against

Chandler, to recover the expenses of the present suit properly and necessarily incurred, in the event of a failure of success, by reason of the failure of the title conveyed to him by Chandler. Such a doctrine making such a distinction we think cannot be sustained upon sound reason or upon well-considered decisions, which go to establish the right of recovery of the costs and expenses, as clearly, we think, in one case as in the other."

⁴ Ryerson v. Chapman, 66 Me. 557.

⁵ Swett v. Patrick, 12 Me. 9.

rantor to defend suits brought against his agent than suits against himself, and the presumption is that he would have been a party to the same litigations had he remained in possession. But the agent must act cautiously and reasonably. He has no right to 'inflammé his own account,'⁶ nor indulge in mere quarrelsome cases. It follows, therefore, that the plaintiff may recover for the damages and costs and expenses of suits brought against him, and also for the costs and expenses of suits brought by him affecting the title to the estate. Each suit may have been part of the means by which the title was sought to be defeated."⁷ In Kansas costs and attorneys' fees can only be recovered when paid in a suit brought to obtain possession which the grantor did not give, or when, if it was given, the defense is made against the suit of the owner of the land.⁸

§ 618. **Same subject.** Cases may arise and have arisen where the superior title asserted is so obviously well founded that resistance cannot be made in good faith; then the covenantor cannot defend at the expense of the covenantor.⁹ It

⁶ Short v. Kalloway, 11 A. & El. 28; Anderson v. Merrill Lumber & Forestry Co., 77 N. H. 275.

⁷ In Ryerson v. Chapman, 66 Me. 557, the defendant getting a supposed title to a parcel of land by levy conveyed it to the plaintiff by a warranty deed. The latter had been in undisturbed possession under the deed for about fifteen years when his possession was invaded by one C., who claimed title to the land upon the ground that the levy was defective and void. The plaintiff sued C. and C. sued him in actions of trespass, and several other suits followed between them. While all the suits were pending one of them was carried up to decide the question of title to the land, and C. prevailed. After this the defendant paid to the plaintiff all the costs and counsel fees incurred in the defense of that action, and also paid him the value of the land from

which he had been evicted, but refused to pay the damages, costs and expenses incurred in the other actions.

⁸ Dale v. Shively, 8 Kan. 276; Jewett v. Fisher, 9 Kan. App. 630.

A purchaser who has resold and taken a mortgage cannot recover from his grantor the expense of defending a suit brought to restrain him from enforcing his mortgage because of the failure of title to a part of the land. Seitz v. People's Sav. Bank, 140 Mich. 106.

⁹ Mengel B. Co. v. Ferguson, 124 Tenn. 433; Alexander v. Staley, 110 Iowa 607 (as against a title known to be paramount when deed was accepted); Matheny v. Stewart, 108 Mo. 73; Cushman v. Blanchard, 2 Me. 268, 11 Am. Dec. 76; Hodgins v. Hodgins, 13 Up. Can. C. P. 146; Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309; Ryerson v. Chapman, 66 Me. 557.

is also true that in other cases the grantee is not obliged at his peril to decide upon the title. He may defend without notice to his warrantor and even exclude him from co-operation in defending the title¹⁰ without affecting his liability upon the covenant. And it may be doubted that the covenantor, when notified to defend, can affect his liability in respect to costs, afterwards incurred by the grantee, by silence or direction not to defend. In a New Jersey case¹¹ Hornblower, C. J., pointedly said: "Suppose the defendants, conscious of the unsoundness of the title, had not only refused to defend the suit, but had given notice to the tenant that if he made any defense he must do it at his own risk and expense; would that have availed them anything? I think not. It would place a grantee in hazardous circumstances if, upon such an intimation from his grantor, he must either defend at his own expense or abandon the title and look for compensation in damages under his covenants. On the contrary, I am of opinion that, notwithstanding such notice from the covenantor the grantee would have a right to recover from him the taxable costs he had incurred in honestly and fairly resisting the claim of title set up by the plaintiff in the ejectment." In Pennsylvania the rule seems to be otherwise. In a recent case, where the alleged breach of covenant was the recovery of a life estate in dower, Sharswood, J., said: "Without undertaking to lay down any general rule it would seem to be most reasonable to hold that where a covenantor has been notified to appear and defend and declines or fails to do so and the covenantee chooses to proceed and incur costs and expenses in what it may be presumed that the covenantor considered to be an unnecessary and hopeless contest, he does so certainly upon his own responsibility."¹² In a Maryland case the court say: "Where such notice is given and the party notified refuses to defend the title the covenantee, or his assignee, has the right to employ counsel for that purpose; and may recover in an action on the covenant such reasonable fees as he has been compelled to pay."¹³ This is in accord

¹⁰ Matheny v. Stewart, *supra*;
Boyle v. Edwards, 114 Mass. 373.

¹¹ Morris v. Rowan, 17 N. J. L.
304.

¹² Terry v. Drabenstadt, 68 Pa.
400.

¹³ Crisfield v. Storr, 36 Md. 129,
11 Am. Rep. 480.

with the rule in Rhode Island, New York, North Carolina and England.¹⁴ Where there is such conflict of authority no rule can be stated that has general force as law. But recognizing that the grantee has a right to defend the title warranted to him or to have it defended, if the covenantor declines to intervene for that purpose on request the grantee ought to be at liberty to defend for himself; and on the principle of allowing full compensation for actual loss, if the title warranted fails, the expense and cost of defending it should fall on the party who covenanted to warrant and defend it and has broken his covenant. After the covenantor has come into court on notice and assumed the defense the grantee is not entitled also to employ counsel for his own protection and charge the expense, in the event of failure of title, to the covenantor.¹⁵ If the grantee is liable for the fees they may be recovered, but if they have not been paid he cannot recover interest on the amount due on account of them.¹⁶ It is otherwise if the fees have been paid.¹⁷

As to the necessity and effect of notice to the covenantor to defend there is considerable diversity of opinion in other respects, as will appear by the cases already referred to and others. But as the covenant to defend is as absolute as that to warrant the title notice would not seem to be more necessary in respect to costs and expenses, reasonably incurred in good faith in the defense of the title, than to confer a right to be compensated for the loss of the land.' In a case already mentioned Ford J., said: "The defendant's counsel supposes

¹⁴ *Point Street I. Works v. Turner*, 14 R. I. 122; *Wiggins v. Pender*, 132 N. C. 628, 61 L.R.A. 772; *Jones v. Balsley*, 154 N. C. 61; *Culver v. Jennings*, 157 N. C. 565; *Rolph v. Crouch*, L. R. 34 Ex. 44; *Olmstead v. Rawson*, 188 N. Y. 517. In this case the vendee recovered costs allowed the plaintiff in the adverse suit, his own proper and legal costs, disbursements and expenses in its defense, the referee's fees and expenses of sale to satisfy a dower right, with interest on each

item from the date of sale, except his own costs and disbursements, which bore interest from the date of judgment in that suit. See § 629.

¹⁵ *Kennison v. Taylor*, 18 N. H. 220; *Long v. Wheeler*, 84 Mo. App. 101; *Conrad v. Effinger*, 87 Va. 59, 24 Am. St. 646. If the covenantor uses on the trial documents procured and paid for by the covenantee he is liable therefor. *Id.*

¹⁶ *Walton v. Campbell*, 51 Neb. 788.

¹⁷ *Charman v. Tatum*, *infra*.

the costs on eviction are allowed because it was the warrantor's duty to defend the suit upon receiving notice of the action; and he objects to them in this case because no notice was given to the warrantor or his representatives of the pendency of the action. But all the cases agree in allowing the costs of eviction, and it is immaterial whether he had notice or not. His covenant to defend is not a conditional one if he has notice; otherwise a want of notice would bar the warranty itself. He covenants to defend as absolutely as he does to warrant. The intent of notice is not to make him liable for costs; it is to make the record of eviction conclude him in respect of the title."¹⁸ And the language in the case in Maine, already referred to, is equally explicit in response to a like objection: "Notice was not necessary to put him in position to enforce such a liability. Without a notice the plaintiff can recover his damages caused by the failure of the title warranted to him. And in this state the costs of the former action and the expenses of counsel fees attending it, whether in asserting or defending the title, are a portion of the damages recoverable. The want of notice of a suit to the warrantor undoubtedly increases the burden of proof that falls on the warrantee. In such case he would be held to prove that the actions brought against him were reasonably defended, and that the costs were fairly and necessarily incurred. And as to the costs in cases in which the warrantee was plaintiff instead of defendant, and also as respects counsel fees and expenses in cases where he was either plaintiff or defendant; and whether the covenantor was notified or not, from the nature of things the burden is on the covenantee to show such items to be reasonable and proper claims where the grantor does not appear in the suits."¹⁹ The defendant must pay, not what the plaintiff may have paid counsel, but what he could have been legally compelled to pay; what the services were reasonably worth as determined by the jury from the evidence.²⁰

¹⁸ *Morris v. Rowan*, 17 N. J. L. 304. But compare *Yokum v. Thomas*, 15 Iowa 67.

¹⁹ *Ryerson v. Chapman*, 66 Me. 557.

²⁰ *Charman v. Tatum*, 54 App. Div. (N. Y.) 61; *Armstrong v. Percy*, 5 Wend. 535, 539; *Head v. Hargrave*, 105 U. S. 45, 26 L. ed. 1028.

While these general principles are supported by the best authorities,²¹ there has been an exception in some jurisdictions of the item of counsel fees. They are not allowed in Massachusetts,²² Mississippi, Louisiana, South Carolina, Virginia, Georgia, or Texas,²³ and perhaps in some other states.²⁴ It is difficult to perceive, however, any sound reason for this exception; for, as was said in an early case in Maine,²⁵ "the plaintiff could not defend without counsel, and if employed they must be paid;" and the same reason that would authorize the recovery of the clerk's, sheriff's and other costs would justify the recovery of reasonable counsel fees. The character of these expenses is the same; one is just as requisite as the other, and both are essential to a defense.²⁶ The Missouri court, although recognizing the liability for attorneys' fees, refused to permit their recovery in an action for the breach of the covenant in a deed executed in Mississippi and covering land there, on the

²¹ *Quick v. Walker*, 125 Mo. App. 257 (no person to whom notice could be given); *Staats v. Ten Eyck*, 3 Cai. 111, 2 Am. Dec. 254; *Pitcher v. Livingston*, 4 Johns. 1, 4 Am. Dec. 229; *Robertson v. Lemon*, 2 Bush 301; *Cox v. Strode*, 2 Bibb 273, 5 Am. Dec. 603; *Pitkin v. Leavitt*, 13 Vt. 379; *Kennison v. Taylor*, 18 N. H. 220; *Lane v. Fury*, 31 Ohio St. 574; *Harding v. Larkin*, 41 Ill. 413; *Keeler v. Wood*, 30 Vt. 242; *Butler v. Barnes*, 61 Conn. 399, not expressly approving the rule, but stating that the local trial practice recognizes it.

²² *Leffingwell v. Elliott*, 10 Pick. 204.

²³ *Clark v. Mumford*, 62 Tex. 531, 535; *Brooks v. Black*, 68 Miss. 161, 11 L.R.A. 176, 24 Am. St. 259; *Lamerlec v. Barthelmy*, 2 McGloin, 106; *Walsh v. Harang*, 48 La. Ann. 984; *Citizens' Bank v. Jeansonne*, 120 La. 393; *Hawkins v. Wood*, 60 S. C. 521 (ruled under a statute); *Morgan v. Haley*, 107 Va. 331, 13

L.R.A. (N.S.) 732; *Taylor v. Allen*, 131 Ga. 416 (expenses of litigation, attorney's fees and traveling expenses).

A late case holds that costs may be imposed in the discretion of the court. *Mayer v. Wooten*, 46 Tex. Civ. App. 327.

²⁴ *Louisville P. W. Co. v. James*, 139 Ky. 434 (costs on appeal from judgment against vendee); *Mengel B. Co. v. Ferguson*, 124 Tenn. 433; *White v. Clack*, 2 Swan 230. See *Holmes v. Sinnickson*, 15 N. J. L. 313; *Adams v. Cox* (Tex. Civ. App.), 150 S. W. 1195.

The North Carolina cases are conflicting. In *Wiggins v. Bender*, 132 N. C. 628, 61 L.R.A. 772, liability is denied. In *Jones v. Balsley*, 154 N. C. 61, liability for counsel fees and costs was enforced though no request was made of the warrantor to assume the defense, he having notice of the pendency of the action.

²⁵ *Swett v. Patrick*, 12 Me. 9.

²⁶ *Taylor v. Holter*, 1 Mont. 688.

ground that because such damages are not recoverable in that state the parties may be presumed to have contracted with reference to its law.²⁷ But if the law of another state is not shown it will be presumed to be like that of the forum.²⁸ In Kentucky and Missouri notice to defend must be given;²⁹ in the former state attorneys' fees must be incurred "in actually defending the suit for eviction;" they cannot be recovered where the covenantee voluntarily undertook to buy in the paramount title.³⁰

§ 619. *Same subject.* In Illinois the right of recovery is confined to costs incurred in actions in which the warrantee is a party to the record and in which he was evicted. And the rule is said to be limited to the taxable costs and reasonable attorneys' fees in that suit.³¹ The covenantee is not entitled to damages on these covenants for any outlays necessitated by the existence or assertion of an invalid adverse claim. The covenant does not protect him against any but lawful claims, which negative the title that the deed to him purports to convey.³² Nor can the covenantee or his assignee recover for any damages resulting from his own wrongful acts;³³ as where the breach of the covenant consists in a third person having a right of way over a staircase in the tenement conveyed with warranty and the plaintiff seeks to recover damages which he has been compelled to pay to such third person for removing the staircase.³⁴ In such a case there was a covenant of warranty and against incumbrances. The plaintiff was held entitled to

²⁷ Matheny v. Stewart, *supra*; McCormick v. Marey, 165 Cal. 386.

²⁸ Hazelett v. Woodruff, 150 Mo. 534.

²⁹ Mackenzie v. Clement, 144 Mo. App. 114; Pineland Mfg. Co. v. Guardian T. Co., 139 Mo. App. 209; Hazelett v. Woodruff, 150 Mo. 534.

The costs and attorney's fees incurred by the grantee in litigating the title to the land with a third person may not be recovered from the grantor unless the latter had such notice of the claim as amount-

ed to an invitation or demand to control the litigation, and this must be given in apt time for his protection. Jeffords v. Dreisbach, 168 Mo. App. 577.

³⁰ Mercantile T. Co. v. South Park R. Co., 94 Ky. 271.

³¹ Harding v. Larkin, 41 Ill. 413.

³² Christy v. Ogle, 33 Ill. 295; Smith v. Parsons, 33 W. Va. 644, quoting the text.

³³ Wilcox v. Danforth, 5 Ill. App. 378; Smith v. Keeley, 146 Iowa 660.

³⁴ Wilcox v. Danforth, *supra*.

recover damages for the incumbrance only to the date of the removal of the staircase, and nothing for the damages which he had been adjudged to pay for tearing it down, though the act extinguished the incumbrance.³⁵ Where an equitable title is conveyed with covenants and the party having the legal title asserts it in such manner as amounts to an eviction, expenses incurred to procure that title by a suit in equity have been allowed on the same principle as where the title undertaken to be conveyed has no equitable or legal foundation, and the paramount title has been procured by the covenantee by purchase.³⁶ A married woman sold real estate, but the acknowledgment of the deed was so defective that the title did not pass. Her heirs, having set up title and brought suit for possession against one to whom the purchaser had conveyed with the covenants, a proceeding in chancery was successfully prosecuted to a decree for the correction of that defective conveyance and the suit for possession was defeated by seasonably obtaining that decree. For the expenses incurred in curing that defect an action was brought on the covenant of warranty. The court held that it was not necessary that the paramount title should be established by judgment or decree. And if, under the circumstances existing when the petition to reform was filed, the plaintiff might have brought in the paramount title and recovered of the covenantor any reasonable amount paid therefor, he might recover from him the costs and expenses, including counsel fees, in both suits; that, looking to the substance as well as to the form of the transaction, it was a mode of getting in the legal title. But in a similar case in Iowa³⁷ the costs were denied because the suit in equity was brought without a previous request to the covenantor to obtain the legal title.³⁸ The reformation of a deed so as to include in it and its covenants land which was not originally described therein will not be given retroactive effect so as to make the grantor liable for the expense of defending an

³⁵ *Id.*

³⁶ *Lane v. Fury*, 31 Ohio St. 574;
Smith v. Keeley, *supra*, citing the
text.

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³⁷ *Yokum v. Thomas*, 1 Iowa 675.

³⁸ *Curtley v. Security Sav. Soc.*,

46 Wash. 50, citing the text.

action for trespass upon the land conveyed and included in the reformed instrument, brought by him against the grantee.³⁹

SECTION 5.

COVENANTS AGAINST INCUMBRANCES.

§ 620. **What are incumbrances.** An incumbrance has been defined to be every right to or interest in the land which may subsist in third persons to the diminution of the value of the land, consistent with the passing of the fee by the conveyance.⁴⁰ The cases reported show a great variety of incumbrances, but they may be grouped or classified for the present purpose as incumbrances which consist: 1. Of a judgment, mortgage or some debt or charge that is a lien on the land conveyed. 2. Some right in a third person which may be absolutely or contingently asserted to the title, possession or use of the land conveyed or some part of it, or some privilege or easement thereon, or which imposes in the future some duty or restriction upon the grantee in respect to it.⁴¹ A special

³⁹ *Butler v. Barnes*, 61 Conn. 399.

⁴⁰ *Crawford v. McDonald*, 84 Ark. 415; *Seldon v. Jones*, 74 Ark. 348; *Ensign v. Colt*, 75 Conn. 111; *Simons v. Diamond M. Co.*, 159 Mich. 241; *Clark v. Fisher*, 54 Kan. 403; *Lafferty v. Milligan*, 165 Pa. 534; 2 Greenlf. Ev., § 242; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 246; *Barlow v. McKinley*, 24 Iowa 69; *Mitchell v. Warner*, 5 Conn. 497; *Stambaugh v. Smith*, 23 Ohio St. 584; *Carter v. Denman*, 23 N. J. L. 273; *Rawle on Covenants*, 94, 95; *Fritz v. Pusey*, 31 Minn. 368.

⁴¹ *Oppenheimer v. Knepper Realty Co.*, 50 N. Y. Misc. 186; *Brass v. Vandecar*, 70 Neb. 35 (lease); *Eppstein v. Kuhn*, 225 Ill. 115, 10 L.R.A.(N.S.) 117; *Brodie v. New England M. S. Co.*, 166 Ala. 170; *Fraser v. Bentel*, 161 Cal. 390;

Newmyer v. Roush, 21 Idaho 106; *O'Connor v. Enos*, 56 Wash. 448 (lease).

"Incumbrances are of two kinds, viz.: 1, such as affect the title, and 2, those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road or right of way, of the latter." *Memmert v. McKeen*, 112 Pa. 315; *Penn v. Schmisser*, 77 Ill. App. 526; *Whiteside v. Magruder*, 75 Mo. App. 364.

A beam right in favor of adjoining premises, existing by reason of a valid written agreement, is an incumbrance. *Schaeffler v. Miebling*, 13 N. Y. Misc. 520.

Mr. Rawle, in his work on *Covenants for Title* (4th ed., pp. 96, 97), thus enumerates what had been

warranty following a general covenant against incumbrances

held to be incumbrances, the existence of which would be a breach of a covenant that the land conveyed is free therefrom: "Thus there can be no doubt that the covenant is broken by the existence of a judgment, a mortgage or any debt which is a lien upon the land conveyed (*Bean v. Mayo*, 5 Me. 94; *Shearer v. Ranger*, 22 Pick. 447; *Norton v. Babcock*, 2 Metc. (Mass.) 510; *Jones v. Davis*, 24 Wis. 229; *Case v. Erwin*, 18 Mich. 434); a right of dower, whether inchoate or consummate by the death of the husband (*Shearer v. Ranger*, 22 Pick. 447; *Bigelow v. Hubbard*, 97 Mass. 195; *Porter v. Noyes*, 2 Me. 26; *Donnell v. Thompson*, 10 Me. 170, 26 Am. Dec. 216; *Smith v. Connell*, 32 Me. 126; *Blanchard v. Blanchard*, 48 Me. 177; *Runnells v. Webber*, 59 Me. 488; *Russell v. Perry*, 49 N. H. 547; *Carter v. Denman*, 23 N. J. L. 273; *Jeter v. Glenn*, 9 Rich. 376; *Henderson v. Henderson*, 13 Mo. 151; *Hatcher v. Andrews*, 5 Bush 561; *McAlpin v. Woodruff*, 11 Ohio St. 120 [*McCord v. Massey*, 155 Ill. 123; *McCrillis v. Thomas*, 110 Mo. App. 699; *Cowan v. Kane*, 211 Ill. 572. See *Hunt v. Marsh*, 80 Mo. 396]; *contra dicta*, *Powell v. Monson Co.*, 6 Mason 355 [see *Combs v. Combs*, 130 Ky. 827, holding that dower is not an incumbrance where an heir conveys to a coheir]); or by the existence of taxes, whether presently due (*Almy v. Hunt*, 48 Ill. 45; *Ingalls v. Cooke*, 21 Iowa 560; *Mitchell v. Pillsbury*, 5 Wis. 407); *Lowe v. Simmons W. Co.*, 39 Utah 395; or which, when thereafter levied, relate back prior to the conveyance (*Hutchins v. Moody*, 30 Vt. 652, 34 id. 433. See *Pierce v. Brew*, 43 Vt. 202; *Rundell v. Lakey*, 40

N. Y. 513; *Overstreet v. Dobson*, 28 Ind. 256; *Blossom v. Van Court*, 34 Mo. 394, 86 Am. Dec. 114; *Peters v. Myers*, 22 Wis. 602; *Long v. Moler*, 5 Ohio St. 271; and see, also, *Cochran v. Gould*, 106 Mass. 29; *Carr v. Dooley*, 119 Mass. 294, 8 Am. Rep. 296; *Blackie v. Hudson*, 117 Mass. 181; *Langsdale v. Nicklaus*, 38 Ind. 289); but obviously not taxes which, assessed after the execution of the deed, do not so relate back. *Jackson v. Sassaman*, 29 Pa. 106. [The recital in his deed by a tax collector, that the land was sold for an unpaid tax, "assessed agreeably to law," is not proof of that fact, or that the tax was an incumbrance. *Maddocks v. Stevens*, 89 Me. 336.] So, where a testator devised to his daughter the right of living in part of a house, of which the whole was afterwards sold by the residuary devisee, such paramount right was held to be a breach of the covenant against incumbrances made by the latter. *Jarvis v. Buttrick*, 1 Metc. (Mass.) 480. So when the premises were sold subject to a covenant that no ardent spirits should be sold therefrom (*Hatcher v. Andrews*, 5 Bush 561), or to a covenant that a certain fence should be erected or maintained (*Burbank v. Pillsbury*, 48 N. H. 475; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550. See *Parish v. Whitney*, 3 Gray 510; *Blain v. Taylor*, 19 Abb. Pr. 228); or to a restriction against building except in a particular way. *Roberts v. Levy*, 3 Abb. Pr. (N. S.) 311 [*Doctor v. Darling*, 68 Hun 70; *Tandy v. Waesch*, 154 Cal. 108; *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. 971]. All these have been held to be breaches of the covenant." And

will not limit the latter.⁴² The diminution of the value of the thing granted, which is said to be the test of an incumbrance, is not to be limited to cases where the thing granted is, by reason of some outstanding right or interest in a third person,

on p. 100 the author says: "Again, it has been said that the covenant is broken by the existence of any easements or servitudes to which the land is subject. *Mitchell v. Warner*, 5 Conn. 508 [*Wetmore v. Bruce*, 54 N. Y. Super. Ct. 149, 118 N. Y. 319; *Teague v. Whaley*, 20 Ind. App. 26]. And as a general proposition this may be also true. Thus, the existence of a paramount private right of way. *Wilson v. Cochran*, 46 Pa. 233; *Russ v. Steele*, 40 Vt. 310; *Blake v. Everett*, 1 Allen 250; *Wetherbee v. Bennett*, 2 Allen 428 [*Butt v. Riffe*, 78 Ky. 352]. Or, it has been held, of a right of way for a railroad. *Barlow v. McKinley*, 24 Iowa 70; *Beach v. Miller*, 51 Ill. 206. See, also, *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Purcell v. Hannibal*, etc. R. Co., 50 Mo. 504. A right to cut and maintain a drain. *Smith v. Sprague*, 40 Vt. 43. Or other artificial water-course. *Prescott v. White*, 21 Pick. 341, 32 Am. Dec. 266. A right to cut timber or 'wood leave,' as it is sometimes called. *Cathcart v. Bowman*, 5 Pa. 319; *Spurr v. Andrew*, 6 Allen 420. And in some cases, it is said, by the right to dam up and use the water of a stream running through the land conveyed. *Morgan v. Smith*, 11 Ill. 194; *Ginn v. Hancock*, 31 Me. 42. All these have been held to be incumbrances within the scope of the covenant."

So is a right of way over a staircase in a tenement conveyed. *Wilcox v. Danforth*, 5 Ill. App. 378; *McGowan v. Myers*, 60 Iowa 256.

An incumbrance exists upon property which is subject to assessment for widening a street or for building a sewer from the date of the order to make the improvement. *Blackie v. Hudson*, 117 Mass. 181; *Carr v. Dooley*, 119 id. 294; *Cadmus v. Fagan*, 47 N. J. L. 549, reversing 46 N. J. L. 441; *Barnhart v. Hughes*, 46 Mo. App. 318. See 2 *Warvelle on Vendors*, § 971 *et seq.* (2d ed.); *Barth v. Ward*, 63 App. Div. (N. Y.) 193. See *Weeks v. Grace*, 194 Mass. 296, 9 L.R.A. (N.S.) 1092.

An unopened but declared street is an incumbrance. *Atlantic Ref. Co. v. Sylvester*, 231 Pa. 491.

The encroachment of a building upon the land conveyed upon adjacent land impairs the value of the former and is an incumbrance. *Fehlhaber v. Fehlhaber*, 80 N. Y. Misc. 149.

Penalties and costs resulting from the nonpayment of taxes stand upon the same footing as taxes. *Carswell v. Habberzettle*, 99 Tex. 1, 122 Am. St. 597.

A contract imposing a right in perpetuity for the benefit of adjoining land, if enforceable in equity, is an incumbrance. *Bailey v. Agawam Nat. Bank*, 190 Mass. 20, 3 L.R.A. (N.S.) 98, 112 Am. St. 296.

⁴² *Duroe v. Stephens*, 101 Iowa 358; *King v. Kilbride*, 58 Conn. 109; *Bender v. Fromberger*, 4 Dall. 436, 1 L. ed. 898; *Alexander v. Schreiber*, 10 Mo. 460; *Duvall v. Craig*, 2 Wheat. 45, 4 L. ed. 180; *Rowe v. Heath*, 23 Tex. 614.

of less pecuniary worth, but extends to and embraces cases where the grantee, by reason of such an outstanding right or interest, does not acquire by the grant the complete dominion over the thing granted which the grant apparently gives, but is or may be deprived thereby of the whole or some part of its use or possession.⁴³

According to the great preponderance of authority the vendee's knowledge of the existence of an incumbrance of the first class does not affect his right to recover damages on the breach of the covenant.⁴⁴ It has, however, been determined that it may be shown in mitigation of damages that the grantee had knowledge, at the time he purchased the property, of the existence of a restriction as to the use which could be made of it.⁴⁵ In some jurisdictions it is presumed that where a servitude imposed upon land is visible and affects only its physical condition the purchase is made with knowledge of it and the price

⁴³ *Tuskegee L. & S. Co. v. Birmingham Realty Co.*, 161 Ala. 542, 23 L.R.A. (N.S.) 992, citing the text; *Beach v. Hudson River L. Co.*, 65 N. J. Eq. 426; *Demars v. Koehler*, 62 N. J. L. 203, 72 Am. St. 642.

A liability which will become absolute and enforceable against land as soon as the work to be done upon it is completed and the cost of doing it ascertained, though these things are done after the conveyance, is an incumbrance. *Cotting v. Commonwealth*, 205 Mass. 523.

⁴⁴ *Cornelius v. Kinnard*, 157 Ky. 50; *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. 971; *Brodie v. New England M. S. Co.*, 166 Ala. 170; *Whitten v. Krick*, 31 Ind. App. 577; *Doyle v. Emerson*, 145 Iowa 358; *Pryor v. Buffalo*, 197 N. Y. 123; *Brown v. Taylor*, 115 Tenn. 1, 4 L.R.A. (N.S.) 309, 112 Am. St. 811; *Newmyer v. Roush*, 21 Idaho 106; *Doctor v. Darling*, 68 Hun 70; *Clark v. Fisher*, 54 Kan. 403; *Bar-*

low v. McKinley, 24 Iowa 69; *McGowen v. Myers*, 60 id. 257; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Foster v. Foster*, 62 N. H. 532; *Lane v. Richardson*, 104 N. C. 642, 650; *Cathcart v. Bowman*, 5 Pa. 317; *Funk v. Voneida*, 11 S. & R. 109; *Demars v. Koehler*, 62 N. J. L. 203, 72 Am. St. 642, reversing 60 N. J. L. 319; *Townsend v. Webb*, 8 Mass. 146; *Flynn v. Bourneuf*, 143 Mass. 277, 58 Am. Rep. 135; *Rickert v. Snyder*, 9 Wend. 416; *Edwards v. Clark*, 83 Mich. 246, 10 L.R.A. 659; *Hubbard v. Norton*, 10 Conn. 422; *Long v. Moler*, 5 Ohio St. 271; *Copeland v. McAdory*, 100 Ala. 553; *Corbett v. Wrenn*, 25 Ore. 305. *Contra*. *Page v. Lashley*, 15 Ind. 152; *Kellum v. Berkshire L. etc. Ins. Co.*, 101 Ind. 455; *Feurer v. Stewart*, 83 Fed. 793.

⁴⁵ *Charman v. Hibbler*, 31 App. Div. (N. Y.) 477; *Roberts v. Levy*, 3 Abb. Pr. (N. S.) 311. Compare *Doctor v. Darling*, *supra*.

is determined upon accordingly.⁴⁶ But this presumption does not include a party-wall which extends but slightly beyond the line,⁴⁷ nor to a private passway.⁴⁸ Knowledge of the existence of a lease does not affect the right to recover.⁴⁹ In Washington a grantor who conveys by metes and bounds with full covenant of warranty is bound as to the whole tract, although a portion of it was plainly and visibly tide land claimed by the state.⁵⁰

§ 621. A covenant in praesenti; effect of incumbrance on executory contract. The American covenant against incumbrances in general use is a covenant *in praesenti* that the premises conveyed are free and clear of all incumbrances. It is generally treated as a personal covenant, not running with the land, and broken, if at all, the moment it is made; it is thereby turned into a chose in action in the covenantee, and therefore incapable of transmission to his grantee by deed of the premises.⁵¹ This rule is recognized in Iowa, and it is laid down there that if the grantee extinguishes the incumbrance he may

⁴⁶ Ireton v. Thomas, 84 Kan. 70, 32 L.R.A.(N.S.) 737; Kalinouski v. Jacobowski, 52 Wash. 359; Stuhr v. Butterfield, 151 Iowa 736, 36 L.R.A.(N.S.) 321 (unopened drainage ditch of which purchaser had knowledge from records); Arterburn v. Beard, 86 Neb. 733, and cases cited; Butt v. Riffe, 78 Ky. 352; Memmert v. McKeen, 112 Pa. 315; Patterson v. Arthurs, 9 Watts 152; Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85; Smith v. Hughes, 50 Wis. 620.

It is said in a late Wisconsin case that a highway is the only exception. Bennett v. Keehn, 67 Wis. 154, 162. See Messer v. Oestrich, 52 Wis. 684. That is not admitted to be such in Massachusetts (Kellogg v. Ingersoll, 2 Mass. 101), it seems. This is the rule in Illinois. Wadhams v. Swan, 109 Ill. 46. In New York there is no distinction recognized between incumbrances which affect the title and those simply affecting the physical condition of

the land. Huyck v. Andrews, 113 N. Y. 81, 10 Am. St. 432, 3 L.R.A. 789. And so in Missouri. White-side v. Magruder, 75 Mo. App. 364. See Teague v. Whaley, 20 Ind. App. 26. And Indiana. Quick v. Taylor, 113 Ind. 540; Sherwood v. Johnson, 28 Ind. App. 277.

⁴⁷ Estate of King, 18 Phila. 81.

⁴⁸ Helton v. Asher, 135 Ky. 751.

⁴⁹ O'Connor v. Enos, 56 Wash. 448.

⁵⁰ West Coast Mfg. & I. Co. v. West Coast I. Co., 25 Wash. 627, 62 L.R.A. 763.

⁵¹ Tuskegee L. & S. Co. v. Birmingham Realty Co., 161 Ala. 542, 23 L.R.A.(N.S.) 992; Seldon v. Jones, 89 Ark. 234; Crawford v. McDonald, 84 Ark. 415; Thompson v. Richmond, 102 Me. 335; Bailey v. Agawam Nat. Bank, 190 Mass. 20, 112 Am. St. 296; Maloy v. Holl, 190 Mass. 277; Simons v. Diamond M. Co., 159 Mich. 241; Pease v. Warner, 153 Mich. 140; Brass v. Vandecar, 70

recover the sum paid for that purpose;⁵² otherwise his relief cannot exceed a nominal sum. But the purchase of the grantor's notes and mortgage is not an extinguishment of them, they being assigned to the grantee and held by him at the time of the trial. To consider such a transaction an extinguishment would enable a grantee to buy in an incumbrance before maturity, hold it unsatisfied, and recover for the breach of his covenant, and then dispose of the notes and mortgage to one in good faith without notice before maturity and for a valuable consideration, and thus profit by the transaction.⁵³

The mere existence of an incumbrance will not relieve the vendee in an executory contract from the performance of the concurrent acts which it is his duty to do. Before he can maintain an action for the breach of the contract, either by way of damages for its non-performance or for the recovery of money paid, he must demand performance from the vendor unless that has been obviated by the acts of the latter, as by his express refusal in advance to comply with the contract or by placing himself in a position in which performance is impossible. The mere existence of an incumbrance at the time fixed for mutual performance does not relieve the vendee from the duty of making a tender and demand.⁵⁴

Neb. 35; *De Jarnette v. Dreyfus*, 166 Ala. 138; *Brodie v. New England M. S. Co.*, 166 Ala. 170; *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. 971; *Harsin v. Oman*, 68 Wash. 281; *Smith v. White*, 71 W. Va. 639, 48 L.R.A.(N.S.) 623; *Buren v. Hubbell*, 54 Mo. App. 617; *Copeland v. McAdory*, 100 Ala. 553; *Harrington v. Bean*, 89 Me. 470; *Duroe v. Stephens*, 101 Iowa 358; *Seventy-third St. B. Co. v. Jencks*, 19 App. Div. (N. Y.) 314 (compare *Geiszler v. De Graff*, 166 N. Y. 339); *Robinson v. Bierce*, 102 Tenn. 428, 47 L.R.A. 275; *Farrell L. Co. v. Deshon*, 65 Ark. 103; *Andrews v. Davison*, 17 N. H. 413, 43 Am. Dec. 606; *Mills v. Saunders*, 4 Neb. 190; *Bean v.*

Mayo, 5 Me. 94; *Eaton v. Lyman*, 30 Wis. 41; *Pillsbury v. Mitchell*, 5 id. 17; *Delavergne v. Norris*, 7 Johns, 358, 5 Am. Dec. 281; *Hall v. Dean*, 13 Johns. 195; *De Forrest v. Leet*, 16 id. 122; *Stanard v. Eldridge*, id. 254; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 246; *Wyman v. Ballard*, 12 Mass. 304; *Garrison v. Sandford*, 12 N. J. L. 261; *Brooks v. Moody*, 25 Ark. 452; *Stewart v. Drake*, 9 N. J. L. 139; *Wadhams v. Swan*, 109 Ill. 46. The states in which the rule is otherwise are indicated in § 625.

⁵² *Doyle v. Emerson*, 145 Iowa 358.

⁵³ *Harwood v. Lee*, 85 Iowa 622.

⁵⁴ *Ziehen v. Smith*, 148 N. Y. 558, reversing 73 Hun 571.

§ 622. **The rule of damages; remote losses.** Being regarded as a covenant of indemnity,⁵⁵ the mere existence of an incumbrance of the first class above mentioned is not ordinarily an actual injury, in the absence of anything done to enforce, or of anything paid by the covenantee to satisfy or extinguish it. In such cases, for the mere technical breach, nominal damages may be recovered, and no more. This was decided at an early day in New York,⁵⁶ the court saying: "If he (the covenantee) has not extinguished it, but it is still an outstanding incumbrance, his damages are but nominal, for he ought not to recover the value of the incumbrance on a contingency where he may never be disturbed by it. This is the reasonable rule; for if he was to recover the value of an outstanding mortgage the mortgagee might still resort to the mortgagor on his personal obligation and compel him to pay it; and if the purchaser feels the inconvenience of the existing incumbrance and the hazard until he is evicted he may go and satisfy the mortgage and then resort to his covenant." This is the settled American rule.⁵⁷ It has been applied in Illinois where the incumbrance was a railway

⁵⁵ A vendee cannot recover damages if he and the vendor's agent were secret partners in purchasing the land and realized a profit in excess of the sum sought to be recovered because of the existence of an incumbrance. *Vonderhite v. Walton*, 7 Ky. L. Rep. 766.

⁵⁶ *Delavergne v. Norris*, 7 Johns. 358, 5 Am. Dec. 281.

⁵⁷ *Wright v. Boggess*, 24 Cal. App. 533; *Tuskegee L. & S. Co. v. Birmingham Realty Co.*, 161 Ala. 542, 23 L.R.A.(N.S.) 992; *Seldon v. Jones*, 89 Ark. 234; *Ensign v. Colt*, 75 Conn. 111; *Thompson v. Richmond*, 102 Me. 335; *Glover v. O'Brien*, 100 Me. 551; *Bailey v. Agawam Nat. Bank*, 190 Mass. 20, 112 Am. St. 296; *Portsmouth Sav. Bank v. Yeiser*, 81 Neb. 343; *General Underwriting Co. v. Stilwell*, 139 App. Div. (N. Y.) 189;

D'Amelio v. Abraham, 54 N. Y. Misc. 386; *Thomas v. Ellison*, 102 Tex. 354; *International D. Co. v. Clemans*, 59 Wash. 398, citing the text; *Hamlin's Est.*, In re, 133 Wis. 140, 17 L.R.A.(N.S.) 1189; *Seventy-third St. B. Co. v. Jencks*, 19 App. Div. (N. Y.) 314; *McCord v. Massey*, 155 Ill. 123; *Buren v. Hubbell*, 54 Mo. App. 617; *McGuckin v. Milbank*, 152 N. Y. 297; *Farrell L. Co. v. Deshon*, 65 Ark. 103; *Tufts v. Adams*, 8 Pick. 547; *Harlow v. Thomas*, 15 id. 66; *Wyman v. Ballard*, 12 Mass. 304; *Prescott v. Trueman*, 4 id. 627, 3 Am. Dec. 246; *Johnson v. Collins*, 16 Mass. 392; *Clark v. Swift*, 3 Metc. (Mass.) 390; *Brooks v. Moody*, 20 Pick. 474; *Thayer v. Clemence*, 22 id. 490; *Jenkins v. Hopkins*, 8 id. 346; *Richardson v. Dorr*, 5 Vt. 9; *Andrews v. Davi-*

across a farm, and was a benefit to the property.⁵⁸ But the damages cannot be reduced by evidence of the enhanced value of the land on account of the road or of privileges accorded to the land-owner by the railway company, such value not being peculiar to the land in controversy.⁵⁹

Nominal damages may be recovered though the covenantee has not satisfied the incumbrance before action is brought on the covenant.⁶⁰ There may be actual injury from the mere existence of a mortgage; and whenever it is actually injurious the covenant affords an indemnity. In a Pennsylvania case the existence of a paramount mortgage having ten years to run gave cause to the creditors of the covenantee to press their demands; he made an assignment, and on the supposition of a sale of the premises to which the covenant related Duncan, J., said: "The grantee ought to recover all the actual damages he

son, 17 N. H. 413, 43 Am. Dec. 606; Osgood v. Osgood, 39 N. H. 209; Willson v. Willson, 25 id. 235, 57 Am. Dec. 320; Smith v. Jefts, 44 N. H. 482; Eaton v. Lyman, 30 Wis. 41; Pillsbury v. Mitchell, 5 id. 17; Eddington v. Nix, 49 Mo. 134; St. Louis v. Bissell, 46 id. 157; Bean v. Mayo, 5 Me. 94; Randell v. Mallett, 14 id. 51; Herrick v. Moore, 19 id. 313; Clark v. Perry, 30 id. 151; Reed v. Pierce, 36 id. 455, 58 Am. Dec. 761; Runnells v. Webber, 59 Me. 488; Mills v. Saunders, 4 Neb. 190; Garrison v. Sandford, 12 N. J. L. 261; Stewart v. Drake, 9 id. 141; Funk v. Voneida, 11 S. & R. 109; Patterson v. Stewart, 6 W. & S. 528; Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229; Hall v. Dean, 13 Johns. 105; Stanard v. Eldridge, 16 id. 254; Baldwin v. Munn, 2 Wend. 405, 20 Am. Dec. 627; Braman v. Bingham, 26 N. Y. 483; Foote v. Burnet, 10 Ohio 317, 36 Am. Dec. 90; Whisler v. Hicks, 5 Blackf. 102, 33 Am. Dec. 454; Smith v. Ackerman, 5 Blackf. 541; Pomeroy v. Burnett, 8 id. 142; Brady v.

Spurck, 27 Ill. 478; Willets v. Burgess, 34 id. 500; Richard v. Bent, 59 id. 38, 14 Am. Rep. 1; Cheney v. City Nat. Bank, 77 Ill. 562; Davis v. Lyman, 6 Conn. 255; Funk v. Creswell, 5 Iowa 62; Beecher v. Baldwin, 55 Conn. 419, 3 Am. St. 57; Bradshaw v. Crosby, 151 Mass. 237.

⁵⁸ Wadhams v. Swan, 109 Ill. 46.

In Alabama where land abutting on a street was conveyed, the grantor having previously released a railroad company from liability for damages because of its occupation of the street, the recovery was measured by the decrease in the market value of the land because of the operation of the railroad. Tuskegee L. & S. Co. v. Birmingham R. Co., 5 Ala. App. 499.

⁵⁹ Kellogg v. Malin, 62 Mo. 429, 432; Koestenbader v. Peirce, 41 Iowa 204.

⁶⁰ Thompson v. Richmond, 102 Me. 335; Harsin v. Oman, 68 Wash. 281; Smith v. Jefts, 44 N. H. 482; Beecher v. Baldwin, *supra*.

has sustained by the grantor's violation of his covenant because the very sale is the consequence of the incumbrance. If there is a judgment against him for the smallest sum, insufficient to condemn his land, by taking in the mortgage, which is a reprisal if due within seven years, his land is condemned and sold by means of this very incumbrance; sold for less, *minus* the mortgage money. Is not this an actual damnification to this amount, occasioned by the breach of covenant? If it was a judgment with a stay of execution and the land sold on a judgment against the grantee and the judgment against the grantor paid out of the proceeds of the sale, this is a damnification. So here, by the operation of law, a consequential damage arises from the delinquency of the grantor; in reality the plaintiff has sustained every possible damage he can sustain—he can never suffer more. It is the same thing to him as if the land had been sold on the mortgage given by the grantor. The equity of this case is to award to the plaintiff the fair present value of the mortgage.”⁶¹ The heirs of a grantor who has conveyed land to some of them as an advancement may recover from his estate the amount of a mortgage on the land conveyed; but they must share with their co-heirs the loss to the estate.⁶² Where the covenantee was not bound to indemnify his grantees because of incumbrances he could not recover from his grantor anything more than nominal damages because of the existence of an outstanding mortgage on a portion of the land which he had conveyed for its full value prior to the foreclosure of a mortgage executed by himself. He could, however, recover substantial damages in respect to the portion of the land owned by him at the time of such foreclosure, and of the title to which

⁶¹ Funk v. Voneida, 11 S. & R. 109; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341.

In General Underwriting Co. v. Stilwell, 139 App. Div. (N. Y.) 189, the grantee had not paid assessments against the property. The assignee sought to foreclose a mortgage on it; the mortgagor set up that he was acting for the mortgagee. A

majority of the court held that the mortgagor might set off damages because of the incumbrance. It was said that as an incident of the action the assessments must be paid out of the proceeds of the sale, and that a decree of sale would convert the nominal into actual damages.

⁶² Polley v. Polley, 82 Ky. 64.

he was thereby divested, by showing that the sum obtained therefor on the foreclosure sale was affected by the outstanding mortgage to his detriment.⁶³

In *Braman v. Bingham*⁶⁴ the grantor covenanted that the premises were subject to no incumbrances except mortgages to the amount of \$12,400; in fact there were mortgages to the amount of \$12,800. The grantee, having paid one of them exceeding \$400, recovered that sum with interest, without paying off those remaining; he was not confined to nominal damages. The court say, by Selden, J., that "the existence of \$400 of incumbrances in excess of the amount named in the covenant constituted a breach of the covenant, and entitled the plaintiff to nominal damages without having made any payment. Such covenant is broken as soon as made, if ever. When the plaintiff paid the excess of \$400 he became entitled to recover that amount as damages for the breach. By the terms of the covenant it appears to have been contemplated that the lands were to remain, for a time at least, subject to the lien of \$12,400. And it would not be reasonable to require the grantee to pay that sum, as well as the excess, to entitle him to a substantial indemnity for the conceded breach of the defendant's covenant." The grantor's liability for the existence of a lease on the premises is not enlarged because he had knowledge of the use the grantee intended to make of the premises unless it would be to impose upon him liability for their rental value for such use, at least in the absence of evidence showing that other local land could not be obtained for that use.⁶⁵ The fee paid an auctioneer for making a sale of premises subject to an inchoate right of dower may not be recovered because the purchaser refused to complete the purchase on discovering the existence of the dower right.⁶⁶ The existence of a lease on the premises is cause for

⁶³ *McGuckin v. Milbank*, *supra*.

⁶⁴ 26 N. Y. 483.

⁶⁵ *Wragg & Son v. Mead*, 120 Iowa 319.

The fair rental value of the land to the expiration of the term is the measure of recovery where there is an outstanding lease of it; but this

may be reduced to a nominal sum by showing that the grantee bought with notice that no rent was to be paid under the lease. *Bass v. Starnes*, 108 Ark. 357.

⁶⁶ *Harrington v. Murphy*, 109 Mass. 299.

the recovery of their fair rental value, and other damages proximately resulting therefrom. The purchaser may disclaim the lease and resort to the covenant of the grantor, in which event his recovery is not lessened by the rent the tenant is liable for. Under proper pleading the purchaser may recover the expense incurred in moving his goods to the premises. But he cannot recover the value of the crops growing on the land at the time of the breach, nor for the expense and trouble in seeking other premises in which to live, nor for board and rent until the lease expired, such trouble and expense ensuing after suit was begun.⁶⁷

§ 623. Same subject; payment of incumbrance; damages if not paid. If the covenantee pays off or procures a discharge of the incumbrance the amount he fairly and necessarily pays for that purpose, not exceeding, however, the purchase-money and interest from the time of payment, or the amount of the incumbrance where that is the standard, will be the measure of damages and may be recovered though such payment may have made after suit brought on the covenant.⁶⁸ The legal ground of action

⁶⁷ Musial v. Kudlik, 87 Conn. 164.

⁶⁸ Farrell L. Co. v. Deshon, 65 Ark. 103; Hartshorn v. Cleveland, 52 N. J. L. 473; Kelsey v. Remer, 43 Conn. 129, 21 Am. Rep. 638; Beecher v. Baldwin, 55 Conn. 419, 3 Am. St. 57; Cadmus v. Fagan, 47 N. J. L. 549; Crane v. Schafer, 140 Ill. App. 647, citing the text; Helton v. Asher, 135 Ky. 751; Charland v. Home for Aged Women, 204 Mass. 563, 134 Am. St. 696; Swinney v. Cockrell, 86 Miss. 318; McCrillis v. Thomas, 110 Mo. App. 699; D'Amelio v. Abraham, 54 N. Y. Misc. 386; Browning v. Stillwell, 42 N. Y. Misc. 346; Thomas v. Ellison, 102 Tex. 354; Lowe v. Simmons W. Co., 39 Utah 395; Bibb v. American C. & I. Co., 109 Va. 261; Porter v. Bradley, 7 R. I. 538; Fehlhaber v. Fehlhaber, 80 N. Y. Misc. 149; Richmond v. Ames, 164 Mass. 467; Corbett v. Wrenn, 25 Ore. 305; Johnson v. Brice, 102 Wis. 575, 580, citing

the text; Amos v. Cosby, 74 Ga. 793 (a wife who joins with her husband in conveying a homestead is liable on the covenant against incumbrances); Johnson v. Collins, 116 Mass. 392; Smith v. Carney, 127 id. 179; Bradshaw v. Crosby, 151 id. 237; Collier v. Cowger, 52 Ark. 322, 6 L.R.A. 107; Ward v. Ashbrook, 78 Mo. 515; Walker v. Deaver, 79 id. 664; Lane v. Richardson, 104 N. C. 642; Barnhart v. Hughes, 46 Mo. App. 318; Kent v. Cantrall, 14 Ind. 452; Rardin v. Walpole, 38 id. 146; Farnum v. Peterson, 111 Mass. 148; Foote v. Burnet, 10 Ohio 317, 36 Am. Dec. 90; Stambaugh v. Smith, 23 Ohio St. 584; Hall v. Dean, 13 Johns. 105; Comings v. Little, 24 Pick. 266; Norton v. Babcock, 2 Metc. (Mass.) 516; Garrison v. Sandford, 12 N. J. L. 261; Stoddard v. Gage, 41 Me. 287; Brooks v. Moody, 20 Pick. 474; Harlow v. Thomas, 15

is not a debt or obligation to pay money, but the breach of the covenant. There being such a breach before the action is commenced it is maintainable for some damages, and any actual loss which results from that breach down to the assessment of damages may be included.⁶⁹ But if the action is brought before the covenant is broken there cannot be a recovery of damages subsequently sustained in the removal of an invalid title, a right

id. 66; *Thayer v. Clemence*, 22 id. 490; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Grant v. Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *Chapel v. Bull*, 17 Mass. 213; *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595; *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761; *Davis v. Lyman*, 6 Conn. 255; *Wyman v. Bridgen*, 4 Mass. 150; *Wyman v. Ballard*, 12 id. 304; *Tufts v. Adams*, 8 Pick. 547; *Batchelder v. Sturgis*, 3 Cush. 205; *Waldo v. Long*, 7 Johns. 173; *Delavergne v. Norris*, id. 358, 5 Am. Dec. 281; *Stanard v. Eldridge*, 16 Johns. 254; *Baldwin v. Munn*, 2 Wend. 405, 20 Am. Dec. 627; *Stewart v. Drake*, 9 N. J. L. 139; *Funk v. Voneida*, 11 S. & R. 112; *Brown v. Brodhead*, 3 Whart. 124; *Henderson v. Henderson*, 13 Mo. 151; *St. Louis v. Bissell*, 46 id. 160; *Snyder v. Lane*, 10 Ind. 424; *Hurd v. Hall*, 12 Wis. 112; *Bailey v. Scott*, 13 id. 618; *Eaton v. Tallmage*, 22 id. 502; *McGary v. Hastings*, 30 Cal. 360, 2 Am. Rep. 456; *Burk v. Clements*, 16 Ind. 132; *Brandt v. Foster*, 5 Iowa 287; *Baker v. Corbett*, 28 id. 320. See *Connell v. Boulton*, 25 Up. Can. Q. B. 444; *Van Gilder v. Bullen*, 159 N. C. 291 (applying the rule to a case of fraudulent misrepresentations as to the state of the title); *Boice v. Coffeen*, 158 Iowa 705 (in equity provision may be made for the award of substantial damages in advance of the discharge of the in-

cumbrance); *Tukey v. Foster*, 158 Iowa 311.

An agreement to pay is not equivalent to payment. *Kirkendall v. Keogh*, 2 Ill. App. 492.

The last grantee of premises subject to annuities cannot enforce contribution from prior purchasers and may deduct from the purchase-money due the entire sum paid to secure their release. *Neely v. Williams*, 149 Fed. 60, 79 C. C. A. 82.

An action to recover the amount of a discharged incumbrance may be brought after the determination of an action involving only the recovery of nominal damages. *Harsin v. Oman*, 68 Wash. 281.

If the incumbrance is discharged by the grantor expenses claimed by the grantee on account of it will be closely scanned. *Bradshaw v. Crosby*, 151 Mass. 237.

⁶⁹ *Corbett v. Wrenn*, 25 Ore. 305; *Brooks v. Moody*, 20 Pick. 474; *Leffingwell v. Elliott*, 10 id. 204; *Wetmore v. Green*, 11 id. 462; *Morrison v. Underwood*, 20 N. H. 369; *Miller v. Hartford, etc. O. Co.*, 41 Conn. 112; *Moseley v. Hunter*, 15 Mo. 322; *Kelly v. Low*, 18 Me. 244; *Stambaugh v. Smith*, 23 Ohio St. 584; *Tufts v. Adams*, 8 Pick. 547 (redemption from mortgage foreclosure). See *International D. Co. v. Clemans*, 59 Wash. 398, as to the need of an amended or supplemental complaint; *Musial v. Kudlik*, 87 Conn. 164.

of action for which is given by statute. The right does not relate back to the institution of a suit brought before the breach.⁷⁰ No recovery can be had because of the extinguishment of an *alleged* incumbrance.⁷¹ Though an assessment for a street improvement is invalid, if the right of the city to have the amount determined in a legal way and to collect it from the property exists under the law, it is immaterial that the first assessment did not legally ascertain the amount due; whether that was done by that assessment or by a re-assessment would not affect the continuance of the lien. The avoidance of the original assessment merely cast upon the plaintiff the burden of showing *aliunde* that the sum he paid was reasonably necessary to release the land from liability for its just and legal share of the expense of the improvement.⁷² The same principle applies where a re-assessment is made of general taxes, as contradistinguished from local assessments; the re-assessment relates back to the time when the void assessment was made.⁷³ The fact that the amount of the lien in such cases was uncertain when the conveyance was made does not affect the liability of the grantor.⁷⁴ One who buys subject to an incumbrance does not acquire any rights

⁷⁰ *Tibbetts v. Lesson*, 148 Mass. 102. Sec. 18, ch. 126, Pub. Stats. of Massachusetts, provides that "whoever conveys real estate by deed or mortgage containing a covenant that it is free from all incumbrances when an incumbrance of record appears to exist thereon, whether known or unknown to him, shall be liable in an action of contract to the grantee," etc., for all damages sustained in removing the same. This does not change the rule that the covenant does not run with the land, and is broken, if at all, upon the delivery of the deed. *Kramer v. Carter*, 136 Mass. 504. Nor does it affect the measure of damages. *Bradshaw v. Crosby*, 151 id. 237. It is limited to incumbrances appearing of record in the registry of

deeds. *Carter v. Peak*, 138 Mass. 439.

A similar statute has been held to apply only to incumbrances appearing of record, but not existing in fact. *Hawthorne v. City Bank*, 34 Minn. 382.

⁷¹ *Robinson v. Bierce*, 102 Tenn. 428, 47 L.R.A. 275; *Barth v. Ward*, 63 App. Div. (N. Y.) 193 (assessment made under void statute; grantor not liable for assessment made subsequently under another statute).

⁷² *Cadmus v. Fagan*, 47 N. J. L. 549; *Hartshorn v. Cleveland*, 52 N. J. L. 473; *Coburn v. Litchfield*, 132 Mass. 449.

⁷³ *Peters v. Myers*, 22 Wis. 602.

⁷⁴ *Lafferty v. Milligan*, 165 Pa. 534; *Barnhart v. Hughes*, 46 Mo. App. 318.

against his vendor by extinguishing it.⁷⁵ A vendee who pays a judgment which is a lien on the land when the action which resulted in the judgment was being defended by his grantor who, after its rendition, undertook to protect the title of his grantee and obtained an injunction restraining further proceedings under the judgment, does so at his peril, it not being shown that the proceedings instituted by the grantor must necessarily have failed.⁷⁶ In equity damages sustained since the commencement of the action may be recovered.⁷⁷ Attorney's fees are not recoverable where the covenantee removes the incumbrance.⁷⁸

The covenantee is not obliged to pay off the incumbrance,⁷⁹ and if it is suffered to ripen into a title adverse and indefeasible the measure of damages, on eviction, will be the same as upon a covenant of warranty,⁸⁰ and perhaps without actual eviction.⁸¹ It has been held in Iowa that a purchaser who receives a deed containing a covenant against incumbrances from one who derived title by foreclosure of a senior mortgage, but without the junior mortgagee having been made a party to the foreclosure

⁷⁵ *Bracken v. Sobra Vista O. Co.*, 143 Cal. 678; *Corbett v. Wrenn*, 25 Ore. 305.

⁷⁶ *Tuggle v. Hamilton*, 100 Ga. 292.

⁷⁷ *Duroe v. Stephens*, 101 Iowa 358; *Moseley v. Hunter*, 15 Mo. 329; *Kelly v. Low*, 18 Me. 244; *Brooks v. Moody*, 20 Pick. 474.

⁷⁸ *Lowe v. Simmons W. Co.*, 39 Utah 395.

⁷⁹ *Carswell v. Habberzettle*, 99 Tex. 1, 122 Am. St. 597; *McGuckin v. Milbank*, 152 N. Y. 297; *Farrell L. Co. v. Deshon*, 65 Ark. 103.

The existence of an incumbrance warranted against absolves the purchaser, who may recover a payment made the auctioneer and the expense of examining the title. *Wetmore v. Bruce*, 54 N. Y. Super. Ct. 149, aff'd 118 N. Y. 319.

⁸⁰ *Stewart v. Drake*, 9 N. J. L. 139; *DeLong v. Spring Lake & S. G. Co.*, 65 id. 1; *Jenkins v. Hopkins*,

8 Pick. 346; *Norton v. Babcock*, 2 Mete. (Mass.) 510; *Dimmick v. Lockwood*, 10 Wend. 142; *Patterson v. Stewart*, 6 W. & S. 527, 40 Am. Dec. 586; *Chapel v. Bull*, 17 Mass. 213; *Monahan v. Smith*, 19 Ohio St. 384; *Smith v. Dixon*, 27 id. 471.

Where the rule prevails that the measure of damages on the breach of the covenant of warranty is the value of the land at the time of eviction, it applies to the breach of the covenant against incumbrances. *Beecher v. Baldwin*, 55 Conn. 419, 3 Am. St. 57. If the land has depreciated in value equal to the unpaid purchase-money the notes taken to secure the payment thereof may be set off against the damages claimed although they are barred as independent causes of action. *Id.*

⁸¹ *Alexander v. Bridgford*, 59 Ark. 195; *Nichol v. Alexander*, 28 Wis. 118.

proceedings, may buy in the junior mortgage, if the premises are of such value that he can better afford to pay the amount which it costs and retain them than suffer a redemption and eviction, and should be allowed to recover on the covenant against incumbrances the amount so fairly paid, notwithstanding he received and retained an interest paramount to the incumbrance of greater value than the amount which he paid for that interest,⁸² for purchasers have a right to the benefit of their purchases, and not simply to a return of their money and interest.⁸³ Referring to the case in which this doctrine was announced,⁸⁴ the court, in *Guthrie v. Russell*, says: "This court ignored the doctrine that the consideration paid is to be taken as the value of the property as between the parties. In that case the court aimed to give full compensation, thus following, to some extent, the rule adopted in Massachusetts and some other states, where the limit of recovery in an action for the breach of the covenant is the actual value of the property at the time of the eviction or at the time of extinguishing the incumbrance. Yet we cannot think that the court designed to depart altogether from the other rule above set forth, which is in accordance with the decided weight of authority and which is expressly held by this court in *Brandt v. Foster*.⁸⁵ We have no doubt that if * * * the incumbrance paid off had exceeded the purchase-money and interest, the plaintiff would have been limited in his recovery to that amount."

One of the appellate divisions of the New York supreme court has interpreted the rulings of the court of appeals of that state to the effect that when the covenant against incumbrances is breached by the existence of an easement the measure of damages is the difference in value of the land with and without the easement,⁸⁶ as favoring a larger measure of liability against the vendor than the value of the land at the time it was conveyed where the vendee has put improvements on the land and

⁸² *Guthrie v. Russell*, 46 Iowa 269, 26 Am. Rep. 135.

⁸³ *Knadler v. Sharp*, 36 Iowa 232.

⁸⁴ *Id.*

⁸⁵ 5 Iowa 295.

⁸⁶ *Huyck v. Andrews*, 113 N. Y.

81, 10 Am. St. 432, 3 L.R.A. 789.

See *Hymes v. Esty*, 133 N. Y. 342, 346.

accepted the conveyance without knowledge of the existence of the incumbrance. The opinion of Judge Parker on this point, favoring the liability of the grantor where the grantee pays the incumbrance to the amount of the payment made, *not exceeding the value of the property when payment was made*, has much force. He said: "Treating, then, the covenant against incumbrances as an indemnity, which it very clearly seems to be, nothing less than payment of the loss actually sustained by reason of the incumbrance can satisfy it. If the grantee has put valuable improvements upon the premises and thereby enhanced their value and the enforcement of an existing incumbrance upon them is about to deprive him of his property in them, evidently the loss which he sustains by reason of such incumbrance is the sum which he must pay to prevent such enforcement, not to exceed, however, the then value of the premises. The payment is made for the purpose of retaining to himself the use and ownership of such premises, and, of course, if not made he could lose no more than their value. But in very many cases, as in the one at bar, it is plain that the grantee will have to expend, in relieving the premises from the burden of the incumbrance, more than he originally paid for the premises, and if he may not recover upon the covenant a greater sum than such purchase price he has been by no means indemnified for the loss he sustains. In other words, complete indemnity cannot be made to the grantee by restoring to him only the purchase-money and interest when he has been deprived of property which far exceeds that amount in value. It is a fair presumption that, in all cases where lands are sold and conveyed, the parties understood that the purchaser will put such improvements on them as he deems necessary for their profitable use and enjoyment, and that in such manner the value of the premises may be greatly increased; and when a grantor covenants to indemnify the purchaser against an outstanding incumbrance he must be deemed to have contracted with a full understanding of the possibility of such increase and of the effect it would have upon the grantee's loss in the event that the incumbrance was enforced. I am not indifferent to the logic of the argument that if the value of improvements may not be con-

sidered in an action upon a covenant of seizin or for quiet enjoyment when the enforcement of the incumbrance has resulted in an eviction and the loss of the entire estate, they should not be allowed in estimating damages for a breach of the covenant against incumbrances when payment has been made instead of an eviction suffered; but my answer is that, however proper the rule may be in the actions in which it was promulgated, it falls too far short of adequate indemnity to be extended to the class of actions now being considered. * * * My conclusion is that, in an action similar to the one at the bar, the amount paid by the covenantee to protect himself against the enforcement of the incumbrance, not to exceed the value of the premises, is the measure of his damages. One of the controlling reasons which influenced the adoption of the existing rule in actions on covenants for quiet enjoyment was that it was a covenant running with the land, and that it could not be presumed that the grantor intended to covenant to pay for extensive improvements or for advances in value, of the extent of which he could make no calculation, and for which he received no consideration, and when that payment, in the years to come, might suddenly overwhelm him or his descendants in unexpected ruin. It is to be noticed that in a covenant against incumbrances the grantor is not contracting under any such uncertainty. He knows, particularly if he has, as in this case, himself created it, the exact amount of the incumbrance and the utmost extent of the liability he incurs; and when he enters into a personal covenant to indemnify the grantee against such incumbrances there is no reason apparent why he should not be held to the performance of his obligation.⁸⁷ The grantor's liability is not limited by the sum named in an indemnifying bond executed by him to the grantee; the latter may have recourse to the covenants in his deed.⁸⁸

If lands are conveyed by a single deed for an entire consideration actually paid and expressed therein it cannot be shown

⁸⁷ *Utica, etc. R. Co. v. Gates*, 8 McAdory, 100 Ala. 553.

App. Div. (N. Y.) 181, aff'g 21 N. Y. Misc. 205. *Contra*, *Copeland v.*

⁸⁸ *Hawkins v. Potter* (Tex. Civ. App.), 130 S. W. 643.

that there was a prior parol agreement to the effect that a part of the land conveyed, upon which there was an incumbrance, was granted without consideration.⁸⁹ If the estate bargained for is entirely defeated the purchaser's recovery cannot exceed the purchase-money and interest on it for six years; taxes paid by him cannot be added thereto.⁹⁰ Where a portion of the land is lost the vendee may recover so much of the consideration as is proportioned thereto.⁹¹ If the covenant in a deed excepts from the warranty against incumbrances a mortgage for a sum named, which was one-third of the amount of a mortgage covering the land conveyed and two other tracts of the same size, it will be presumed that each tract should bear one-third of the incumbrance; hence no action for the breach of the covenant lies until, upon the foreclosure of the mortgage, the land conveyed was made liable for the payment of more than one-third the mortgage debt.⁹² Where the vendor is entitled to a reconveyance of property which has been paid for and has had the income from it the vendee is entitled to interest on the purchase price on its repayment.⁹³

In a recent case⁹⁴ in which the grantee had been sued by a third person who claimed a right of way in the land upon which the grantee had encroached with a building the question of the grantor's liability for the expenses and attorneys' fees incurred by the grantee in defense of that action was considered. The pronouncement of the court is not positive because the facts were somewhat uncertain. It was said: If it was a question reasonably doubtful whether the plaintiff in that suit was right in his contention as to the right of way the present plaintiff had the right to defend that suit, and it may be that he had the right to ask the present defendant to defend it, and that any expenses reasonably incurred in defending against the claim of a right

⁸⁹ *Bruns v. Schreiber*, 43 Minn. 468.

⁹⁰ *Daggett v. Reas*, 79 Wis. 60; *Pearson v. Ford*, 1 Kan. App. 580; *Dimmick v. Lockwood*, 10 Wend. 142; *Foote v. Burnet*, 10 Ohio 317, 335, 36 Am. Dec. 90.

⁹¹ *Helton v. Asher*, 135 Ky. 751; *Alexander v. Bridgford*, 59 Ark. 195.

⁹² *Harwood v. Lee*, 85 Iowa 622.

⁹³ *Sharp v. Behr*, 136 Fed. 795.

⁹⁴ *Richmond v. Ames*, 164 Mass. 467, 475.

of way made in that suit he may recover of the present defendant.⁹⁵ Whether such expenses should include reasonable fees paid for counsel, in addition to the taxable costs, is, on the authorities, a question of some difficulty. If it was the duty of the present defendant to defend the suit and she had an opportunity of defending it and declined to do so, then, if the present plaintiff in good faith defended such suit it would seem reasonable that counsel fees should be recovered.⁹⁶ If no opportunity was given to the present defendant to defend the former suit, the law, perhaps, is more doubtful.⁹⁷ The purchaser must act with discretion in bringing an action else he may not recover fees paid his attorney.⁹⁸ He may not recover costs incurred in a prior action which failed because of acts which worked an estoppel.⁹⁹ The grantee who acquires an outstanding interest has the burden of showing the amount paid and that it was the reasonable and fair value of the interest acquired.¹ Where the breach of the covenant results from a mortgage, judgment, attachment or other incumbrance that the grantor may remove but little difficulty can exist in complying with this rule. But where the incumbrance is of such character that it is not removable as a matter of right, such as dower and the like, the damage

⁹⁵ *Bradshaw v. Crosby*, 151 Mass. 237; *Farnum v. Peterson*, 111 Mass. 148.

⁹⁶ *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 392. See *Leffingwell v. Elliott*, 10 Pick. 204.

A purchaser who resisted the establishment of an easement over land with the result that it was established at a point where it affected the land much less seriously than it would if the claimed right had been established, recovered from his vendor the costs of the action, including a reasonable attorney's fee, though the vendor disapproved of the defense in advance. *Helton v. Asher*, 135 Ky. 751.

⁹⁷ See *Lindsey v. Parker*, 142

Mass. 582; *Boston & A. R. v. Charlton*, 161 Mass. 32.

⁹⁸ *Brown v. Taylor*, 115 Tenn. 1, 4 L.R.A.(N.S.) 309, 112 Am. St. 811. In *De Jarnette v. Dreyfus*, 166 Ala. 138, the expense of filing an injunction against an evictor who held the paramount title were not recoverable against the grantor who was not notified.

⁹⁹ *O'Connor v. Enos*, 56 Wash. 448.

¹ *Grant v. Tallman*, 20 N. Y. 141; *Guthrie v. Russell*, 40 Iowa 269; *Farnum v. Peterson*, 111 Mass. 148; *St. Louis v. Bissell*, 46 Mo. 157; *Walker v. Deaver*, 5 Mo. App. 139; *Anderson v. Knox*, 20 Ala. 156; *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *Gilbert v. Rushmer*, 49 Kan. 632.

is not to be fixed by the action of the covenantee, but must be established by him if he seeks to recover more than a nominal sum.² Unless the grantor has notice of the grantee's purpose to incur expense in anticipation of the right to use the land for a particular purpose such expense is not an element of damage. A recovery for the value of its use and the expense of getting possession of it was allowed.³ Where the grantor obligated himself to furnish power to a third person for a series of years after the conveyance at a price less than the cost of producing it the grantee was entitled to recover the instalments of loss as they accrued or a lump sum equal to the sum total of the present worth of each instalment, computed at six per cent. from the time of the conveyance, subject to the rule that the total recovery should not exceed the consideration paid for the land.⁴ The grantee is entitled to the rent derived from land while the title is in escrow where the operation of the deed relates back to the time of the execution of the contract of sale and that draws interest.⁵ An intermediate covenantee who voluntarily purchases the outstanding title may not recover according to the rights of the immediate covenantee.⁶

§ 624. **The English and Canadian rule of damages.** In Canada the covenant against incumbrances has been construed and enforced to give substantial damages for the mere existence of incumbrances, as the covenant of seizin is generally in the United States, except that instead of following the analogy of allowing the consideration and interest for want of title, the amount of the incumbrance was held in the court of queen's bench to be the measure of damages without regard to whether it is more or less than the purchase-money.⁷ The rule of the case cited is based on *Lethbridge v. Mytton*,⁸ and has been ap-

² *McCord v. Massey*, 155 Ill. 123, 46 Am. St. 315; *Fraser v. Bentel*, 161 Cal. 390. See *Oppenheimer v. Knepper Realty Co.*, 50 N. Y. Misc. 186.

³ *Beutel v. American M. Co.*, 144 Ky. 57, 35 L.R.A.(N.S.) 779.

⁴ *Schimmelpfenning v. Brunk*, 153 Iowa 177.

⁵ *Scott v. Stone*, 72 Kan. 545.

⁶ *Thompson v. Richmond*, 102 Me. 335.

⁷ *Connell v. Boulton*, 25 Up. Can. Q. B. 444.

⁸ 2 B. & Ad. 772.

plied where the vendee had mortgaged the land and the mortgage given by his grantor covered other lands as well as those owned by the plaintiff, and was for a sum much greater than the value of the land at the time the action was brought. It was impossible to apportion the damages, and the measure was held to be the whole amount due on the mortgage, which was required to be paid into court to insure that the money reached its proper destination.⁹ A strong dissenting opinion by Meredith, J., sets forth the view that the English case only determines that at common law a plaintiff in an action for damages for breach of a covenant to pay off a specific mortgage on a specified day is not limited to nominal damages where he has sustained no actual loss; but in a case where the value of the land is greater than the amount of the mortgage may have judgment for that amount, and that the defendant must look to equity to compel the proper application of the money when recovered so that he may not run any risk of having to pay the amount more than once. The opinion points out that of three eminent writers upon the subject no two of them agree as to the effect of *Lethbridge v. Mytton*. Mr. Mayne's opinion is that it was rightly decided, and the principle applies to covenants against incumbrances, where the land is greater in value than the amount of the mortgage. Mr. Sedgwick's opinion was that the case was wrongly decided, and that the plaintiff was entitled only to nominal damages until actual damage was sustained or expense was incurred; while Mr. Rawle's opinion is that the case was rightly decided because the covenant was to pay a certain amount on a certain day, but that it is not applicable to the case of a covenant against incumbrances. The writer hereof agrees with the dissenting judge that there is much to be said in support of Mr. Rawle's view. A covenant to pay off a certain sum due on a certain mortgage at a specified time very materially differs from a covenant that no incumbrance exists. The one asserts, the other denies, the existence of incumbrances. In the one the covenant would, if Mr. Mayne's opinion is right, be broken as soon as made; in the other there would be no breach

⁹ *McGillivray v. Mimico R. E. S. Co.*, 28 Ont. 265 (1898).

until the time fixed for payment, a difference which may very seriously affect the plaintiff's right of action, as the judge pointed out, and if Mr. Mayne's opinion is right the covenant against incumbrances would be an exception to the general rule as to covenants for title both in Canada and in England in this, that they are continuing covenants running with the land, which may be sued upon from time to time as fresh damages arise. Upon first principles, the damages in such a case as this ought to be measured by the loss the plaintiff sustains; if it be substantially the land entirely, then he should have its value, but that is, under ordinary circumstances, the most. Therefore if there were no subsequent incumbrances the measure of the plaintiff's damages here should be the amount by which the value of the land is depreciated by reason of the existence of the incumbrance in question. By bringing his action he fixes the time at which that value is to be ascertained. There was not a complete failure of consideration, for under the deed he has had possession, and has raised \$600 on the security of the land. It may be that a release of this small portion of the mortgaged lands can be had for less than the value of the land, and if that be so that sum should be paid in so as to relieve the mortgagors to that extent from the mortgage. In no case can the plaintiff's damages exceed the value of all he can lose by reason of the existence of this mortgage, in respect to which he is in no way personally liable. But throughout the case the existence of the subsequent incumbrances seems to have been overlooked; they were created by the plaintiff or his vendor and subsist, and would seem to prevent the plaintiff recovering anything in this action until they are released. If he is liable to pay these mortgages they may, after payment, be an element in the damages of the plaintiff. Again, if the plaintiff's contention is right, if *Lethbridge v. Mytton* governs this case, then this covenant was broken as soon as made, and broken once for all, and the right of action never passed to the plaintiff. And apart from either of these considerations the inconsistency of judgment in favor of the plaintiff for more than fifty times the value of the land which is the subject-matter of this action is increased by the fact that the same land was mortgaged back to the defendants, and is yet

incumbered in their favor for more than eight times its value, as well as by the fact that a like claim may be made by the first of the subsequent incumbrances, whose rights are prior to those of the plaintiff, who took expressly subject to them.

In Canada the covenant is held to run with the land, although the grantor was in fact seized only of an equity of redemption; that it can be sued upon as such by the grantee; and the court of common pleas held that the measure of damages was the difference between the value of the equity of redemption and the indefeasible estate of inheritance contracted for and paid for, that difference being represented by the amount for which the mortgage stands as security.¹⁰

¹⁰ *Empire G. M. Co. v. Jones*, 19 Up. Can. C. P. 245. A very interesting and instructive opinion on this point was given in this case. The court says: "Upon the question of damages, *Hackett v. Boulton*, 3 C. P. 407, is an express authority that substantial damages are recoverable. *Carlisle v. Orde*, 7 C. P. 456, although there was a bond of indemnity sued upon as well as a covenant, shows, I think, the opinion of Draper, C. J., to have been that substantial damages are recoverable upon the covenant under the circumstances appearing here. The only difference between *Connell v. Boulton*, 25 U. C. 444, and this case is that there the mortgage was due. It is an authority, also, that substantial damages are recoverable. *Raymond v. Cooper*, 8 C. P. 388, and *Carr v. Roberts*, 5 B. & Ad. 78, were cases of bonds of indemnity. *Lethbridge v. Mytton*, 2 B. & Ad. 772, was a case of a covenant of indemnity, and to pay off a mortgage within a year. Ten years elapsed without its having been paid, and although the mortgage never was enforced, on an action being brought on the covenant, the covenantee was

held entitled to recover the full amount of the mortgage, although no damages whatever, further than what consisted in its mere existence, had been sustained by him. In *Graham v. Baker*, 10 C. P. 426, and *Snider v. Snider*, 13 C. P. 156, the breaches consisted in a simple naked negation of title, and the parties had possession, and no damage by reason of the existence of any incumbrance was stated or suggested. It was treated that the defect of title might have been cured by lapse of time, so that these cases cannot affect the present. There are, however, observations in *Kennedy v. Solomon*, 14 Q. B. at p. 628, in the judgment of the late Chief Justice Sir John Robinson, which give some countenance to the contention of the defendant, that nominal damages only are recoverable here. The observations alluded to are not upon a point upon which the judgment was given, for the judgment was upon the covenant for quiet enjoyment. They related to the covenants for seizin and for good title. There is also a difference between the covenant for right to convey there and here; for here the covenant is spe-

§ 625. In some states covenant runs with land. In several of the states this covenant is held to run with the land for the

cially directed to a right to convey free from incumbrance, so as to assimilate it to a covenant that the premises are free from incumbrances. Moreover, the learned chief justice does not express a decided opinion, but a doubt only. * * * He says, 'a mortgage or payment is treated in equity not as a matter affecting the title or right to convey, because they hold that the mortgagor or the judgment debtor is, nevertheless, the owner of the estate, and entitled to convey subject, of course, to the incumbrance. In *Townsend v. Champernown*, 1 Y. & J. 449, the court said that in practice, in the master's office, a mortgage, even though it may be to secure a sum larger than the value of the property, is always treated and considered as matter of conveyance, and not of objection to the title; and I find no authority for holding that it is otherwise regarded at law, though I do not feel confident that when a mortgage in fee has been given by the vendor, before giving the conveyance in which he covenants for title, and where the mortgage money has not been paid, an action might not lie on the covenant for title, and nominal damages be recovered, though the vendee had never been molested by any claim under the mortgage while it was unsatisfied.' Now, on a bill for specific performance in equity, the reference to the master is to inquire and report whether a good title *can be* made, and when first shown. It is shown by an abstract which must show all the incumbrances; and the abstract is held to be complete, and a good title shown whenever it appears that upon certain acts being

done the legal and equitable estates will be in the purchaser; consequently, the appearance of incumbrances on the abstract is no reason why the master should report that a good title cannot be made; nor do they afford sufficient grounds of exception to his report that a good title can be made; for, the court being in possession of what the incumbrances are, before the conveyances come to be made, can and does cause them to be removed, and gives the purchaser ample protection against them. This is the extent of the rule in equity, and the like rule prevails at law in executory contracts, where the contract points to the showing the title and not to the perfecting it in the purchaser, by conveyance. *Savory v. Underwood*, 23 L. T. (Q. B.) 141. But the rule, I apprehend, does not, and indeed cannot, have any application to executed contracts. The court of chancery treats the mortgage as an incumbrance, and causes it to be removed, or makes ample provision for the protection of the purchaser against it; acting upon the principle that the court will not—inasmuch as everything it does is done with a view of perfection—cause conveyances to be executed containing a covenant, which when executed would, *eo instanti*, give to the purchaser an action at law to recover damages in respect of these same incumbrances. True it is that in equity the mortgagor is in a sense deemed to be the owner of the estate, and the mortgage only a pledge and an incumbrance. Treating it as an incumbrance presently existing is sufficient for the purpose of this action; but it is to be added that at

protection of the owner who suffers actual injury from the incumbrance. It is there held that the covenantee may recover

law, the mortgagee in fee is regarded in quite a different light. He is seized of the estate; and that being so, the mortgagor *cannot* be. When he then assumes to convey in fee simple or absolute, and covenants for seizin or for good title simply, the rule prevailing in equity, upon references to the master on bills for specific performance, can furnish no rule for fixing the measure of damages sustained by reason of the breach of that covenant, short of the protection given by the court of chancery itself, when the conveyance comes to be executed; namely, full protection and indemnity against the incumbrances.

"In *Howell v. Richards*, 11 East 642, Lord Ellenborough says: 'The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey, viz.: in this case an indefeasible estate in the fee-simple.' Now, if he executes a deed purporting to convey such an estate, when he in fact has only an equity of redemption, the legal estate being in a mortgagee in fee, and covenants that he has such an estate, how can it be said that this covenant is not substantially broken? And if substantially broken, that is, not merely technically, but in substance, how can it be said that the purchaser should be restricted to the recovery of nominal damages only? *Vane v. Lord Barnard*, Gilb. Eq. 7, before Lord Chancellor Cowper, has been referred to; but that, in my judgment, rightly understood, is a strong case in support of the recovery of substantial damages in this case. Lord Barnard, on the marriage of

his son, entered into articles with trustees, whereby he covenanted to settle certain lands to the usual limitations of marriage settlements; and he covenanted 'that, in such settlement, there shall be covenants that he is seized in fee, has good right to convey, and that the trustees shall enjoy free from incumbrances.' It happened that these lands were charged by Lord Barnard's own marriage settlement with £6,500, to be paid to such 'daughter, or daughters, as should be living at his death, and not provided for.' A bill was filed against Lord B. for a specific performance of the covenant in his son's articles by Lord B.'s paying off or otherwise giving collateral security against the contingent portion of £6,500. All parties had notice of this charge when Lord B.'s covenant was given. The lord chancellor refused this relief, saying: 'Lord B. has not covenanted that the lands are free from incumbrances, but only that in the settlement he would give specific covenants. Notice or no notice was very material in this case; for, where a covenant is in this manner, if any incumbrance is discovered between the executing the articles and the sealing the deed of settlement, whereof the party had no notice, that incumbrance shall be discharged even before the sealing of the deed of settlement, because it would be needless to enter into a covenant which, before entering into, is already known to be broken. Now, when you have notice of an incumbrance before executing the articles, you consent with your eyes open to accept the party's covenant against incumbrances you were aware of; and when you have

nominal damages for the technical breach which happens at the moment of executing the deed containing the covenant in con-

chosen your own security this court will give no other security than by the articles is agreed to, and the rather in this case for that the portion is not a certain incumbrance but a contingent one. It was strongly urged by Mr. Vernon that, supposing these articles were but a covenant *to covenant*, yet as soon as the articles were performed by sealing the deed of settlement, then they might on that day file a bill to enforce specific performance of the covenant.' The lord chancellor said in this case they could not, 'for the incumbrance was not necessary but contingent; and if you brought an action at law upon such a covenant you would not recover two pence until *breach*, which possibly *may never happen*; so relief was refused against this contingent covenant, but was granted in respect of another charge which was present and not contingent.' The reporter adds: 'It seems the portion being *contingent*, and *not certain*, was the reason of this part of the decree, because it is plain by the latter part of the decree where the incumbrance was certain, viz., the payment of a yearly sum, and Lord B. was decreed immediately to discharge it, though by the articles he did but covenant to covenant;' and the report concludes: 'Note the difference between a present covenant that the lands are free from incumbrance and that a man shall execute a deed with covenant that the lands are free, and between a covenant that lands are free and that the trustee shall enjoy the lands free.'

"The portion in this case, it is to be observed, in respect of which the relief was refused, and to which the

lord chancellor referred when he said an action at law would not lie, was not a present incumbrance. It had nothing of the character of a '*debitum in presenti solvendum in futuro*.' It depended upon two contingencies whether it would ever become an incumbrance; namely, Lord B. leaving a daughter him surviving, and her not being provided for. The contingency referred to was not whether, admitting the charge to be a present incumbrance, it might or not ever be enforced to the damage of the covenantee, but whether it ever should become a present incumbrance. That this was the view of the lord chancellor is apparent from his decreeing indemnity against the charge which was payable annually, and which was not therefore as yet payable, although by possibility it might never be enforced, to the damage of the covenantee. That was a present incumbrance, *debitum in presenti solvendum in futuro*; and therefore it was decreed to be discharged. The portion, on the contrary, was somewhat of the character of an inchoate right to dower which is not a present charge on the estate, and for which no action lies [see *ante*, § 619, note]. Here the mortgage is a present incumbrance, and the covenant is a present covenant, so that Vane v. Lord Barnard is an authority that substantial damages are recoverable here. But the case of Lock v. Furze, 19 C. B. (N. S.) 119; and in the exchequer chamber, L. R. 1 C. P. 441, conclusively places the principle for estimating the measure of damages upon a sound, firm and rational basis, namely, that there is no difference in this respect

sequence of the mere existence of the incumbrance; yet, that this does not arrest the covenant and merge it in a chose in action; that a judgment for such damages does not operate as a bar to a fresh suit in favor of the covenantee or even a remote

between a contract entered into on the sale of real property and on the sale of a chattel. The true measure of damages in both cases is the difference between the value of the thing as it is and as it was warranted to be. The old case of *Gray v. Briscoe*, Noy, 142, is reaffirmed, where the covenant was that the covenantor was seized of Blackacre in fee-simple, when in truth it was copyhold land. The court held the covenant to be broken, and that the plaintiff should recover damages according to the rate that the country values fee-simple more than copyhold. The rule as now settled by *Lock v. Furze*, after a review of all the cases, I take to be this: that as affecting contracts relating to realty, in the case of executory contracts, upon the vendor failing to establish a good title, the vendee shall recover his deposit, if any, and interest, and such reasonable expenses as he has incurred in investigating the title; and in case he has entered into possession, in pursuance of the contract, then perhaps such further sum as he may have reasonably expended on the property in the expectation of the contract being fulfilled. In case the contract has been executed, but no title has passed at all, then, on a covenant for seizin or good right to convey, he shall recover back his principal and interest and expenses; but in case some estate has passed by the deed, but not the whole estate contracted for, then he is entitled to recover the difference in money between the value of that

estate which has passed and that which the deed purported to convey, and which the grantor covenanted that he had a right to convey. Now to apply this rule to the present case. The deed purported to convey an indefeasible estate of inheritance in fee-simple, free from incumbrances done or knowingly suffered by the grantor. All that the grantees have in truth obtained is an equity of redemption which is subject to a mortgage which constitutes a present incumbrance, although the moneys secured thereby are payable at future periods. The covenant is broken; the plaintiffs, therefore, have a right to recover in damages the difference between the value of the equity of redemption which they have got, and the indefeasible estate of inheritance which they contracted for and paid for. That difference is represented by the amount for which the mortgage stands as a security, and neither more nor less. A case might no doubt arise, as where the amount secured by the mortgage is made payable at a remote period, and either without interest or at a low rate of interest, in which it might be necessary to make a deduction equivalent to the difference between the value of a present payment of the principal, and payment at the deferred period; but in this case there arises no question of that kind."

See *Mayne on Damages* (8th Eng. ed.), p. 260. This author favors the same view: "There seems to be no difference in principle be-

grantee when, in the time or during the ownership of either, a substantial injury is sustained; and that for such injury recovery may be had, limited *in maximum* only as is the recovery upon the other covenants.¹¹ This is substantially the rule in Ohio, Indiana,¹² Illinois, Wisconsin, South Carolina, New York, Michigan, Texas and Missouri, except that in some states no right of action accrues until the vendee has been ousted or

tween a covenant against incumbrances and a covenant to pay them off. If so, the point is decided in England," referring to *Lethbridge v. Mytton*, 2 B. & Ad. 772. He continues: "I conceive that the rule laid down by the court of king's bench is the true one. The damages are not, as Mr. Sedgwick seems to suppose, given in respect to a future contingent loss. They are the proper compensation for an actual and existing loss. The question is: how much is the value of the estate diminished at the moment by the existence of the incumbrances? If interest has to be paid upon them there is a clear loss of annual profit; but suppose the interest is provided for elsewhere and the estate is merely an ultimate security, still the owner is damnified to the full amount of the incumbrances, if he should wish to sell the estate, or mortgage it, or to charge portions upon it. True, he may not want to do any of these things at present, but as soon as he does want to do them he will undoubtedly fail. It is no satisfaction to a man who has to break off a match, for instance, because he cannot effect a settlement, to be told that he may bring an action and obtain substantial damages. Nor is it any answer to say that he may himself pay off the incumbrance and then sue; because very likely he may have no ready money, and be unable to bor-

row any on account of the incumbered condition of his estate; in short, the American doctrine converts a covenant to pay off incumbrances into a covenant of indemnity against incumbrances, which it is apprehended is a very different thing."

¹¹ *Eaton v. Lyman*, 30 Wis. 41, 33 id. 34; *Meeklem v. Blake*, 22 id. 495; *Pillsbury v. Mitchell*, 5 id. 17; *Dickson v. Desire*, 23 Mo. 151; *Foot v. Burnet*, 10 Ohio 317, 36 Am. Dec. 90; *Backus v. McCoy*, 3 Ohio 211, 17 Am. Dec. 585; *Devore v. Sunderland*, 17 Ohio 60; *Overhiser v. McCollister*, 10 Ind. 41; *McCready v. Brisbane*, 1 N. & McC. 104, 9 Am. Dec. 676; *Jeter v. Glenn*, 9 Rich. 376; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Gardner v. Letson*, 8 Ohio Dec. 256, quoting the text (court of common pleas); *Lescaleet v. Rickner*, 16 Ohio C. C. 461; *Geiszler v. De Graaf*, 166 N. Y. 339; *Post v. Campau*, 42 Mich. 90; *Wyatt v. Dunn*, 93 Mo. 459; *Seibert v. Bergman*, 91 Tex. 411.

¹² The covenant included in the general warranty in the statutory form of deeds runs with the land and is not *in presenti* unless the deed was ineffectual as a conveyance, in which case the covenant would be *in presenti*, being broken as soon as made. *Worley v. Hineman*, 6 Ind. App. 240.

The common-law rule that an action on a covenant running with the

has been obliged to extinguish the incumbrance.¹³ In most of these states the rule in respect to this covenant is the same that is applied in actions for breach of the covenant of seizin. They are treated as covenants of indemnity against actual damage, arising in the one case from the want of lawful title and in the other from the assertion of a paramount incumbrance; they run with the land until such damage has actually been sustained.¹⁴ The covenant may be sued upon by the subsequent grantee notwithstanding it was broken while the title was in the prior grantee if the latter did not sue before he conveyed and the subsequent grantee has been damaged by the breach.¹⁵ Where land conveyed by a deed containing a covenant against a local assessment, which is an incumbrance, is subsequently conveyed subject to the assessment the continuity of the covenant is broken, and a subsequent grantee who acquires title under a deed containing such a covenant cannot recover upon it in an action against the original grantor.¹⁶

land is a local one has been changed by statute in Indiana, and whether or not a deed executed there and conveying lands in another state contains a covenant that runs with the land is to be decided by the local law. *Id.*

It is further said in the case cited: Usually, it is true, a special covenant against incumbrances is *in præsenti*, and does not run with the land, as such covenant is broken as soon as made, and vests the right of action at once in the immediate covenantee, and in him alone, or, in case of his death, in his legal representatives; but it is otherwise where the covenant against incumbrances is embraced in the general warranty. In that case any breach calculated to disturb the grantee in the enjoyment of his property is covered by his covenant, embracing as it does a guaranty for future as well as present enjoyment. He may wait until

he is evicted and then sue, or he may pay off the incumbrance and bring his action, provided he finds it necessary to extinguish the incumbrance in order to ward off an eviction if the land is legally bound.

¹³ *Langenberg v. Heer* D. G. Co., 74 Mo. App. 12; *Hunt v. Marsh*, 80 Mo. 396; *Coleman v. Whittle*, 79 S. C. 212, 128 Am. St. 841 (in the absence of fraud); *Hamlin's Est.*, *In re*, 133 Wis. 140, 17 L.R.A.(N.S.) 1189, citing *Spoor v. Green*, L. R. 9 Ex. 99; *Yancey v. Tatlock*, 93 Iowa 386; *Jenkins v. Hopkins*, 9 Pick. 543; *Post v. Campau*, 42 Mich. 90; *Wyatt v. Dunn*, 93 Mo. 459.

¹⁴ *Walker v. Deaver*, 79 Mo. 664; *Mecklem v. Blake*, 22 Wis. 495; *Langenberg v. Heer* D. G. Co., *supra*; *Buren v. Hubbell*, 54 Mo. App. 617.

¹⁵ *Langenberg v. Heer* D. G. Co., *supra*.

¹⁶ *Geiszler v. De Graaf*, 166 N. Y. 339.

The court of last resort in New York has recently settled the conflict of decisions in that state¹⁷ in favor of the rule that covenants against incumbrances run with the land. It is said in the opinion that in England the law became so uncertain in this respect, as the result of conflicting decisions,¹⁸ that the controversy was set at rest by the enactment of a statute which provided that the covenants should run with the land unless otherwise restricted in the conveyance. * * * "The covenant is for the protection of the title, and there is no good reason why it should not be held to run with the land, like the covenant of warranty or quiet enjoyment. The principle which was at the foundation of the common-law rule, that choses in action were not assignable, having become obsolete, there is no reason that I can perceive why the rule should survive the reason upon which it was founded."¹⁹

In *Post v. Campau*²⁰ Cooley, J., said: "If all incumbrances were of the same nature and might be got rid of at the pleasure of the owner of the property incumbered there would be no difficulty and no wrong in applying to all the same rule. But anything is an incumbrance which constitutes a burden upon the title: a right of way,²¹ a condition which may work a forfeiture of the estate,²² a right to take off timber;²³ a right of dower, whether assigned or unassigned.²⁴ In short, every right or interest in the land, to the diminution of the land, but consistent with the passage of the fee by the conveyance.²⁵ Some of these are permanent in their nature and incapable of being removed at the option of the covenantee. They permanently reduce the value of the title conveyed, and this as much at the

¹⁷ *Coleman v. Bresnahan*, 54 Hun 619; *Clarke v. Priest*, 21 App. Div. (N. Y.) 314 (holding that the covenant runs with the land). *Seventy-third St. B. Co. v. Jencks*, 19 App. Div. (N. Y.) 314, and *Geiszler v. De Graaf*, 44 App. Div. (N. Y.) 178, hold otherwise.

¹⁸ *Kingdon v. Nottle*, 1 M. & S. 355, 4 id. 53; *Spoor v. Green*, L. R. 9 Ex. 99.

¹⁹ *Geiszler v. De Graaf*, *supra*.

²⁰ 42 Mich. 90.

²¹ *Clark v. Swift*, 3 Metc. (Mass.) 390.

²² *Jenks v. Ward*, 4 Metc. (Mass.) 412.

²³ *Cathcart v. Bowman*, 5 Pa. 317.

²⁴ *Runnells v. Webber*, 69 Me. 488.

²⁵ *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 246.

time of the conveyance as at any future time; and it is therefore reasonable to hold that the covenant against them is broken at once and finally. The covenantee may at once proceed to recover full damages. But when the covenant consists of a money charge, capable of being removed at some time, but which has yet caused no loss to the covenantee, the doctrine that because the promise of the covenant is technically broken by the existence of the incumbrances [substantial damages may be recovered] must often in its application prove a denial of justice. A covenant may be said to run with the land when its purpose is to give future protection to the title which the deed containing the covenant undertook to convey, and it does not run with the land when its whole force is given assurance against something which immediately affects the title and causes present damage. Tested by this rule, a covenant against an incumbrance which consists in a right of way would not run with the land; but a covenant against a money charge must attach itself to the title conveyed and accompany it, not only for the protection of the covenantee, but for the protection of any of his assigns whom the incumbrance may eventually damnify.²⁶ It is only by thus distinguishing between incumbrances that the covenant can have reasonable effect in all cases and, when the courts thus discriminate, there is no difficulty in giving substantial redress under definite and inflexible rules of law. When the law can be just and also certain, there is no reason why an unjust certainty should be perpetuated. * * * I am of the opinion that the better and only just rule is that a right of action accrues when substantial damage is suffered, and that there may be successive breaches when, by successive acts or occurrences, damage is from time to time suffered as a consequence of the incumbrance."

In Ohio an action is not maintainable for a mere technical breach of the covenant of seizin.²⁷ But it is there held that the covenant against incumbrances is broken as soon as made if an incumbrance in fact exists; and a right of action thereon im-

²⁶ Foote v. Burnet, 10 Ohio 332,
36 Am. Dec. 90; Knadler v. Sharp,
36 Iowa 232; Richard v. Bent, 59
Ill. 38, 14 Am. Rep. 1.

²⁷ See Ohio cases just cited, and
Stambaugh v. Smith, 23 Ohio St.
584.

mediately accrues to the covenantee at least for nominal damages. In such action, however, more than such damages cannot be recovered unless the covenantee has removed the incumbrance or it be shown that his possession has been disturbed, or his use or enjoyment of the land has in some way been interfered with by reason of it.²⁸

In Illinois the covenants of seizin and against incumbrances are differently expounded. They are thus compared:²⁹ "Where the covenant of seizin is broken and there is an entire failure of title the breach is final and complete, the covenant is broken once for all; actual damages, and all the damages that can result from the breach, have accrued; the measure of damages is the purchase-money and interest, which are at once recoverable. In such case the right of action is substantial, and its transfer may well be held to come within the rule prohibiting the assignment of choses in action. But as the covenant against incumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance. And where there is the barren right of recovery of only nominal damages the right of action is one only in name, and is essentially no right of action. It is distinguishable from an ordinary chose in action." And further: "As the doctrine of covenants running with land is an exception to the common-law rule that choses in action are not assignable, why limit its sphere of usefulness and confine it to those covenants which may be broken in the future? May it not as well extend to such as have been only nominally broken at the time of the assignment, and the substantial breach occurs afterwards, and the whole damages are sustained by the assignee? It does not appear to be a sufficient answer that the rule denying the action to the assignee creates only a formal difficulty, as the assignee may maintain an action in the name of the assignor for his use. This is a cumbrous form of a remedy, and the remedy is liable to be embarrassed. In the case in

²⁸ *Stambaugh v. Smith, supra*; *Blandeau v. Sheridan*, 81 Mo. 545.
Buren v. Hubbell, 54 Mo. App. 617; ²⁹ *Richard v. Bent, supra*.

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hand such rule would require this suit, as we understand, to be brought in the name of the assignee in bankruptcy, * * * and to establish the right of action in such assignee might be a serious inconvenience. If it be held that the real cause of action on such a covenant accrues immediately upon the making of the deed it would seem that the statute of limitations would then commence to run when the breach was only formal and no actual damage suffered or recoverable, and when, perhaps, the incumbrance was not even discovered; and afterwards, when the incumbrance comes to be discovered, or when the actual loss on account of the incumbrance arises and the substantial breach takes place, the statute of limitations may have run against the action. In the state of the authorities, not feeling embarrassed by any former decision of our own upon that point, we feel free to adopt the rule which we regard as the more reasonable and just. That is obviously the one which sustains this action in the present form [in the name of the assignee of the covenant] for the breach of the covenant against incumbrances, and admittedly so by courts which have felt constrained to lay down the contrary rule only in supposed obedience to the strict common-law rule." The law of the state wherein the land is situated determines whether the covenant runs with the land.³⁰

§ 626. **Criticism of the rule of damages.** It appears to be assumed very generally in this country that the mere existence of a money incumbrance upon land is no injury to a purchaser; that unless the incumbrance has been asserted or the covenantee has paid something to extinguish it there is a mere technical breach for which only nominal damages should be allowed, and only grudgingly conceded to be a right of action,³¹ that it would be unjust to allow the covenantee, who may never be disturbed by the incumbrance, to recover the amount for which it is security from the covenantor, for the lien is only collateral to a personal obligation which might still be enforced against the covenantor; and to permit such a recovery would not only expose him to the danger of being called upon to pay the debt a

³⁰ Riley v. Burroughs, 41 Neb. 296.
See § 605.

³¹ See Richard v. Bent, 59 Ill. 38,
14 Am. Rep. 1.

second time, but would give the covenantee a certain compensation for an uncertain and contingent loss. To avoid this supposed injustice the general course of decision in this country has been to deny the covenantee more than nominal damages for the mere existence of a money incumbrance covenanted against, or to oblige him to extinguish it; or else to treat the covenant as a continuing one in favor of the owner, who may pay it or be foreclosed by it—even by a remote grantee who has been denominated “the last purchaser and the first sufferer.” This view is so firmly fixed in our jurisprudence that it is probably idle to question or criticise it; but it may be remarked that the rules on this subject are not modified when the mortgage or other incumbrance is not collateral to any personal obligation of the covenantor. No exception is made where there is no such obligation, or where the incumbrance is created by some former owner. Where it is actually security for the covenantor’s personal obligation as payment pending the suit entitles the covenantee as plaintiff to increase his damages by the amount paid, there is no sound reason for requiring him to advance the money for that purpose, since a payment of the incumbrance by the party whose covenant is broken after suit brought on the covenant against him would certainly go in mitigation and avert the danger of a second recovery. Nor is it true that the recovery of substantial damages for the mere existence of an incumbrance on premises sold and warranted to be unincumbered is obnoxious to the objection of allowing a certain compensation for a contingent loss. This is affirmed by a preponderance of authority in respect to the covenant of seizin which is of the same nature. The existence in a third person of a paramount title justifies a full recovery as for want of that title. But it is said the covenant against incumbrances is one of indemnity. True; but it is so as a consequence of this rule of damages. Why should it be deemed more a covenant of that description than any other in a deed? It is designed for the same general purpose, to assure to a purchaser the full benefit of his purchase. While the incumbrance exists the granted premises are diminished in market value to the amount of it. The purchaser to that extent fails to obtain the fruits of his purchase; to that extent the seller has

purchase-money for which he has not fulfilled, as contemplated, the contract of sale. An incumbrance is deemed in other cases to produce real injury if its existence impairs the market value of the land; for, universally, incumbered land is estimated at a value reduced by the amount of the incumbrance for all the purposes of ownership. The right of recovery on this covenant for the existence of an easement or any permanent incumbrance is commensurate with this reduction of value. The fact that an estate can be sold is one of its elements of value and is not to be excluded from consideration.³²

If this covenant is held to run with the land it will pass by a deed without covenants—by even an execution sale. On what hypothesis is the last purchaser the first sufferer? Only on the supposition that he has bought the premises as unincumbered and paid full value. Then, if he has purchased without covenants, it may be just to allow him the benefit of the covenant to his grantor, who would, in the case supposed, have no occasion to avail himself of it; but the first sufferer would then be saved from loss only by the provident caution of his grantor. But if, as is presumably the case more frequently, the land is sold with a knowledge of the incumbrance and without any covenant against it the purchaser buys at a price reduced on account of the incumbrance, and the reduction of the price is equal to or greater than the amount which must be paid to disincumber the title. In that case, if the purchaser has the benefit of the covenant, he may discharge the incumbrance and reimburse himself by a suit on the covenant against the original grantor and thus obtain a clear title for a price reduced by reason of an incumbrance which costs him nothing to remove.

§ 627. Damages where incumbrance permanent. Incumbrances of the second class are not removable at the will of the seller or purchaser; and when the covenant is broken by the existence of such an incumbrance recovery, proportioned to the actual injury, may be had in an action brought at once; and if no actual injury can be inferred or is not proved nominal damages only can be recovered. The inquiry in such cases, adapted to the par-

³² *Wetherbee v. Bennett*, 2 Allen 423.

ticular circumstances, is, what is the injury naturally and proximately resulting from the existence of the incumbrance to the purchaser.³³ For the existence of a mere inchoate right of dower only nominal damages can be given, for during the life of the husband it is uncertain that any loss will ever occur; and so, if the right is consummated by the death of the husband, so long as the dower has not been assigned; for the widow may never procure an assignment of it.³⁴ It was held in an early Massachusetts case³⁵ that the existence of a paramount right to the premises was an incumbrance; that if the plaintiff had not extinguished the right and it still remained against the title he could only recover nominal damages; but if he had, at a just and reasonable price, extinguished such paramount title so that it could never afterward prejudice the grantor the price so paid would be the measure of damages.³⁶ A recovery by the widow of a remote vendor of a proportionate part of the value of the land is cause for holding a subsequent grantor liable only for that proportion of the consideration received as expressed in his deed, that being conclusive as between strangers to it.³⁷

³³ *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Myers v. Munson*, 65 Iowa 423; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426, 62 Mo. 429; *Barlow v. McKinley*, 24 Iowa 69; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Butler v. Gale*, 27 Vt. 730; *Van Wagner v. Van Norstrand*, 19 Iowa 427; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 246; *Batchelder v. Sturgis*, 3 Cush. 205; *Hubbard v. Norton*, 10 Conn. 422; *Harlow v. Thomas*, 15 Pick. 66; *Giles v. Dugro*, 1 Duer 335; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Chapel v. Bull*, 17 Mass. 212; *Greene v. Creighton*, 7 R. I. 1.

³⁴ *Hazelrig v. Hutson*, 18 Ind. 481; *Blevins v. Smith*, 104 Mo. 583, 13 L.R.A. 441; *Sheafe v. O'Neil*, 9 Mass. 13; *Runnells v. Webber*, 59

Me. 488. See *Cowan v. Kane*, 211 Ill. 572.

Where the vendor is guilty of fraud in representing that his wife joined him in the deed the measure of damages is the difference between the value of the land under the disability of the purchaser to convey it and what it would have been worth had the inchoate right of dower been conveyed. *Brisbane v. Pomeroy*, 13 Daly 358.

³⁵ *Prescott v. Trueman*, *supra*, approved in *Richmond v. Ames*, 164 Mass. 467.

³⁶ *Ward v. Ashbrook*, 78 Mo. 515; *Walker v. Deaver*, 79 Mo. 664 (without regard to the value of the land or the amount of the purchase-money); *Carter v. Denman*, 23 N. J. L. 260.

³⁷ *Blackwell v. McBride* (Ky. Super. Ct.), 14 Ky. L. Rep. 760.

Where the incumbrance was a right of way over the granted land for the purpose of taking water from a spring situated on it the covenantee was held entitled to just compensation for the real injury resulting from the continuance of the easement.³⁸ Just compensation in such case has generally been estimated by the amount which the existence of the easement reduces the market value of the land.³⁹ To this should be added interest on the use of the money paid.⁴⁰ Interest will be allowed for a period not in excess of six years antecedent to the eviction.⁴¹ Where the incumbrance has been extinguished there may be a recovery for the injury sustained between the date of the deed and the time of the extinguishment and also of the reasonable expenses incurred in securing the extinguishment, including a reasonable attorney's fee.⁴² There cannot be a recovery of an attorney's fee incurred in another action, though the grantor had notice of it, if the judgment therein was binding upon him only as to the existence of the incumbrance; where the damages recoverable from one grantor are based on the injury sustained at the time of the breach of his covenant a judgment against him is not determinative of the liability of another grantor; hence one of these is not chargeable with the costs of a defense made by the grantee at the suit of another.⁴³

³⁸ *Harlow v. Thomas*, 15 Pick. 66; *Harrington v. Bean*, 89 Me. 470, citing the text.

³⁹ *Bailey v. Agawam Nat. Bank*, 190 Mass. 20, 112 Am. St. 296, 3 L.R.A.(N.S.) 98; *Fraser v. Bentel*, 161 Cal. 390, quoting the text; *Hall v. Gale*, 20 Wis. 292; *Streep v. Abeln*, 59 Mo. App. 485; *Copeland v. McAdory*, 100 Ala. 553; *Whiteside v. Magruder*, 75 Mo. App. 364 (in the absence of evidence concerning special damages or benefits the value of the land occupied by a railroad with interest thereon from the time of sale was allowed); *Richmond v. Ames*, 164 Mass. 467; *Vonderhite v. Walton*, 7 Ky. L. Rep. 766; *Giles v. Dugro*, 1 Duer 331; *Kellogg v. Malin*, 62 Mo. 429; *Wil-*

liamson v. Hall, id. 405; *Mitchell v. Stanley*, 44 Conn. 312; *Kostendader v. Pierce*, 37 Iowa 645; *Koestenbader v. Peirce*, 41 Iowa 204; *Brantley v. Johnson*, 102 Ga. 850; *Myers v. Munson*, 65 Iowa 423; *Smith v. White*, 71 W. Va. 639, 48 L.R.A.(N.S.) 623.

The lessened value of land resulting from a building restriction are susceptible of ascertainment with reasonable certainty. *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. 971.

⁴⁰ *Myers v. Munson*, 65 Iowa 423.

⁴¹ *De Long v. Spring Lake & S. G. Co.*, 65 N. J. L. 1.

⁴² *Helton v. Asher*, 135 Ky. 751.

⁴³ *Myers v. Munson*, 65 Iowa 423.

The damages resulting from the existence of a right of way are usually assessed as of the date of the trial. If there have been special damages theretofore suffered by reason of the exercise of the right of way these may be shown up to the date of the trial.⁴⁴ In the absence of other proof as to the extent of the damages resulting from the existence of an easement the sum which the plaintiff's grantor accepted for it may be taken to be a fair measure of the plaintiff's loss.⁴⁵ Where the plaintiff had never been disturbed in the enjoyment of his estate by any user of the way and the right had been extinguished without expense the court refused to instruct the jury to return a verdict for nominal damages only. It was held not to follow from these facts that there was no actual damage. While the right of way lasted the plaintiff was precluded from using the part of the land covered by the way as fully as he otherwise might have done. He could not set a tree, or a post, or a building upon it; or inclose or cultivate it; or sell or lease it to any person to whom such an incumbrance would be objectionable. It was an apparently permanent subtraction from the substance of the estate. The court approved of an instruction to the effect that the plaintiff was entitled to just compensation for the real injury resulting to the estate in its market value from the incumbrance.⁴⁶ And this measure of compensation cannot be modified by showing that, notwithstanding the incumbrance, the premises are susceptible of some of the beneficial uses incident to ownership; nor can it be enhanced by showing special injury from the incumbrance by reason of some special use the purchaser intended to make of the premises, but which was not communicated to the seller and did not form the basis of the contract of purchase.⁴⁷ The probability that a restriction concerning the use to which land may be put will not be en-

⁴⁴ *Richmond v. Ames*, *supra*.

⁴⁵ *Estate of King*, 18 Phila. 81, said in a note to have been affirmed by the supreme court of Pennsylvania. But see *Bonzer v. Garrett*, — Tex. Civ. App. —, 162 S. W. 934, *contra*,

⁴⁶ *Wetherbee v. Bennett*, 2 Allen 428; *Foster v. Foster*, 62 N. H. 46; *Smith v. Davis*, 44 Kan. 362.

⁴⁷ *Wetherbee v. Bennett*, *Foster v. Foster*, *Smith v. Davis*, *Fraser v. Bentel*, *supra*; *Batchelder v. Sturgis*, 3 Cush. 201; *Kellogg v. Malin*, 62 Mo. 429.

forced has been held competent evidence on the question of the warrantee's damage.⁴⁸ Where the owner of property, the use of which was restricted, contracted to sell it unrestricted for a certain price, but the vendee refused to complete the purchase because of the existence in the owner's chain of title of a deed creating restrictions as to the character of buildings to be erected, and the owner thereafter sold the property as restricted and sued his grantor for damages it was ruled that these were measured by the difference in the value of the property unrestricted and restricted, and that as bearing upon this difference in value evidence of the amount expended by the plaintiff upon the property in necessary improvements, between the dates of the two sales, was admissible, but there could not be a recovery of interest upon the amount of such damages because the incumbrance was permanent.⁴⁹

Where a hotel was erected upon two parcels of land purchased from different persons, each of which was subject to a covenant forbidding its use for the sale of liquor, one of such grantors, whose deed covenanted against incumbrances, was not relieved from the duty of defending, upon the request of the grantee, an action brought against the latter for the violation of the restrictive covenant, and failing to do so became liable for the costs and counsel fees reasonably incurred by his grantee in defending the action, that having resulted in an injunction restraining the violation of such restrictive covenant.⁵⁰

"While the question as to the measure of damages has usually arisen in cases brought for damages for breach of covenants against incumbrances and the incumbrance has been paid by the covenantee, yet in all cases the doctrine seems to be recognized that where the incumbrance has resulted in an adverse and indefeasible title, under which the covenantee has been evicted from all or a part of the premises, he may recover all or a proportionate part of the consideration paid. This seems to be a fair and equitable doctrine. The covenantee may not in all cases be able or willing to pay off the incumbrance, and when

⁴⁸ *Foster v. Foster*, 62 N. H. 532.

⁵⁰ *Charman v. Tatum*, 54 App.

⁴⁹ *Doctor v. Darling*, 68 Hun 70. Div. (N. Y.) 61. See § 82 *et seq.*

he does not choose to do so he should have the right to recover of the covenantor the damages he may sustain by reason of being evicted from all or a part of the premises conveyed to him, limited, of course, to the amount of the consideration actually paid for the property, with interest thereon for not exceeding six years."⁵¹

§ 628. **Same subject.** In a case where the incumbrance consisted of a prior grant of timber growing on a farm, with the privilege of entering to cut it during a future term, it was held that the covenant was broken as soon as made, and that the measure of just compensation was the value of the timber for the purposes of the farm at the time of the grant.⁵² In another

⁵¹ Per Corson, J., in *Loiseau v. Threlstad*, 14 S. D. 257; *Dimmick v. Lockwood*, 10 Wend. 142; *Jenkins v. Hopkins*, 8 Pick. 346; *De Long v. Spring Lake, etc. Co.*, 65 N. J. L. 1; *Tandy v. Waesch*, 154 Cal. 108; *Rayman v. Klare*, 242 Pa. 448. See § 616 as to interest.

⁵² *Cathcart v. Bowman*, 5 Pa. 217, 47 Am. Dec. 408.

In a recent case there was an incumbrance on an eighth fractional part of the land conveyed, consisting of the grant of the right to enter and cut all the "saw-timber." The damage was measured by the diminished value of the whole tract—the difference between its value if the title were good and its value as depreciated by the incumbrance. The writer of the opinion observed: "We readily perceive that a strong argument can be made in favor of the view that the recovery ought to be limited to the amount which would have been recovered if the entire title of the incumbered portion had failed; for it would seem in this case that the plaintiff ought not to recover more damages for the sale by the defendant of the timber on the forty acres than he would

for the sale of the fee-simple interest in it. So, on the other hand, it could be urged with equal force that the damages would be the same, ordinarily, whether the trees were cut from a part of the land or miscellaneously from all parts, provided the number and kind of trees cut were in each case the same. Making choice between two difficulties, we prefer to adopt the simpler and more convenient rule, which, as we have said, is to compensate the plaintiff for the estimated diminution in value of his entire tract of land by reason of the incumbrance from the time of the breach of the covenant with interest and costs of suit, not, however, to exceed the purchase-money paid for the whole tract with interest." *Clark v. Zeigler*, 79 Ala. 346, 350, 85 id. 154.

"When crops have reached the point where they have a distinct value of their own as a part of the soil, it is no injustice to the grantor to treat them as a building or any other fixture would be treated and to allow the value thereof if it can be ascertained." *Newburn v. Lucas*, 126 Iowa 85.

case the incumbrance was an existing contract running with the land to fence a railroad passing through the premises, and it was held that the inquiry in respect to damages was how much the land charged with the obligation of maintaining the fence was affected by that obligation; in other words, how far the existence of that incumbrance impaired the value of the estate to the owner and what would be the difference in its fair market value by reason of its existence.⁵³ All the damages resulting from an incumbrance giving a stranger to the title a paramount right of flowage as to a portion of the land conveyed are suffered by the grantee on the day the conveyance is made, and he is entitled to recover such sum as will place him in as good condition as if the covenant had not been broken—the difference between the value of the land as it was in fact and its value as it would have been without the incumbrance, with interest thereon from the date of the conveyance.⁵⁴ An outstanding lease may be an incumbrance, and when it is and there is a suspension of the covenantee's enjoyment during its continuance, the annual value or the interest on the purchase-money has been allowed for that time as damages;⁵⁵ and in other cases the fair rental value of the land to the expiration of the term.⁵⁶ If there is a crop on the land to harvest after the delivery of the deed the value of the crop, less the cost and expense of caring for and harvesting it, may be considered in estimating the injury to the grantee from being deprived of the possession of the premises. The conveyance does not substitute the vendee in place of the vendor and make the former the landlord so as

⁵³ *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335, 118 Mass. 156; *Burbanks v. Pilsbury*, 48 N. H. 475, 97 Am. Dec. 633.

⁵⁴ *Harrington v. Bean*, 89 Me. 470.

⁵⁵ *Rickert v. Snyder*, 9 Wend. 416.

⁵⁶ *Porter v. Bradley*, 7 R. I. 542; *Fritz v. Pusey*, 31 Minn. 368; *Wragg & Son v. Mead*, 120 Iowa 319, 17 Am. Neg. Rep. 274; *Clark v. Fisher*, 54 Kan. 403; *Edward v. Clark*, 83 Mich. 246, 10 L.R.A. 659; *Moreland v. Metz*, 24 W. Va. 119, 49 Am. Rep.

246; *Rickert v. Snyder*, 9 Wend. 416; *Christy v. Ogle*, 33 Ill. 295; *Wetherbee v. Bennett*, 2 Allen 428; *Brass v. Vandecar*, 70 Neb. 35; *Malsbary v. Jacobus*, 88 Neb. 751; *Brown v. Taylor*, 115 Tenn. 1, 112 Am. St. 811, 4 L.R.A.(N.S.) 309; *O'Connor v. Enos*, 56 Wash. 448; *Browning v. Stillwell*, 42 N. Y. Misc. 346. Compare *Batchelder v. Sturgis*, 3 Cush. 201. See *Van Wagner v. Van Nostrand*, 19 Iowa 422; *Grace v. Scarborough*, 2 Spear 649.

to limit his recovery to such sum as the tenant is liable for.⁵⁷ The grantor's liability is not enlarged beyond the rental value because he knew of the use for which the property was purchased.⁵⁸ This rule applies regardless of the nature of the incumbrance. The value of the land is to be fixed as of the date of the conveyance and upon the basis of the price paid.⁵⁹ Where the incumbrance is a life estate or an estate in dower its value for the time the purchaser is kept out of its enjoyment is the rule of damages; ⁶⁰ and, as has been said, the duration of a life may be determined by life tables.⁶¹ The grantee of land on which is a party-wall built by the mutual agreement of his grantor and the latter's co-owner and at their joint cost must have his damage assessed with reference to his rights in the easement on the land of such co-owner and in view of the whole of the original agreement.⁶²

If the covenantee extinguishes an incumbrance of this class the amount which he fairly and reasonably pays for that purpose will be the measure of damages.⁶³ He must show that the sum paid was reasonable, and otherwise than by proving the fact that he paid it.⁶⁴

§ 629. **Liability of remote covenantor.** Where the property conveyed is incumbered with a perpetual easement the liability of a remote covenantor is not necessarily the same as that of a subsequent one. The original vendee had a right of action

⁵⁷ Clark v. Fisher, Browning v. Stillwell, *supra*.

⁵⁸ Vragg & Son v. Mead, *supra*.

In Batchelder v. Sturgis, *supra*, it is held that there cannot be a recovery of the lessened value of land for the purpose of resale unless the fact that it was purchased for such purpose was communicated to or known by the grantor. It was said: There are cases where purchases are made expressly for particular purposes and where the party may be liable for extrinsic damages on account of the loss of the particular purpose or object.

⁵⁹ Sherwood v. Johnson, 28 Ind.

App. 277; Phillips v. Reichert, 17 Ind. 120, 79 Am. Dec. 463.

⁶⁰ Tierney v. Whiting, 2 Colo. 620; Christy v. Ogle, 33 Ill. 295; Terry v. Drabenstadt, 68 Pa. 400.

⁶¹ Mills v. Catlin, 22 Vt. 106; § 455.

⁶² Mackey v. Harmon, 34 Minn. 168.

⁶³ Chapel v. Bull, 17 Mass. 213; Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169. See last note to § 627.

⁶⁴ Anderson v. Knox, 20 Ala. 156; St. Louis v. Bissell, 46 Mo. 157; Dickson v. Desire, 23 Mo. 151, 167, 66 Am. Dec. 661.

before he conveyed.⁶⁵ His rights as against his grantor depended upon the effect of the easement on the market value of the property at the time of the breach and interest on the amount of the depreciation resulting.⁶⁶ The rights of the second grantee as against his grantor would be affected by the conditions existing when his right of action accrued. The first grantor is not liable for attorneys' fees paid by a subsequent grantor in defense of an action against him on his covenant.⁶⁷ A vendee who admits that the market value of his land is enhanced by reason of the dedication by his vendor of part of it for streets cannot recover damages therefor merely because his vendee, to whom he sold the land for a particular purpose, has recovered damages of him.⁶⁸

§ 630. Where covenant is connected with that for quiet enjoyment. The covenant against incumbrances in use in England, and to some extent also in this country, is connected with the covenant for quiet enjoyment, and is to the effect that the grantee shall enjoy the premises free of incumbrances. It is not broken by the mere existence of an incumbrance, and hence there can be no recovery of nominal damages based upon that fact. It assures the purchaser against disturbance in the future by means of any incumbrance, and hence runs with the land.⁶⁹ The covenant to warrant and defend the premises against the lawful claims of all persons is, so far as the question of eviction is concerned, equivalent to the covenant for quiet enjoyment.⁷⁰ Such covenant is broken by the existence of an outstanding paramount right to an easement which naturally impairs the value of the estate conveyed and interferes with the use and possession of some portion of it although

⁶⁵ *Myers v. Munson*, 65 Iowa 423.

⁶⁶ *Id.*; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. 432, 3 L.R.A. 789, approved in *Hymes v. Esty*, 133 N. Y. 342.

⁶⁷ *Myers v. Munson*, *supra*.

⁶⁸ *Vonderhite v. Walton*, 7 Ky. L. Rep. 766.

⁶⁹ See *Martin v. Barber*, 5 Blackf. 232; *Hutchins v. Moody*, 30 Vt. 658;

Carter v. Denman, 23 N. J. L. 260; *Grace v. Scarborough*, 2 Spear 652, 42 Am. Dec. 391; *Greene v. Creighton*, 7 R. I. 1; *Jeter v. Glenn*, 9 Rich. 374; *Rawle on Cov.* (4th ed.) 89, 90.

⁷⁰ *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426; *Harrington v. Bean*, 89 Me. 470; *Shattuck v. Lamb*, 65 N. Y. 503.

there is not a technical, physical ouster from the actual possession of any portion of it. There is, in such a case, an eviction *pro tanto*.⁷¹

§ 631. **Covenant to pay incumbrances.** Another form of covenant relating to incumbrances is that to pay and discharge them. This form usually relates to some pecuniary lien or charge on the land which the covenantor has the right to remove by payment. If he neglects to perform within the time fixed therefor, or within a reasonable time if none is fixed, the covenantee, without having paid anything to extinguish the lien, is entitled to recover, by the almost uniform course of decision, the present amount of the incumbrance.⁷² The rule as stated has been varied in Oregon in a case where a part of the mortgaged land was conveyed and the grantees covenanted to pay the mortgage debt and save the mortgagor harmless therefrom. On the sale of the entire tract under foreclosure the measure of recovery was what the reserved part of the tract was worth at the time of the foreclosure. The rule requiring the party entitled to the benefit of the covenant to protect himself from loss and limiting his recovery because of his failure to do so was regarded as inapplicable because the promise to pay was absolute.⁷³ The plaintiff might have bought the land at the

⁷¹ Harrington v. Bean, Lamb v. Danforth, *supra*; Clarke v. Estate of Conroe, 38 Vt. 469; Russ v. Steele, 40 Vt. 310; Scriven v. Smith, 100 N. Y. 471, 53 Am. Rep. 224.

⁷² Haas v. Dudley, 30 Ore. 355; Stichter v. Cox, 52 Neb. 532; Stout v. Folger, 34 Iowa 71, 11 Am. Rep. 138; Gage v. Lewis, 68 Ill. 604; Jones v. Parks, 78 Ind. 537; McAbee v. Cribbs, 194 Pa. 94; Williams v. Fowle, 132 Mass. 385; Locke v. Homer, 131 id. 93, 41 Am. Rep. 199; Reed v. Paul, 131 Mass. 129; Shanahan v. Perry, 130 id. 460; Lethbridge v. Mytton, 2 B. & Ad. 772; Carr v. Roberts, 5 id. 78; Gardner v. Niles, 16 Me. 279; Gennings v. Norton, 35 id. 308; Booth v. Starr,

1 Conn. 249, 6 Am. Dec. 233; Lathrop v. Atwood, 21 Conn. 123; Dorsey v. Dashiell, 6 Md. 204, 61 Am. Dec. 300; Hogan v. Calvert, 21 Ala. 199; Ardesco O. Co. v. North American O. & M. Co., 66 Pa. 381; Scobey v. Finton, 39 Ind. 275; Manahan v. Smith, 19 Ohio St. 384; Gilbert v. Wiman, 1 N. Y. 550; Ex parte Negus, 7 Wend. 499; Webb v. Pond, 19 id. 423; Thomas v. Hammond, 47 Tex. 42; Lowe v. Turpie, 147 Ind. 652, 37 L.R.A. 233; Dana v. Goodfellow, 51 Minn. 375; Wilson v. Graham, 16 Manitoba 101. See Wetmore v. Greene, 11 Pick. 462; and § 624.

⁷³ Wicker v. Hoppock, 6 Wall. 94, 18 L. ed. 752.

sale, and if it did not sell for enough to satisfy the mortgage he could have paid the balance, and, under the rule referred to, that would have measured his recovery. The defendant, however, was the principal debtor, and as between him and the plaintiff, when the former assumed the payment of the mortgage, the plaintiff was a mere surety. The land conveyed was primarily liable for the payment of the amount assumed, and that retained by the plaintiff was liable for a deficiency only. Under these circumstances the plaintiff was not bound to discharge the obligation of the defendant, nor to take any steps in the foreclosure proceedings. It was by the default of the defendant that the plaintiff was deprived of his property and damaged to the extent of its value.⁷⁴ The liability for the breach of a special contract to pay all damages resulting from the failure to pay or remove a vendor's lien is measured by the value of the property lost at the time it was lost.⁷⁵ If the mortgage has been paid out of the land or extinguished by the act of the mortgagee only nominal damages can be recovered.⁷⁶ If the grantor in a warranty deed gives his grantee a bond conditioned for the satisfaction of a mortgage on the land conveyed the bond is a security independent of the deed. If the title is lost by foreclosure the damage will be the consideration paid and interest on it from the time of eviction.⁷⁷ This measure of recovery is not affected by the covenantee's transactions in matters not connected with the breach of the contract by the covenantor, as where the former purchased an assignment of the certificate of sale of the land in question and other land at a foreclosure sale, the whole being sold as one parcel; the covenantor was not entitled to have the certificate of sale of the land not conveyed to the covenantee assigned to him upon paying the sum originally paid for the certificate.⁷⁸ The grantee may have his

⁷⁴ Haas v. Dudley, 30 Ore. 355, 363. The opinion specially refers to Wilcox v. Campbell, 106 N. Y. 325.

⁷⁵ Hassard v. May (Tex. Civ. App.), 152 S. W. 665.

⁷⁶ Muhlig v. Fiske, 131 Mass. 110.

⁷⁷ Howell v. Moores, 127 Ill. 167;

Manahan v. Smith, 19 Ohio St. 384; Chinn v. Wagoner, 26 Mo. App. 678; Bohlcke v. Buchanan, 94 id. 320, 327. See Commercial I. Co. v. National Bank, 36 Wash. 287.

⁷⁸ Dana v. Goodfellow, 51 Minn. 375.

obligations for the unpaid purchase-money canceled.⁷⁹ The damage resulting from the breach of such a covenant may be liquidated in advance.⁸⁰ Depreciation in the market value of land between the dates of the conveyance and the operation of the statute of limitations upon the incumbrance is not a basis upon which to award damages.⁸¹ A grantee who fails to pay an incumbrance must answer for the difference between the amount obtained on a sale of the land, that being more than the incumbrance, and the purchase price.⁸²

There is a difference between a contract to discharge or acquit from a debt and one to discharge or acquit from the damage by reason of it. Where the condition of the contract is to discharge or acquit the plaintiff from a bond or other particular thing then, unless this be done, the defendant is liable from the nature of the contract, though the plaintiff has not paid it. But if it be to discharge or acquit the plaintiff from any damage by reason of such bond or particular thing, then it is a condition to indemnify and save harmless.⁸³ If, however, it affirmatively appears that the promisees were not liable and had no personal debit relations with the creditor, if such promisees can recover at all they can only recover what they have lost by the default. This is the general rule of damages, to which the cases giving the debtor damages to the amount of his debt, against one who agrees to pay it, are exceptions, resting on special reasons.⁸⁴ When the instrument deviates the least from a simple contract to indemnify against damages, even where indemnity is its sole object and where, in consequence of the prior liability of other persons, no actual loss may be sustained, the decisions, though not heretofore altogether harmonious, have gradually inclined to the allowance of actual compensation measured by the full

⁷⁹ *Chinn v. Wagoner, supra.*

⁸⁰ *Fasler v. Beard*, 39 Minn. 32.

⁸¹ *Egan v. Yeaman* (Tenn. Ch. App.), 46 S. W. 1012, affirmed by supreme court without opinion.

⁸² *Young v. Stone*, 4 W. & S. 45.

⁸³ 1 *Saunders* 117, note 1; *Booth*

v. Starr, 1 Conn. 244, 250, 6 Am. Dec. 233; *Munn v. Eckford*, 15 Wend. 502; *Keep v. Brigham*, 6 Johns. 158; *Thomas v. Allen*, 1 Hill 145; *Rockfeller v. Donnelly*, 8 Cow. 623; *Chace v. Hinman*, 8 Wend. 452.

⁸⁴ *Pratt v. Bates*, 40 Mich. 37.

amount of the liability which the defendant undertook to pay.⁸⁵ If the deed excepts incumbrances to a specified amount and these are assumed by the grantee the grantor is bound to discharge any existing incumbrance in excess of such sum.⁸⁶ A vendor who acts in bad faith in failing to remove an incumbrance and thereby causes the vendee unnecessary trouble and expense may become liable for the attorney's fees of the latter.⁸⁷

The purchaser of land who assumes the payment of a mortgage upon it out of the proceeds of the sale of the land occupies a different position from one who buys subject to the mortgage; while, in either case, he would take the land charged with the debt, he would, in the latter instance, not be personally liable; in the former that liability would attach as soon as the money to pay had been realized from the sale of the land. If the purchase was made subject to the mortgage he is entitled to contest its validity in an action to establish his liability for the debt.⁸⁸

SECTION 6.

DEFENSES AND CROSS-CLAIMS AGAINST PURCHASE-MONEY.

§ 632. **Diversity of decisions.** Independently of the provisions of the modern codes regulating counter-claims, there has not been much uniformity of practice in respect to defenses which may be made in actions for purchase-money. In some states this defense in actions upon contract has been permitted to some extent under the name of failure of consideration, and

⁸⁵ *Id.*; *Hodgson v. Bell*, 7 T. R. 97; *Devol v. McIntosh*, 23 Ind. 529; *Johnson v. Britton*, *id.* 105; *Scobey v. Finton*, 39 *id.* 275; *Warwick v. Richardson*, 10 M. & W. 284; *Sparkes v. Martindale*, 8 East 593; *Ross v. Pye*, *Yelv.* 207; *Wood v. Wade*, 2 Stark, 167; *Thomas v. Allen*, 1 Hill 145; *Holmes v. Rhodes*, 1 B. & P. 638; *Post v. Jackson*, 17 Johns. 239; *Churchill v. Hunt*, 3 Denio 321; *Farquhar v. Morris*, 7

T. R. 124; *Smith v. Pond*, 11 Gray 234; *Stewart v. Clark*, 11 Mete. (Mass.) 384. See *Stephens v. Boulton*, 23 Up. Can. Q. B. 16.

⁸⁶ *Baring v. Bohn*, 64 Ill. App. 196.

⁸⁷ *Mendel v. Leader*, 136 Ga. 442; sec. 4392 Civil Code.

⁸⁸ *Worley v. Hineman*, 6 Ind. App. 240. See *Savage v. Cauthorn*, 109 Va. 694.

in others under the name of discount or recoupment. This general subject has been considered as a separate topic;⁸⁹ now we will briefly refer to the practice relative to allowing the damages for breach of these covenants as a full or partial defense in actions at law and suits in equity for the purchase-money. Where there is a right to substantial damages for the breach of any covenant in a deed and these are presently recoverable from the party to whom unpaid purchase-money is payable it prevents circuity and multiplicity of actions to permit both claims to be proved and to compensate each other in one action.⁹⁰

§ 633. **The New York rule.** In an early case in New York⁹¹ the defense of a defect of title, without eviction, was allowed although the essential conditions did not exist for the recovery of damages on the covenants in the deed. For this reason the case, upon this point, was afterwards overruled⁹² and has been generally disapproved. In the later case of Tallmadge v. Wallis⁹³ there was a breach of the covenant of seizin, and based upon it was a plea of a total want of consideration in bar of an action upon a bond for the purchase-money. The plea was held bad on demurrer because there was no allegation that the defendant "obtained no estate or interest whatever under the conveyance"; for in the absence of an allegation to the contrary it would be presumed that he obtained possession of the premises, and therefore that there was not an entire want of consideration. There can be no inference that possession delivered by a seller having no title is a benefit conferred by the conveyance, if so recent that the superior owner can recover *mesne* profits for the whole time it was enjoyed; hence the judgment on the demurrer in that case indicates that in New York recovery of full damages, measured by the consideration money, cannot be had for breach of the covenant of

⁸⁹ § 168 *et seq.*

⁹⁰ The general subject is discussed by Sanborn, C. J., in *Williams v. Neely*, 134 Fed. 1, 69 L.R.A. 232, 67 C. C. A. 171.

⁹¹ *Frisbie v. Hoffnagle*, 11 Johns. 50.

⁹² *Vibbard v. Johnson*, 19 Johns.

77; *Lattin v. Vail*, 17 Wend. 188; *Whitney v. Lewis*, 21 id. 131; *Tallmadge v. Wallis*, 25 id. 107; *Lamerson v. Marvin*, 8 Barb. 14.

⁹³ 25 Wend. 107.

seizin if the covenantor received possession and has not been evicted. It is true, however, that if possession for which the party receiving and enjoying it will be liable to a third person as superior owner is of any value there is not in fact an entire want of consideration. But in a legal sense, in view of the rules for measuring damages for breach of the covenants for title, such a possession is of no appreciable value as a benefit moving from the grantor, because for all that it is deemed to be legally worth he is held liable to the superior owner, and during the period of such liability he is not treated as receiving any benefit under the conveyance from the covenantor, nor is he charged with any such benefit in reduction of damages, otherwise recoverable, in any action for the breach of those covenants. The opinion in this case favors the allowance against purchase-money upon proper pleading of all damages which are recoverable for breaches of the covenants in the deed.⁹⁴ The chancellor referred to the cases which had established in that state the right of recoupment for partial failure of consideration and said, as there was a total failure, the defendants, *therefore*, instead of pleading in bar of the action, should have pleaded the general issue *non est factum* and given notice with such plea of the *partial* failure of title for the purpose of reducing the amount to be recovered upon the bond. In more recent cases in that state, to actions to foreclose purchase-money mortgages the defense of a partial failure of title was attempted, the deeds containing the covenants of seizin and warranty. The court held the defense inadmissible because there had been no eviction or disturbance of the defendant's possession; that as to the right of such a defense there was no difference between a breach of the covenant of seizin and one of the covenant of warranty.⁹⁵ It is now settled that if, at the time when the plaintiff is bound to execute a deed the title is unmarketable the purchaser may rescind the contract,

⁹⁴ See, also, *Bush v. Marshall*, 6 How. Pr. 284; *Curtiss v. Bush*, 39 Barb. 661.

⁹⁵ *Farnham v. Hotchkiss*, 2 Keyes

9; *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268; *Ryerson v. Willis*, 81 N. Y. 277. See *Parkinson v. Jacobson*, 13 Hun 317.

recover the money paid or recoup or recover damages as the nature of the case may require.⁹⁶

§ 634. **Alabama rule.** In Alabama there would seem to be no right of recoupment of damages at law for breach of the covenants in actions for purchase-money. The reason assigned is that a court of law cannot do complete justice between the parties.⁹⁷ Goldthwaite, J., said: "Such a defense, whatever be its merits, cannot be called a failure of consideration for which the notes were given; because if there were no warranty whatever the defendant would be without any remedy. It follows that if he is now entitled to any remedy it must be in consequence of the warranty and the subsequent insolvency of the warrantor, by which the covenant intended for the purchaser's security has become unavailable. Without stopping now to inquire whether these circumstances afford a reason for equitable interposition and relief, we think it clear that they do not make out a *legal* defense, even in a case where the recovery on the covenant of warranty ought to be equal or larger than the sum sued for. The reasons which induce this conclusion are these: In the first place, the damages to be recovered on the covenant of warranty are in their nature unliquidated, and therefore are not the subject of a set-off, according to our judgment in the case of *Dunn v. White*;⁹⁸ secondly, the covenant of warranty would not be extinguished by this defense; thirdly, the covenant itself operates as an estoppel to the grantor and would have the effect to transfer to the purchaser or his assigns any subsequently acquired title which should be vested in the grantor; fourthly, by the conveyance all the covenants running with the land are *ipso facto* assigned to the purchaser." If the purchaser accept a deed with warranty he cannot set up either fraud or failure of consideration at law as a defense to an action upon notes given for purchase-money.⁹⁹ If, however, the deed of a trustee is void

⁹⁶ *McCutchen v. Klaes*, 26 Colo. App. 374; *Urnback v. Pye*, 55 N. Y. Misc. 465; *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. 844, 5 L.R.A. 654. See § 640.

⁹⁷ *Bliss v. Smith*, 1 Ala. 273; *Cullum v. Branch Bank*, 4 Ala. 21, 37 Am. Dec. 725.

⁹⁸ 1 Ala. 645.

⁹⁹ *Starke v. Hill*, 6 Ala. 785; *Tan-*

because the authority given him by the statute has not been pursued the vendee may resist the recovery of the purchase-money although he has not been evicted.¹

§ 635. **Mississippi rule.** In Mississippi Yerger, J., said in a case decided in 1852:² "Upon examining the various cases decided in that state in relation to the relief which a vendee of lands is entitled to receive on account of the failure or defect of title the following rules are clearly established: First, where a contract for the sale of real estate has been executed and the vendee has received a deed with covenants of warranty and taken possession of the land he cannot in a case free from fraud or misrepresentation avoid a judgment for purchase-money, either at law or in equity, on account of a defect or a failure of title unless he has been evicted. Second, if there has been fraud or misrepresentation in relation to the validity of the title, or the absence of incumbrance upon it a court of law or equity, if the title be defective or incumbered, will relieve from payment of the purchase-money without eviction, notwithstanding a party may have received a deed with covenants of general warranty and gone into possession of the land.³ Third, where the vendee, at the time of his purchase, knew of the defect of title or the existence of incumbrances on the estate and took a deed with covenants of war-

kersly v. Graham, 8 id. 247; Cole v. Justices, id. 793; Knight v. Turner, 11 id. 636; McLemore v. Mabson, 20 id. 139; Patton v. England, 15 id. 69; Peden v. Moore, 1 Stew. & P. 81, 21 Am. Dec. 649; Homer v. Purser, 20 Ala. 573; Thompson v. Christian, 28 id. 399; Helvenstein v. Higgason, 35 id. 259; Andrews v. McCoy, 8 id. 920, 42 Am. Dec. 669.

¹ Wiley v. White, 3 Stew. & P. 355.

It is said in Hickson v. Lingold, 47 Ala. 449, an action by an executor on a note given for the purchase-money of land sold by him, that the principle to be extracted from the local cases "is that where the vendee

is in the possession of the property purchased he cannot successfully resist and defeat an action for the purchase-money on the ground that the vendor's title is defective, or that he had no legal authority to make the sale, or that the sale was void. In other words, that it is inequitable to permit the vendee to retain the property purchased and not pay for it." The case of Wiley v. White, *supra*, is not noticed by the court.

² Wailes v. Cooper, 24 Miss. 208.

³ This rule is applied in a Tennessee case involving the law of Mississippi. Brady v. McGehee, 1 Tenn. Cas. 154 (1860).

ranty he cannot at law avoid a recovery even after eviction, but must rely upon the covenant. Nor will a court of chancery, in such a case, as a general rule, grant any relief, but will remit the party to his covenants, such being the remedy provided for himself." In a later case⁴ the court say: "It has been repeatedly decided by learned and able judges in this country, not in virtue of any statutory provision, but upon principles of justice and convenience, and with a view of preventing litigation and expense, that where fraud has occurred in obtaining, or in the performance of, contracts, or where there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defense when sued upon such contract in all cases where the title to real estate is not involved; and that he shall not be driven to assert them either for protection or as a ground for compensation in a cross-action. And although there is some diversity of judicial opinion upon the subject, it is believed to be the better opinion that this defense cannot, in general, be made where the partial failure relates to title to real estate merely; and this is predicated upon the exclusive and peculiar jurisdiction of equity over the title to real estate in causing it to be perfected, and upon the further consideration that the vendee in general sustains no injury by the partial defect of title so long as he retains possession, as also because it would be without the principle upon which recoupment is allowed in the common-law courts, inasmuch as, for want of that peculiar jurisdiction of the equity courts to cause defective titles to be perfected, they could not do final and complete justice in the premises and terminate all further litigation touching the contract."⁵

⁴ *Myers v. Estee*, 47 Miss. 4.

⁵ See *Laughman v. Thompson*, 6 Sm. & M. 259; *Chaplain v. Briscoe*, 5 id. 198; *Kilpatrick v. Dye*, 4 id. 289; *Willey v. Hightower*, 6 id. 345; *Hoy v. Taliaferro*, 8 id. 727; *Vick v. Percy*, 7 id. 256, 45 Am. Dec. 303; *Stone v. Buckner*, 12 Sm. & M.

73; *Duncan v. Lane*, 8 id. 744; *Anderson v. Lincoln*, 5 How. (Miss.) 279; *Puckett v. McDonald*, 6 id. 269; *Winstead v. Davis*, 40 Miss. 785; *Heath v. Newman*, 11 Sm. & M. 201; *Glenn v. Thistle*, 23 Miss. 42; *Miller v. Lamar*, 43 id. 383; *Wofford v. Ashcraft*, 47 id. 641;

§ 636. **Rule in various other states.** In Tennessee, Arkansas, Michigan, Virginia and Illinois a purchaser may avail himself of eviction or other breach of the covenants for which he is entitled to substantial damages as a full or partial defense to an action for purchase-money.⁶ In Florida⁷ it has been held that in an action upon a note for purchase-money of land an equity existing in a third person is not sufficient to sustain a plea of failure of consideration. A mere equity, in another person is no defense at law; there must be fraud or eviction, or something equivalent thereto, or admitted or unquestionable paramount title. In Maine it appears to be settled that there can be no defense at law against the collection of a purchase-money note on the ground of a partial failure of title;⁸ but it is otherwise if there is a total failure of title,⁹ or a partial failure other than of title.¹⁰ And it has been so held also in Massachusetts.¹¹ In Missouri a vendee in possession under covenants of warranty cannot set up a want or failure of consideration. But if the deed conveys an unknown, uncertain and undetermined interest a total failure of consideration may be

Ware v. Houghton, 41 id. 382, 93 Am. Dec. 258; Feemster v. May, 13 Sm. & M. 275.

In Turner v. McDadory, 58 Miss. 27, there was a breach of the warranty by the establishment of a paramount title, which the warrantee purchased. It was held that a court of law could not order the judgment obtained by the warrantor on the purchase-money notes to be credited with the amount paid by the warrantee for such purpose, the claim not being reduced to judgment against the warrantor.

⁶ Crawford v. McDonald, 84 Ark. 415; Coffman v. Scoville, 86 Ill. 300; Penn v. Schmisser, 77 Ill. App. 526; Virginia M. Co. v. Wilkinson, 92 Va. 98; Farrell L. Co. v. Deshon, 65 Ark. 103; Edmunds v. Porter, 2 Cold. 42; Walker v. Johnson, 13 Ark. 522; Griggs v. D. &

M. R. Co., 10 Mich. 117; Redding v. Lamb, 81 id. 318, 331; McDaniel v. Grace, 15 Ark. 489; Slack v. McLagan, 15 Ill. 242; Knapp v. Lee, 3 Pick. 459; Rice v. Goddard, 14 Pick. 293; Pence v. Huston, 6 Gratt. 304; Doremus v. Bond, 8 Blackf. 368; Morgan v. Smith, 11 Ill. 194, 200; Schuchman v. Knoebel, 27 Ill. 175.

⁷ Long v. Allen, 2 Fla. 402.

⁸ Lloyd v. Jewell, 1 Me. 352, 10 Am. Dec. 73; Wentworth v. Goodwin, 21 Me. 154; Jenness v. Parker, 24 id. 294; Herbert v. Ford, 29 id. 554; Morrison v. Jewell, 34 id. 146; Thompson v. Mansfield, 43 id. 490; Bean v. Harrington, 88 Me. 460.

⁹ Jenness v. Parker, Bean v. Harrington, *supra*.

¹⁰ Ladd v. Putnam, 79 Me. 568.

¹¹ Bowley v. Holway, 124 Mass. 395.

shown.¹² In Wisconsin the grantee in a deed with full covenants, whose possession has not been disturbed, cannot defend an action to foreclose his mortgage to secure the payment of the unpaid portion of the purchase-money on the ground that his grantor had no title.¹³ In Minnesota the fact that lands are incumbered or the title is otherwise imperfect when the contract is made, or at any time before the date fixed for its completion, will not constitute a defense to an action for the recovery of an instalment of the purchase price falling due at any earlier date because the incumbrance or other defect may be removed within the time fixed for the completion of the purchase.¹⁴ The rule that a vendee in possession may resist the payment of his purchase-money note when the title fails or is defective and the vendor is insolvent, has no application when such purchaser has bought in the outstanding title or removed the incumbrance; the measure of relief in such a case is the outlay, not exceeding the value of the land.¹⁵

In Georgia the purchaser of land who enters into possession under a warranty deed or a bond for title cannot, before eviction, defeat an action for the purchase-money unless there has been fraud on the part of the vendor, or he is insolvent, or there is some other ground which would in equity entitle the purchaser to relief.¹⁶ But if the obligee in such a bond is not in default, although in possession of the land, he may recoup the damages resulting from the breach of it, the surrender of the possession being tendered and a willingness shown to account for rents during the time possession was held. The obligee may also waive the obligor's tort in wrongfully entering upon the land and appropriating wood thereon and set off in

¹² Carrabine v. Cox, 136 Mo. App. 370; Lewis v. West, 23 Mo. App. 503.

¹³ Falkner v. Woodard, 104 Wis. 608 and cases cited; Bardeen v. Markstrum, 64 Wis. 613; Bennett v. United States Land, Title & Legacy Co., 16 Ariz. 138.

¹⁴ Townshend v. Goodfellow, 40 Minn. 314, 12 Am. St. 736, 3 L.R.A.

739; Duluth L. & L. Co. v. Klov-dahl, 55 Minn. 341.

¹⁵ Bank v. Johnston, 105 Tenn. 521.

¹⁶ McGehee v. Jones, 10 Ga. 127; Watson v. Kemp, 41 Ga. 586; McCauley v. Moses, 43 Ga. 577; Smith v. Hudson, 45 Ga. 208; Booth v. Saffold, 46 Ga. 278.

an action to recover the purchase-money the value of the wood taken. But he cannot set off the profits he would have made on a sale of the land but for the wrong done by the obligor, the latter not having notice of the contract of resale when his bond was executed or before the breach occurred.¹⁷

§ 637. **South Carolina and Virginia rule.** In South Carolina the covenant of warranty includes the covenant of seizin, and therefore a breach does not depend on an eviction.¹⁸ Formerly there were three classes of cases in which a purchaser could be relieved in part or in whole from the payment of the purchase-money.¹⁹ First, if there was a partial failure of consideration, as where part of the land sold and conveyed was covered by a paramount title, which might, and in the opinion of the jury would, so far deprive the party of the benefit of his purchase. This has been essentially matter of discount,²⁰ and could be given in evidence only under a notice of discount. In such case the measure of damages to be allowed to the party on his covenant of seizin was the *pro rata* value of the land covered by the paramount title, estimated by the purchase-money and interest, and the relative value of the land lost to the land remaining.²¹ The second class was where the grantor, when he sold and at the trial, had no title to the land. In such case the vendee having acquired no title had, of course, no consideration for his promise; and so, when the action was on a parol contract, it was a *nudum pactum* and the vendee might be relieved at law. The defense could be made under the general issue.²² But in an action upon a specialty, before the act of 1831, the defense had to be specially pleaded or set up by way of discount.²³ That act merely let the party into his defense under a notice instead of a plea. In a suit on a specialty, therefore, it was deemed proper for the defendant to consider

¹⁷ *Sanderlin v. Willis*, 94 Ga. 171, followed, as to the first proposition, in *Preston v. Walker*, 109 Ga. 290.

¹⁸ *Johnson v. Purvis*, 1 Hill 322; *Sumter v. Welsh*, 1 Brev. 539; *Johnson v. Nixon*, 2 id. 472.

¹⁹ See *Van Lew v. Parr*, 2 Rich. Eq. 347.

²⁰ *Farrow v. Mays*, 1 N. & McC. 312.

²¹ *Furman v. Elmore*, 2 N. & McC. 199, 10 Am. Dec. 586.

²² *Farrow v. Mays*, *supra*.

²³ *Hunter v. Graham*, 1 Hill 370.

his covenant of seizin as broken to the whole extent of the purchase-money and interest, and to claim damages accordingly by way of discount. In such case if the jury was satisfied that in fact as well as law the purchaser took nothing by his title and that he would be ousted by the paramount title they might find a verdict for the defendant, not on the ground that the failure of title is a rescission of the contract, but that the damages on the covenant of seizin were exactly equal to the purchase-money and interest. It was held not necessary to appeal to equity to put the parties in *statu quo*; because the vendor's deed conveyed no title to the vendee; and the vendor could claim no rents and profits, for his vendee was liable to the owner of the paramount title for the rent of the land during the time he might be in possession.²⁴ Both of these classes have always been regarded as constituting legal defenses, examinable and relievable in courts of law. In the third class, where there was a good title in part or in whole conveyed by the vendor to the vendee and the object of the vendee's purchase was defeated either by a part failure of the title or the failure of some incident to the purchase represented by the vendor, or shown by the title as resulting from the purchase, the purchaser was formerly held to be relievable at law although he might be in possession by a rescission of the contract.²⁵ Subsequently, however, the court retraced their steps in respect to this class and established the doctrine that if the purchaser had not been evicted the contract could not be rescinded in a court of law, and that the party must seek relief in a court of equity, because a court of law could not do full and adequate justice between the parties.²⁶ But at the present day it is held that in actions brought for the purchase-money the purchaser may make a clear, subsisting, outstanding title the ground of abatement for the contract value of such part of

²⁴ Taylor v. Fulmore, 1 Rich. 52.

²⁵ Gray v. Handkinson, 1 Bay 278; State v. Gaillard, 2 id. 11, 1 Am. Dec. 628.

²⁶ Carter v. Carter, 1 Bailey 217; Bordeaux v. Cave, id. 250; Westbrook v. McMillan, id. 259; Johnson v. Purvis, 1 Hill 322.

the premises as it may cover.²⁷ And so if the warranty of quantity is broken.²⁸

²⁷ Van Lew v. Parr, 2 Rich. Eq. 347. See Means v. Brickell, 2 Hill 657; Abercombie v. Owings, 2 Rich. 127; Jeter v. Glenn, 9 id. 378.

²⁸ Crawford v. Crawford, 1 Bailey 128; Ellis v. Hill, 6 Rich. 37. In this case the court say: "The rule, in our courts, long established, is that in an action upon a security executed for the purchase-money of land bought at a fixed rate per acre the purchaser may abate the price by proof of deficiency in quantity; and that proof of the sale of so many acres, at a certain rate per acre, may be adduced by parol and a verdict thereupon shall be reduced *pro tanto* according to the deficiency. The doctrine is not obnoxious to anything contained in the statute of frauds, nor to that rule of evidence which excludes anything by parol to vary, contradict, add to or subtract from written evidence of contract. It proceeds upon the footing of failure of consideration, and has been also adjudged to belong to the rights of a defendant under our discount law (*vide* Abercombie v. Owings, 2 Rich. 127, which is a case full to the point of the one before us). The case cited, and that of Bauskett v. Jones, 2 Spear 68, contain a reference to a multitude of instances in which the rule has been administered as was done on circuit in the present instance. The distinction is where a gross sum has in point of fact been given for a body of land, described by metes and bounds, with quantity mentioned as additional matter of description (which intent may be the more manifest from reference to very specific boundaries, illustrated by plat annexed), and the

purchaser obtains the parcel of land accordingly; and where the purchaser has bought by the acre and stipulated to pay according to the quantity in point of fact. Another question, dependent upon the position of a purchaser as plaintiff in an action on the warranty does not present itself. It is manifest the description contained in the deed of conveyance is not conclusive upon the point under consideration. It was much more specific in the case of Abercombie v. Owings than in this case; in that a survey had been previously made, though of doubtful accuracy, and the conveyance expressed a gross sum as the consideration, and the quantity was stated at eighty-five acres, 'more or less,' bounded by lines beginning at a corner, and running thence, etc., according to the plat made by the surveyor, Gilbert. The conveyance here was for one-ninth part of a tract whereon a certain person then lived containing six hundred and forty acres, more or less, situate in Union district, on the west side of Broad river, adjoining lands belonging to J. H., F. S., W. D., and J. B. T. Such was the whole specification and without plat. The defense here resisted was allowed in the case cited; *a fortiori*, it was properly allowed in the case before us. No sensible difference arises from the circumstance that in Abercombie v. Owings it was stipulated by parol before the execution of the deed and the notes under seal that a mistake in the quantity should be rectified when afterwards ascertained. The nature of the contract in this case implied the same. The same objection would exist in either

The rule is the same in Virginia.²⁹ In one case a deed of bargain and sale conveyed a tract of land described as "containing by survey seven hundred and eighty-five acres," giving metes and bounds; the price stated in the deed was \$11,755, which is the product of seven hundred and eighty-five acres at \$15 per acre, there being no other evidence of the terms of the contract. It turning out that there was less than seven hundred and eighty-five acres, the vendee recovered compensation for the deficiency. He enjoined a judgment recovered against him for the balance of the purchase-money, alleging a defect in the title to the land, which he failed to prove; whereupon the injunction was dissolved and the bill dismissed. Afterwards he brought another suit in which he established his right to compensation for a deficiency in the quantity of the land to an amount equal to the unpaid balance of the purchase-money. He was awarded the damages which accrued on the dissolution of the first injunction as well as against the judgment at law.³⁰ In a later case³¹ it is laid down that the use of the words "more or less," or "supposed to contain so many acres, more or less," in a deed or contract for land will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency beyond what may reasonably be attributed to small errors from variations of instruments or otherwise, unless a contract of hazard was intended, which is not to be presumed where the vendor represented the tract of land as "containing one hundred and forty acres more or less and known as the K. tract," the price being \$6,000; it was presumed that the quantity influenced the price and that the sale was by the acre, there being but one hundred and twenty-six acres, and one-half of a certain spring, represented to be on the land, not being on it, the vendee was entitled to an abatement of the price for the loss of the deficiency in area and the loss of one-

case, the same has been urged as to the evidence disclosing the nature and terms of the contract. Now, as heretofore, it must be held unavailing."

²⁹ Crawford v. McDaniel, 1 Rob. 448.

³⁰ Keyton v. Brawford, 5 Leigh 39.

³¹ Grayson v. Buchanan, 88 Va. 251.

half the spring, the abatement for deficiency to be on the basis of the average value of the entire acreage, and for the loss of the spring to the extent the tract, on a valuation of \$6,000, was damaged thereby.

In South Carolina where the equitable title is conveyed with a right to call for the legal title the existence of the latter in a third person will not entitle the grantee to a discount.³²

§ 638. **Texas and Kentucky rule.** In Texas the purchaser with covenants of warranty may defend against a demand of purchase-money without eviction. Where he, by competent and sufficient evidence, established the existence and validity of an outstanding title it was held that there is no reason why his remedy should be delayed until he is disturbed in the enjoyment of the land, and this when the defendant was in possession.³³ But in such a case, whether the failure of title be partial or total, the vendee should offer to reconvey the land as to which it had failed.³⁴ If, however, the purchaser goes into possession under a deed of warranty, having notice of the defects in the title, he is not entitled to withhold the purchase-money, for the transaction still remains as the vendee understood it at the time of the purchase, and in that case he will be obliged to await eviction and rely on his covenant for the damages which result from a breach of it.³⁵ It is necessary to the defense of the failure of title, without eviction, in an action upon a purchase-money note that the vendee should have made the purchase without notice of the defect.³⁶ This rule does not apply where the vendor expressly agrees to obtain the outstanding title for the vendee.³⁷

³² *Hodges v. Connor*, 1 Spear 120; *Johnson v. Purvis*, 1 Hill 322.

³³ *Tarpley v. Poage*, 2 Tex. 139; *Peck v. Hensley*, 20 id. 673; *Cooper v. Singleton*, 19 id. 260, 70 Am. Dec. 333; *Woodward v. Rodgers*, 20 Tex. 176; *Cook v. Jackson*, id. 209; *Twohig v. Brown*, 85 Tex. 51; *Ogburn v. Whitlow*, 80 Tex. 239.

³⁴ Id. See *Demarett v. Bennett*, 29 Tex. 262.

³⁵ *Demarett v. Bennett*, *supra*; *Bryan v. Johnson*, 39 Tex. 31.

³⁶ *Herron v. De Bard*, 24 Tex. 181; *May v. Ivie*, 68 id. 379; *Carson v. Kelley*, 57 Tex. 379; *Crouch v. Johnson*, 7 Tex. Civ. App. 435; *Ogburn v. Whitlow*, *supra*; *Fagan v. McWhirter*, 71 Tex. 567; *Earle v. Mark*, 80 Tex. 39.

³⁷ *Doughty v. Cottraux*, 8 Tex. Civ. App. 125.

In Kentucky, unless the vendor is insolvent or a non-resident, the vendee cannot set up a defect in his title, but must look to the covenants in his deed and wait for an eviction. If the vendor has not put the vendee in possession that will be deemed equivalent to a breach of warranty and may be a defense to an action for the purchase-money in whole or *pro tanto*.³⁸ If one of the vendors is solvent, and they all acted in good faith, and the vendee is in possession under his deed the purchase price may be recovered notwithstanding a breach of the warranty.³⁹ Where the sale was in gross of between three hundred and fifty and four hundred acres and the tract contained but two hundred and sixty-seven acres, the vendee was entitled to an abatement of the price. But this was not allowed at the average price agreed to be paid for the whole farm, which was supposed to be about half bottom and half hill land, the deficit being altogether in the latter, which was about one-third as valuable as the bottom land; such relative value was adopted as the basis on which to abate the recovery.⁴⁰ On the failure of the title because the land was owned by the state the abatement was governed by the cost of obtaining a patent from the state.⁴¹

§ 639. **Pennsylvania rule.** In Pennsylvania the doctrines held on the subject under consideration are peculiar, owing in part to the blending of legal and equitable remedies in the jurisprudence of that state. If the purchase is made with notice of a defect in the title or of an outstanding incumbrance there is a presumption that the covenant was expressly taken

³⁸ *Pryse v. McGuire*, 81 Ky. 608; *English v. Thomason*, 82 Ky. 280; *Laeivson v. Baird*, 91 Ky. 204; *Little v. Bishop*, 22 Ky. L. Rep. 1747.

In *Hall v. Campbell*, 5 Ky. L. Rep. 246 (an unreported court of appeals case), the rule, as stated in the abstract, is thus: Where there is a breach of warranty and the vendor is insolvent the vendee may set off against the purchase-

money the damages resulting from the breach; but unless the vendor is insolvent or has practiced fraud in procuring the vendee to accept the conveyance the latter must look to the warranty. To the same effect is *Hoertz v. Marrett*, id. 698, and *Abner v. York*, 19 id. 643.

³⁹ *Smith v. Jones*, 97 Ky. 670.

⁴⁰ *Heaton v. Timmons*, 15 Ky. L. Rep. 62 (Ky. Super. Ct.).

⁴¹ *Little v. Bishop*, *supra*.

for protection against it, and if it has been broken the purchaser has a right to have his damages deducted from the purchase-money.⁴² The defense on the ground of right to detain the purchase-money is then treated as in the nature of an action on the covenants, and is allowed to prevent circuitry of action.⁴³ Where the purchaser bought without notice of an existing adverse title or incumbrance and the consideration money has not been paid he may defend himself in an action for it by showing that the title is defective or incumbered in whole or in part, and may do so whether there are covenants or not.⁴⁴ The rule in such case is the same after as before the execution of the deed.⁴⁵

The general principle is that a purchaser may defend himself from payment of the purchase-money by reason of a clear defect or outstanding incumbrance unless the intention was to run the risk of it; and of course there can be no such intention if the defect or incumbrance was unknown.⁴⁶ Where one party intended to convey, and the other expected to receive, good title it is but equity that the purchaser should have relief in case of any defect of title although there was no express agreement for that purpose; but where the intent was that the purchaser should run the risk of title there is not a word to be said for him.⁴⁷ Where, therefore, there is a known defect, but no covenant or fraud, the vendee can avail himself

⁴² *Youngman v. Linn*, 52 Pa. 413; *Wilson v. Cochran*, 46 id. 229; *Swayne v. Lyon*, 67 Pa. 436.

⁴³ *Id.*; *Morris v. Buckley*, 11 S. & R. 163; *Christy v. Reynolds*, 16 id. 258; *Tod v. Gallagher*, id. 261, 16 Am. Dec. 571; *Ives v. Niles*, 5 Watts 323; *Poyntell v. Spencer*, 6 Pa. 254.

⁴⁴ *Cross v. Noble*, 67 Pa. 74. Mr. Warvelle disapproves this view, saying that it is manifestly opposed to the current of authority and in direct contradiction of the rule that a purchaser who neglects to obtain satisfactory assurances of the title

he buys takes it subject to all its defects and infirmities; and it is quite certain that a purchaser by quitclaim, who takes with notice of a defect, actual or constructive, does so at his peril and cannot afterwards be heard to dispute the vendor's right to recover whatever balance may be due. 2 *Vendors* (2d ed.), § 904.

⁴⁵ *Youngman v. Linn*, 52 Pa. 413.

⁴⁶ *Rawle on Cov. for Tit.* (4th ed.), 622, 623; *Steinhauer v. Witman*, 1 S. & R. 438; *Hart v. Porter*, 5 id. 201.

⁴⁷ *Hart v. Porter*, *supra*.

of nothing, being presumed to have been compensated for the risk in the collateral advantages of the bargain.⁴⁸ The defect being known and not provided for the presumption is said to be irresistible, in the absence of an express stipulation, that the vendee relied on his own judgment as to the soundness of the title.⁴⁹

In *Wilson v. Cochran*⁵⁰ Woodward, J., thus summarizes the Pennsylvania doctrine: "The detention of the purchase-money on account of breaches of the vendor's covenant is a mode of defense that is peculiar to our Pennsylvania jurisprudence; but the principle is well settled with us that where a vendor has conveyed with covenants on which he would be liable to the vendee in damages for a defect of title the vendee may detain the purchase-money to the extent to which he would be entitled to recover damages upon the covenant, and he is not obliged to restore possession to his vendor before or at the time of availing himself of such defense. Where there is a known defect, but no covenant or fraud, the vendee can avail himself of nothing, being presumed to have been compensated for the risk in the collateral advantages of the bargain. But where there is a covenant against a known defect he shall not detain purchase-money unless the covenant has been broken. If the covenant be for seizin or against incumbrances it is broken as soon as made if a defect of title or an incumbrance exists; but if it be a covenant of warranty it binds the grantor to defend the *possession* against every claimant of it by right, and is consequently a covenant against rightful eviction. To maintain an action for the breach of it an eviction must be laid and proved, not necessarily by judicial process or the application of physical force, but by the legal force of an irresistible title. There must be proof at the least of an involuntary loss of possession. And as the right to detain purchase-money is in the nature of an action on the covenant and is allowed to prevent circuity, the vendee who seeks to detain by virtue of a

⁴⁸ *Lighty v. Shorb*, 3 P. & W. 447,
24 Am. Dec. 334; *Wilson v. Cochran*,
46 Pa. 129; *Youngman v. Linn*,
supra.

⁴⁹ *Smith v. Sillyman*, 3 Whart.
589; *Ross' Ap.*, 9 Pa. 497.

⁵⁰ 46 Pa. 231.

covenant of warranty is as much bound to prove an eviction as if he were plaintiff in an action of covenant. Until eviction the covenant is part of the consideration of the purchase-money he agreed to pay, and holding the covenant he may not withhold the purchase-money. But after eviction he has the right to have his damages deducted from the purchase-money.”⁵¹

If the defense is made on the ground of covenant broken surrender of possession is not necessary;⁵² but when, upon the equitable doctrine of this state, a purchaser seeks to resist the payment of the purchase-money, where the covenant is not broken and such money is secured by mortgage on the premises and no personal demand is made on him, but it is merely asked in default of payment of the purchase price that the property conveyed be restored, the purchaser must either pay the purchase-money or restore the possession to the person from whom he received it.⁵³ In such cases relief in this form is granted on the ground that eviction may take place; but say the court in one case:⁵⁴ “This is very delicate ground on which to administer justice to vendors and vendees, for in determining the possibility of an eviction we have not before us the paramount claimant on whose will and rights the liability to eviction depends. Possibly, he has no rights, as would appear the moment he attempted to assert them, or if he have rights it is possible he may never attempt to assert them; and in either case it would be against conscience and equity to allow the purchaser to keep the land on which so unsubstantial a cloud rests and the price also which he agreed to pay the party who put him into possession.”

§ 640. Defenses under the code. The code adopted in many states and territories defines very uniformly what counter-claims may be set up in the answer; it may contain a statement of any new matter constituting a defense or counterclaim. The latter is defined to be, first, a cause of action arising out of the con-

⁵¹ *Murphy v. Richardson*, 28 Pa. 288; *Rowland v. Miller*, 3 W. & S. 393.

⁵² *Poyntell v. Spencer*, 6 Pa. 257; *Wilson v. Cochran*, 46 id. 129.

⁵³ *Rawle on Cov. for Tit.* (4th ed.), 623, 643, note 3; *Hersey v. Turbett*, 27 Pa. 424.

⁵⁴ *Beaupland v. McKeen*, 28 Pa. 130, 70 Am. Dec. 115.

tract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action; second, in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. Under these provisions, of course, any claim of damages for which an action could be maintained for breach of the covenants, or for equitable relief in respect to them, would be available in the form of a counter-claim.⁵⁵

§ 641. **Defenses in equity.** In those jurisdictions which have entertained the defense of an entire or partial failure of title in actions on securities for purchase-money the conflict of opinion

⁵⁵ *McCormick v. Merritt*, 131 Iowa 160; *Brown v. McCrie*, 77 Kan. 230; *Talbott v. Donaldson*, 71 Kan. 483; *Walker v. Wilson*, 13 Wis. 522; *Hale v. Gale*, 14 id. 54; *Akerly v. Vilas*, 21 id. 109, 377; *Eaton v. Tallmadge*, 22 id. 526; *Lowry v. Hurd*, 7 Minn. 362; *Small v. Reeves*, 14 Ind. 163. See *Ludlow v. Gilman*, 18 Wis. 552; *Taft v. Kessell*, 16 id. 273; *Dorr v. Streichen*, 18 Minn. 26; *Kingsland v. Haines*, 62 App. Div. (N. Y.) 146; *Krumm v. Beach*, 96 N. Y. 398.

In *Akerly v. Vilas*, 21 Wis. 109, *Downer, J.*, said: "Before the code it was well settled that in suits brought to foreclose mortgages for the purchase-money, in which the mortgagor, being in possession of the lands, set up a partial failure of title as a defense without averring an actual eviction, or an action of ejectment brought, or that he was in any way disturbed in his possession, the court would not interfere, but leave him to his action at law. *Van Waggoner v. McEwen*, 1 Green's Ch. 422; *Abbott v. Allen*, 2 Johns. Ch. 519; *Platt v. Gilchrist*, 3 Sandf. 118; *Simpson v. Hawkins*, 1 Dana 303; *Rawle on Cov. for Tit.* (3d ed.) 676, 686. Courts of equity

declined to go into such defenses because title to lands could better be tried in actions at law, and the damages were often unliquidated and not the subject of set-off; and also because the possession of the defendant, being undisturbed, might ripen into a perfect title. But the code allows a counter-claim to be set up in an answer to a foreclosure action, as well as in others. It is no objection to such counter-claim or claims that the damages are unliquidated, or that the claims are legal or equitable, or both; for claims legal or equitable, for liquidated and unliquidated damages on contracts may all be set up in the same answer. The defendant who sets up by way of counter-claim a cause of action based upon the covenants in a deed is entitled to recover the same damages as he would have recovered if he had brought a separate action on these covenants. If he declares upon the covenant of seizin and alleges breaches it is no defense to his claim that he is in undisturbed possession of the premises. He is entitled to recover his actual damages whatever they may be, the same as in a suit at law before the code."

has been chiefly in respect to the allowance of damages for breach of the covenant of seizin when the facts would not justify recovery on the other covenants. There has been greater reluctance to permit a recovery in such cases where the amount is sought to be deducted from unpaid purchase-money, especially in suits for foreclosure of liens in equity, than in actions by the covenantee at law on the covenant.⁵⁶ In courts of equity the protection of purchasers against the collection of purchase-money, where there are defects of title covered by covenants, is more ample, and the jurisdiction is more generally and uniformly exercised than at law. It is available, first, where the seller comes into equity to enforce the payment of the purchase-money by marshaling or administering assets, foreclosure of securities, or the like, and there is such a defect of title, or such expenses or payments to extinguish a paramount title or incumbrance as would sustain an action at law on the covenants for substantial damages. The court will apply these damages, ascertain according to its practice, *pro tanto* to the satisfaction of the plaintiff's claim and only decree for the plaintiff the balance.⁵⁷ Second,

⁵⁶ Mr. Rawle (in Cov. Tit. 590, 4th ed.) says: "In suing upon this covenant cases may occur in which, although the purchaser may have paid nothing to buy in the paramount title and may be still in possession, yet the failure of title is so complete as to authorize the assessment of damages by the consideration money or a proportionate part of it; and in such cases it might be proper and even necessary for the plaintiff to offer to reconvey the interest or title actually vested in him, and that, although it would be no bar to his recovery that he had not done so, yet that the court might stay the execution or reserve the actual entry of the judgment till such conveyance were made. It is difficult to say how far this doctrine can be made to apply to actions where the defendant seeks to

detain the purchase-money under similar circumstances. On the one hand, there are reasons growing from the desire to prevent circuity of action, and the injustice that may often arise by reason of the delay, expense and risk of the vendor's insolvency, to which the purchaser may be put by turning him round to his action on the covenant. On the other, the temptation offered to purchasers, when pressed for the contract price, to ferret out defects in the title of their vendor is such as may induce a leaning in favor of the rule that unless there has been a *bona fide* eviction, actual or constructive, the parties must be left to pursue the remedies originally provided for themselves."

⁵⁷ Williams v. Neely, 134 Fed. 1, 69 L.R.A. 232, 67 C. C. A. 171, citing the text; Detroit & M. R. Co. v.

in the exercise of its *quia timet* jurisdiction, as where there is already an actionable breach of the covenants and the damages therefor are not a defense in a suit for purchase-money, or there has been no opportunity to make it, or loss of the estate from the pendency of actions to enforce a paramount title or incumbrance, is imminent, and by reason of the absence or insolvency of the covenantor the remedy by action at law on the covenants will be unavailing.⁵⁸ Where the only covenants in the deed are those for quiet enjoyment and of warranty, and there has been no eviction, actual or constructive, equity will not, as a general rule, interfere to prevent the collection of purchase-money.⁵⁹

Griggs, 12 Mich. 45; Coster v. Monroe Mfg. Co., 2 N. J. Eq. 467; Glenn v. Whipple, 12 id. 50; Van Waggoner v. McEwen, 2 id. 412; Earl of Bath v. Earl of Bedford, 2 Ves. Sr. 587; Fergus v. Gore, 1 Sch. & Lef. 107; Lovell v. Sherwin, 2 Eq. R. 329, 23 Eng. L. & Eq. 534; Parker v. Harvey, 2 Eq. Cas. Abr. 460; In re Dickson, L. R. 12 Eq. 154; Van Riper v. Williams, 2 N. J. Eq. 407; Dayton v. Dusenbury, 25 id. 110; White v. Stretch, 22 id. 79; Fowler v. Boling, 6 Barb. 165; Noonan v. Lee, 2 Black, 499; York v. Allen, 30 N. Y. 104; Norton v. Jackson, 5 Cal. 262; Pickett v. McDonald, 6 How. (Miss.) 269; Kilpatrick v. Dye, 4 Sm. & M. 289; Prichard v. Evans, 31 W. Va. 137; General Underwriting Co. v. Stilwell, 139 App. Div. (N. Y.) 189.

⁵⁸ Crenshaw v. Smith, 5 Munf. 415; Stockton v. Cook, 3 id. 68; Clark v. Hardgrove, 7 Gratt. 399; Yancy v. Lewis, 4 Hen. & Munf. 390; Jones v. Waggoner, 7 J. J. Marsh. 144; Trumbo v. Lockridge, 4 Bush 417; Andrews v. McCoy, 8 Ala. 920, 42 Am. Dec. 669; McLemore v. Mabson, 20 Ala. 139; Wyatt v. Greer, 4 Stew. & P. 318; Kelly v. Allen, 34 Ala. 663; Smith v. Petrus, 1 Stew. & P. 107; Beebe v.

Swartwout, 8 Ill. 177; Vick v. Percy, 7 Sm. & M. 268; McGehee v. Jones, 10 Ga. 135; Hoppes v. Cheek, 21 Ark. 588; Vance v. House, 5 B. Mon. 540; Young v. Butler, 1 Head 640; Perciful v. Hurd, 5 J. J. Marsh. 672; Ingram v. Morgan, 4 Humph. 66, 40 Am. Dec. 626; Luckett v. Triplett, 2 B. Mon. 39; Champlin v. Dotson, 13 Sm. & M. 553; Wofford v. Ashcraft, 47 Miss. 641; Atwood v. Vincent, 17 Conn. 575; Davis v. Logan, 5 B. Mon. 341; Jones v. Stanton, 11 Mo. 433; Denny v. Wickliffe, 1 Mete. (Ky.) 226; Green v. Campbell, 2 Jones Eq. 446; Shannon v. Marselis, 1 N. J. Eq. 413; Hatcher v. Andrews, 5 Bush 561; Simpson v. Hawkins, 1 Dana 303; Willy v. Fitzpatrick, 3 J. J. Marsh. 582; Morrison v. Beckwith, 4 T. B. Mon. 73.

⁵⁹ Hunt v. Marsh, 80 Mo. 396; Cartwright v. Culver, 74 id. 179; Pershing v. Canfield, 70 id. 140; Platt v. Gilchrist, 3 Sandf. 118; Patton v. Taylor, 7 How. 132, 12 L. ed. 637; Refeld v. Woodfolk, 22 How. 318, 16 L. ed. 370; Noonan v. Lee, 2 Black 499, 17 L. ed. 278; Bumpus v. Platner, 1 Johns. Ch. 213; Abbott v. Allen, 2 id. 519; Gouverneur v. Elmendorf, 5 id. 79; James v. McKernan, 6 Johns. 543; Prevost v.

As between the original mortgagor and mortgagee, notwithstanding the court has determined in a foreclosure suit that, in order to save the property, the mortgagor must pay the entire original purchase-money and interest without any deduction on account of the partial failure of title to the land, a judgment for damages for the breach of the covenant of warranty will be allowed in reduction of the mortgage debt arising out of the conveyance, such judgment being rendered before the judgment of foreclosure was completed.⁶⁰

Gratz, 3 Wash. C. C. 434; Beach v. Waddill, 8 N. J. Eq. 299; Leggett v. McCarty, 3 Edw. Ch. 124; Woodruff v. Bunce, 9 Paige 443, 38 Am. Dec. 559; Greenleaf v. Queen, 1 Pet. 138; Whitworth v. Stuckey, 1 Rich. Eq. 409; Van Lew v. Parr, 2 id. 321; Maner v. Washington, 3 Strobb. Eq. 171; Young v. McClung, 9 Gratt. 336; Long v. Israel, 9 Leigh 556; Young v. Butler, 1 Head 640; Buchanan v. Alwell, 8 Humph. 516; Elliott v. Thompson, 4 id. 99, 40 Am. Dec. 630; Lewis v. Morton, 5 T. B. Mon. 1; Vance v. House, 5 B. Mon. 537; Casey v. Lucas, 2 Bush 55; Ohling v. Luitjens, 32 Ill. 23; Beck v. Simmons, 7 Ala. 76; Wilty v. Hightower, 6 Sm. & M. 345; McDonald v. Green, 9 id. 138; Beebe v. Swartwout, 8 Ill. 162; Eddington v. Nix, 49 Mo. 134; Cooley v. Rankin, 11 Mo. 647; Middlekauff v. Barrick, 4 Gill 290; Hall v. Priest, 6 Bush 12; Busby v. Treadwell, 24 Ark. 456; Hile v. Davison, 20 N. J. Eq. 228; Hulfish v. O'Brien, id. 230;

Ludlow v. Gilman, 18 Wis. 552; Akerly v. Vilas, 21 id. 88; Timms v. Shannon, 19 Md. 296, 81 Am. Dec. 632; Merritt v. Hunt, 4 Ired. Eq. 406; Wilkins v. Hogue, 2 Jones' Eq. 479; Henry v. Elliot, 6 id. 175; Clanton v. Burges, 2 Dev. Eq. 13; Beale v. Seiveley, 8 Leigh 658; Perciful v. Hurd, 5 J. J. Marsh. 670; Miller v. Long, 3 A. K. Marsh. 334; Anderson v. Lincoln, 5 How. (Miss.) 279; Gartman v. Jones, 24 Miss. 234; Wailes v. Cooper, id. 208; Edwards v. Morris, 1 Ohio 239, 13 Am. Dec. 608; Stone v. Buckner, 12 Sm. & M. 73; Maxfield v. Bierbauer, 8 Minn. 480; Glenn v. Whipple, 12 N. J. Eq. 50.

⁶⁰ Harrington v. Bean, 94 Me. 208, citing Van Riper v. Williams, 2 N. J. Eq. 407; Union Bank v. Pinner, 25 N. J. Eq. 495; Holbrook v. Bliss, 9 Allen 69; Davis v. Bean, 114 Mass. 360; Northy v. Northy, 45 N. H. 141; Goodwin v. Henney, 49 Conn. 563.

CHAPTER XIV.

VENDOR AND VENDEE — PERSONAL PROPERTY.

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SECTION 1.

VENDOR AGAINST VENDEE.

§ 642. **Recovery on executed sales.** Where there has been a delivery, or what is equivalent to it, of the property sold or which the vendor is at liberty to treat as sold, and when the contract is thus so far executed that the title has passed to the vendee the vendor is, in the absence of an agreement for credit, entitled to the price or value,¹ if the sale has not been prohibited

- ¹Pittsburgh H. & H. S. Co. v. Bown, 174 Fed. 981, 98 C. C. A. 593; Pearson v. Mason, 120 Mass. 53; Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Lydon v. Sullivan, 31 Ky. L. Rep. 227; Campbell v. Woods, 122 Mo. App. 719; Sturtevant M. Co. v. Kingsland B. Co. (N. J. L.), 70 Atl. 732; Phillips v. Hollenberg M. Co., 82 Ark. 9 (it is immaterial that it was destroyed before part of the purchase money was due); McCarthy v. Nixon G. Co., 126 Ga. 762; American T. Co. v. Seigel, 221 Ill. 145, 4 L.R.A. (N.S.) 1167; Toledo C. S. Co. v. Tyden, 141 Ill. App. 21; Osgood v. Skinner, 111 id. 606; Gaar v. Fleshman, 38 Ind. App. 490; Rogers v. French, 122 Iowa 18; Thompson v. Seek, 84 Kan. 674; Dougherty T. & A. Co. v. Peru-Van Zandt I. Co., 75 Kan. 450; Central M. Co. v. Graves, 74 Kan. 718; Louisville P. Co. v. Crain, 141 Ky. 379; Pounds v. Courn, 210 Mo. 115; Koenig v. Truscott B. Mfg. Co., 155 Mo. App. 685; Poliakov v. Petry, 50 N. Y. Misc. 602; Willis v. Jarrett C. Co., 152 N. C. 100; Henderson v. Jennings, 228 Pa. 188, 30 L.R.A.(N.S.) 827; Graham v. Burgiss, 78 S. C. 404; Mayberry v. Lilly M. Co., 112 Tenn. 564; McGowin v. Dickson, 182 Ala. 161; Martyn v. Western Pac. R. Co., 21 Cal. App. 589; Bellows v. McKenzie, 212 Mass. 601 (though the vendor may retain a lien on the goods); Scribner v. Schenkel, 128 Cal. 250; Ozark L. Co. v. Chicago L. Co., 51 Mo. App. 555; Crown V. & S. Co. v. Wehrs, 59 Mo. App. 493; Stresovich v. Kesting, 63 Mo. App. 67; Pratt v. Freeman & Sons Mfg. Co., 115 Wis. 648.
- A purchaser who unexcusedly refuses to perform his contract to pay the balance of the price or restore the goods to the possession of the seller cannot recover the money paid on the contract. Rayfield v. Van Meter, 120 Cal. 416; Neis v. O'Brien, 12 Wash. 358, 50 Am. St. 894; Strickland v. McCulloch, 8 New South Wales (law) 324.
- By the common law a sale of per-

by law.² The retention of part of the goods purchased is attended with liability for their value; the purchaser may not plead recoupment in bar of the action.³ A sale or an agreement to sell may be valid though the price of the property be not named and fixed. Thus, it has been laid down by an elementary writer that *express* contracts are those where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods; *implied*, are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform: as, if I employ a person to do any business for me, or perform any work, the law implies that I undertook or contracted to pay him as much as his labor deserves; as, if I take up wares from a tradesman without any agreement as to price, the law concludes that I contracted to pay their real

sonal property is usually termed a "bargain and sale of goods." It may be defined to be a transfer of the absolute or general property in a thing for a price in money. Hence it follows that to constitute a valid sale there must be a concurrence of the following elements, viz.: 1st, parties competent to contract; 2d, mutual assent; 3d, a thing the absolute or general property in which is transferred from the seller to the buyer; and 4th, a price in money paid or promised. Benj. on Sales, § 1; Mechem on Sales, § 1.

All that is required to give validity to a sale of personal property, whatever may be the amount or value, is the mutual assent of the parties to the contract. As soon as it is shown by any evidence, verbal or written, that it is agreed by mutual assent that the one shall transfer the absolute property in the thing to the other for a money price the contract is completely proven and binding on both parties. See *Lincoln v. Johnson*, 43 Vt. 74, 77;

Williamson v. Berry, 8 How. 544, 12 L. ed. 1191; *Mechem on Sales*, § 5.

If by the terms of the agreement the property in the thing sold passes immediately to the buyer, the contract is termed in the common law "a bargain and sale of goods;" but if the property is to remain for the time being in the seller and only to pass to the buyer at a future time or on the accomplishment of certain conditions as, for example, if it is necessary to weigh or measure what is sold out of the bulk belonging to the vendor, then the contract is called in the common law an executory agreement. Benj. on Sales, § 3; *Mechem on Sales*, § 3.

One who assumes continued ownership of property and is unable to unconditionally deliver it may not recover the agreed price. *Hamilton v. Finnegan*, 117 Iowa 623.

² *Crossman v. Lurman*, 192 U. S. 189, 48 L. ed. 401.

³ *Gibboney v. Wayne*, 141 Ala. 300.

value.⁴ A doubt was at one time expressed in an English case whether, where the parties are altogether silent as to the price in an executory contract of purchase and sale, the law will supply the want of an agreement by inferring that they must have intended to sell and to buy at a reasonable price; but it was declared that, undoubtedly, the law makes that inference where the contract is executed by the acceptance of the goods by the defendant in order to prevent the injustice of his taking them without paying for them.⁵ This doubt, however, was removed by a decision soon afterwards in the same court, this language being used: "What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth."⁶ Also: "A contract to furnish a cargo at a reasonable price means such a price as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable. This price may or may not agree with the current price of the commodity at the port of shipment at the precise

⁴ 1 Black. Com., p. 443.

⁵ *Acebal v. Levy*, 10 Bing. 376; note 2 to *Webber v. Tivill*, 2 Saund. 121.

⁶ *Hoadly v. McLaine*, 10 Bing. 482; *Deck v. Feld*, 38 Mo. App. 674; *Shealy v. Edwards*, 73 Ala. 175, 49 Am. Rep. 43; *Greene v. Lewis*, 85 Ala. 221, 7 Am. St. 42; *Nashville, etc. R. Co. v. Wood*, 171 Ala. 382 (it seems); *Stout v. Caruthersville H. Co.*, 131 Mo. App. 520; *Teetzel v. Davidson M. Co.*, 74 Neb. 529; *Hirsch v. Leatherbee L. Co.*, 69 N. J. L. 509; *Lovejoy v. Michels*, 88 Mich. 15, 13 L.R.A. 770; *B. S. Green Co. v. Smith*, 52 Ill. App. 158; 1 *Mechem on Sales*, § 207; *Taft v. Travis*, 136 Mass. 95.

Under an allegation of an agreed price, if there is a failure to prove such price, evidence of value is com-

petent for the purpose of establishing the right to recover what the article was reasonably worth, but not to sustain a recovery beyond the sum alleged. *Livingston v. Wagner*, 23 Nev. 53; *Sussdorff v. Smidt*, 55 N. Y. 319.

The rule stated in the text cannot be applied in an action by the purchaser for damages for failure to deliver the purchased property. *Trunkay v. Hedstrom*, 131 Ill. 204.

The price at which goods are offered in circulars and advertisements may be recovered by one who ships accepted goods in accordance therewith. *Robinson v. Leatherbee T. & L. Co.*, 120 Ga. 901.

The price at which the vendee sells the property may be recovered after deducting compensation for his services in making the sale. *Greene v. Bateman*, 2 W. & M. 359.

time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity or from various other causes."⁷

Where an order, silent as to price, is sent to a merchant or manufacturer of goods in which he deals and is accepted the law fixes the price at the current rate at which the goods are sold, and the party ordering is bound equally as though the price had been stated in the order. So, where an order is given for two articles mixed, to a manufacturer of such mixture, without specifying the proportion of each, the manufacturer is empowered to compound the same in the usual manner in which the mixture is prepared for market, and the acceptance of the order makes a valid contract to that effect.⁸ A personal delivery of goods by a dealer to a customer or by any person on request to another is a transaction of the same nature and there is a tacit agreement to pay the customary price or what they are reason-

⁷ *Acebal v. Levy*, 10 Bing. 376; *James v. Muir*, 33 Mich. 223; *Rhodes v. Holladay-K. L. & L. Co.*, 105 Mo. App. 279.

In *Lovejoy v. Michels*, 88 Mich. 15, 13 L.R.A. 770, the price charged for goods, nothing being said about it in the order, was that fixed by a combination of manufacturers, and was a considerable advance over the price which prevailed before the combination was formed, notice of which advance had not been given the customers of the plaintiff. Three opinions were filed. Two of the justices held that, independently of the unlawful character of the combination, the price fixed was no better evidence of value than one fixed by any vendor upon his wares and was not a market price; that the market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the

usual and ordinary course of lawful trade and competition, and that, in the absence of an agreement, a price fixed by a combination of dealers does not bind the purchaser nor will the law so far countenance such combinations as to regard prices fixed by them as even evidence of value. One justice was of the opinion that a price so fixed was not evidence to show a reasonable price for goods sold by members of the combination, and that in the absence of proof of market value the reasonable worth of the goods must be determined by the cost of production and a reasonable profit thereon. The other two justices held that an arbitrary price fixed by such an association will not bind a purchaser who has not agreed to pay it. See § 653.

⁸ *Konitzky v. Meyer*, 49 N. Y. 571; *Vickery v. Evans*, 16 Ind. 331.

ably worth.⁹ The vendor is entitled to their value at the time of executing the order without reference to any subsequent rise in the market price.¹⁰ Where parties have contracted to sell and buy a specific quantity of goods at a fixed price, if more are ordered and shipped, after a known advance in the price, the stipulated price does not bind the parties.¹¹ If goods are ordered to be shipped their market value at the time and place of shipment measures the vendee's liability.¹² Interest on the price is recoverable from the time the goods were accepted in the absence of an agreement as to the date for payment.¹³ It is not cause for refusing the claim for interest that the vendee interposed a counter-claim because of a defect in the quality of the goods,¹⁴ or that a suit was pending involving his right to their possession if he could have terminated it by paying the sum due.¹⁵ Though the demand be unliquidated the vendee must pay interest if he has the means of determining the sum due the vendor.¹⁶ There may be a recovery of interest on the purchase price or reasonable value of the article sold from the date of its delivery in accordance with the statute of the state where the contract of

⁹ *Metropolitan C. Co. v. Billings*, 202 Mass. 457; *Althouse v. Alvord*, 28 Wis. 517, 9 Am. Rep. 515. In this case Dixon, C. J., said: "The cost of the material out of which the article is made, * * * or in other words the profits arising to the vendor from the manufacture and sale, are matters quite foreign to the issue where the manufactured article itself has a fixed and uniform market price or value. The purchaser must be presumed to have been familiar with such usual price or value and to have bought with reference to it, and therefore willing to pay it. At all events it would be most unjust to the seller under such circumstances, there being no stipulation as to price, to require him to take less than he could have obtained elsewhere or from other purchasers." *Henckley*

v. Hendrickson, 5 McLean 170; *Wells v. Abernethy*, 5 Conn. 222; *Burr v. Williams*, 23 Ark. 244.

¹⁰ *Hill v. Hill*, 1 N. J. L. 261, 1 Am. Dec. 206; *Jenkins v. Richardson*, 6 J. J. Marsh. 541.

¹¹ *Rice v. Western F. Co.*, 64 Ill. App. 603.

An order to supply goods "as heretofore" implies that the previous price paid is to be continued. *Walsh v. Myers*, 92 Wis. 397.

¹² *Fenton v. Braden*, 2 Cr. C. C. 550, 8 Fed. Cas., p. 1140.

¹³ *Denver P. B. Co. v. Young*, 49 Colo. 498; *Fairbanks v. Midvale M. & Mfg. Co.*, 105 Mo. App. 644.

¹⁴ *Dickinson F. & P. Co. v. Crowe*, 63 Wash. 550.

¹⁵ *Johnson v. Crawford*, 144 Fed. 905.

¹⁶ *Courteney v. Standard B. Co.*, 16 Cal. App. 600.

sale was made, such statute being pleaded and proved in another state in which the action was brought.¹⁷ The vendor of a patent which is a process covering an entire manufacture, and not an improvement, or addition to, or combination of any other machine or process, who has sold it in consideration of a share of the profits arising from its use, is not entitled to have these measured by the advantages gained by the defendant in excess of what he would have obtained by using other means for making the product already open to the public and capable of producing the same result; instead, there must be taken from the total sales of **the product all legitimate costs and charges of the manufacture and sale; the difference measures the recovery.**¹⁸ If cattle are delivered in excess of the number sold at an agreed price per head according to the different classes there cannot be a recovery for the additional number on the basis of the reasonable value. In the absence of proof showing which cattle were delivered by mistake the contract price measures the recovery, and if the excess of each class received over the number bought could be ascertained their value should be according to the classification under the contract at the time they were received.¹⁹ The refusal of the vendor to accept a conditional medium of payment entitles him to recover the agreed value of the goods.²⁰ On the return to the buyer of his check sent for goods, the price of which he objected to, and on his failure to exercise the privilege of returning them, the seller may insist upon the invoice price.²¹

§ 643. Same subject; recovery after rescission of contract; price fixed by third party. Where, by a course of dealing or custom, there is one price for cash and another and larger price if credit is given, and a charge is made and the account presented in expectation of payment at once, and it is not made the value of the credit price may be recovered.²² If goods are

¹⁷ *McCarthy v. Nixon G. Co.*, 126 Ga. 762; *Morris v. Wibaux*, 159 Ill. 627, 649. See § 366.

¹⁸ *Curry v. Warner*, 2 Marvel 98, citing *Freeman v. Freeman*, 142 Mass. 98; *Troy I. & N. Factory v. Corning*, 6 Blatch. 328; *Hitchcock v. Tremain*, 9 Blatch. 325.

¹⁹ *Williams v. Deen*, 5 Tex. Civ. App. 575.

²⁰ *Browne v. St. Paul P. Works*, 62 Minn. 90.

²¹ *American F. & F. Co. v. Settergren*, 130 Wis. 338.

²² *Taylor v. Tucker*, 1 Ga. 231.

delivered upon a special contract and on examination are rejected as not conformable to it, but not returned to the vendor, he may recover their market value.²³ So if property is paid on a contract which is afterwards rescinded, the value of the property delivered, rather than the contract price of it, may be recovered.²⁴ If a person who has been in the habit of buying goods from another appropriates goods which he does not account for and thereby prevents the owner from accurately ascertaining the value of those taken he is liable for the highest value of goods of the kind taken, and has the burden of showing their character.²⁵ A vendee who agrees to pay as the consideration for property all the indebtedness due therefor from his vendor, to an amount specified, is liable to that extent although the latter has not paid his creditors, and notwithstanding the possibility that they may not insist upon full payment of their claims.²⁶ A vendor who agrees to deed a lot to a vendee for every article bought on payment of a stated sum for the execution of the deeds may recover such sum and the agreed price for the goods, less the value of the lots unconveyed.²⁷ If the vendor's title to the property sold is not good and the vendee is obliged to account to the owner for it he is entitled to be credited on the purchase-price with the amount paid the owner.²⁸ Under a contract to pay a certain price for timber to be "furnished" by the plaintiff, the defendant then being engaged in negotiations for the purchase of lands and having instructed the plaintiff to cut the timber therefrom, the defendant having become the owner of such timber, was entitled to be credited on the contract price with the value of the stumpage.²⁹

The parties may agree that the price may be fixed by a third person named by them. They are then as much bound by the price he may fix, and it is as much a part of the contract, as

²³ *Shields v. Pettie*, 4 N. Y. 122;
Terwilliger v. Knapp, 3 E. D. Smith
86; *Howard v. Hoey*, 23 Wend. 350.

²⁴ *Camp v. Pulver*, 5 Denio 48;
Day v. Mapes-R. C. Co., 174 Mass.
412; *Bresnahan v. Ross*, 103 Mich.
483.

²⁵ *McCown v. Quigley*, 147 Pa.
307.

²⁶ *Meyer v. Parsons*, 129 Cal. 653.

²⁷ *Hathaway v. O'Gorman*, 26 R.
I. 476.

²⁸ *Parish v. McPhee*, 102 Wis. 241.

²⁹ *Id.*

if fixed by them.³⁰ Until it is fixed the agreement to sell is incomplete.³¹ But if the property has passed to the vendee and he does any act to obstruct or render impossible the valuation in the mode agreed upon the vendor will be entitled to recover its value as estimated by a jury, as where the defendant agreed to buy goods at a valuation and the valuers disagreed, and thereupon the defendant consumed the goods.³² The additional price agreed to be paid for property if a test of it to be made by the vendee should disclose the existence of certain qualities may not be recovered where he refuses to make the test, it being within the power of the vendor to show whether the stipulated qualities existed. The damages are measurable by a nominal sum.³³ It is competent for the parties to agree that a third person may decide any other fact upon which the identity, price or quantity depends, as to select, inspect, weigh or measure the commodity sold.³⁴ The person whom they appoint for such purpose thereby becomes the agent of both parties, and his action in the matter for which he was appointed, honestly performed, will be conclusively binding upon them.³⁵

³⁰ *Crilly v. Ruyle*, 87 Neb. 367; *Benj. on Sales*, § 87; *Brown v. Bel-lows*, 4 Pick. 189; *Cunningham v. Ashbrook*, 20 Mo. 553; *McCandlish v. Newman*, 22 Pa. 460; *Nutting v. Dickinson*, 8 Allen 540.

³¹ *Id.*; *Thurnell v. Balbirnie*, 2 M. & W. 786; *Cooper v. Shuttleworth*, 25 L. J. (Ex.) 14; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Milnes v. Gery*, 14 Ves. 400; *Wilks v. Davis*, 3 Meriv. 507; *Fuller v. Bean*, 30 N. H. 290.

³² *Humaston v. Telegraph Co.*, 20 Wall. 20, 22 L. ed. 279; *Albemarle L. Co. v. Wilcox*, 105 N. C. 341; *Clark v. Watson*, 18 C. B. 277; *Carter v. McNeeley*, 1 Ired. 448.

³³ *Hopedale E. Co. v. Electric S. B. Co.*, 184 N. Y. 356, distinguishing *Mackay v. Dick*, L. R. 6 App. Cas. 251, and other cases holding that a contract is to be deemed satisfied

if the buyer prevents the fulfillment of a stipulated condition by the seller.

³⁴ *Brooke v. Laurens M. Co.*, 78 S. C. 200; *Gallagher v. Baird*, 54 App. Div. (N. Y.) 398; *Weeks v. O'Brien*, 141 N. Y. 199. See § 712.

³⁵ *Loree v. Webster Mfg. Co.*, 134 Wis. 173; *President, etc. Delaware & H. C. Co. v. Pennsylvania C. Co.*, 50 N. Y. 250; *Savercool v. Farwell*, 17 Mich. 319; *Merrill v. Gore*, 29 Me. 346; *McAndrews v. Santee*, 57 Barb. 193; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379.

"It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, even though the party establishing it was interested, provided the interest was known and no objection was made by the parties, and no

If it does not appear that the person so employed acted corruptly, or made some gross mistake,³⁶ in the absence of fraud or anything tending to show unfairness on the part of the plaintiff in procuring the result, the action of the referee is mutually binding.³⁷ Where mill logs were sold at a specified price per thousand feet, according to the quantity of lumber they should afterwards be estimated to make, and there was a table or scale of estimation then in such general use that the parties were found by the jury to have referred to it as a rule for computing the quantity, they were bound by it though it proved erroneous in some respects.³⁸

fraud or bad faith is shown." *New England T. Co. v. Abbott*, 162 Mass. 148, 27 L.R.A. 271.

³⁶ *Robinson v. Fiske*, 24 Me. 401.

³⁷ *Malone v. Gates*, 87 Mich. 332; *Bresnahan v. Ross*, 103 Mich. 483; *McParlin v. Boynton*, 8 Hun 449; *Newlan v. Dunham*, 60 Ill. 23.

In the last case the court say the decision of the referee cannot be affected by proof of mistake, but only by fraud. See *Chapman v. Dease*, 34 Mich. 375.

³⁸ *Heald v. Cooper*, 8 Me. 32. In this case *Parris, J.*, delivering the opinion, said: "No mode is prescribed in the written contract by which this estimate is to be made; and it is understood that, from the nature of the article to be delivered, the exact contents could not be ascertained until after the logs had been taken down the river and converted into boards. But it is alleged on the part of the plaintiff that this contract was entered into in reference to a usage or custom prevailing among log dealers on the K. river to ascertain the quantity of boards which may be made from a log or a lot of logs by a scale called the Brunswick scale; and it was submitted to the jury to determine whether, at the time of making

the contract, that scale was in such general and exclusive use as that the parties in making their contract must be presumed to have had reference to it, and would expect to ascertain the number of feet of boards which the logs would make by that scale, and they found in the affirmative. This usage explains the intent of the parties; and not being in opposition to established principles of law, or a contradiction to the express terms of the written instrument, is deemed to form a part of the contract as much as though actually incorporated into it, or expressly referred to. *Williams v. Gilman*, 3 Me. 276; 2 Stark. Ev. 453. * * * Considering that the jury have found the usage, and that the parties contracted in reference to such usage, they are bound by it, and the plaintiff is entitled to \$3 per thousand according to the scale, unless the defendants entered into the contract under such circumstances as will absolve them from the whole or any part of it. They contend that the estimate by the Brunswick scale is erroneous; that its application to logs of the size of those delivered under this contract gives a larger quantity of boards than can be actually produced; and

Where a contract for the sale of hops provided for an inspection by one of the two vendors or another person mutually satisfactory and the designated seller made the inspection, it was held an essential prerequisite to the tender of the goods, and none the less conclusive for having been made by the party selling. The court say: "The contract was for the sale and purchase of hops of a certain description, and the object of the inspection was to determine for the benefit of both parties whether they answered that description. . . Until the vendors delivered the hops with the inspection the vendee was not obliged to pay, and, when so delivered, the vendors were entitled to the purchase price. The inspection was thus as much for the convenience and benefit of one party as the other. Its purpose, like similar provisions in a variety of contracts, was to prevent dispute and litigation at and after performance. * * * And if it was only *prima facie* evidence of the quality of the hops, then it was an idle ceremony, because, not being binding, the vendee could still dispute the quality of the hops, refuse to take them and show, if he could, when sued for not taking them, that they did not answer the requirements of the contract; and thus the plain purpose for which the provision

that the plaintiff is, therefore, not entitled to the benefit of that part of the contract growing out of the usage, but must be holden to the strict quantity, or, at farthest, to the estimate made by the Leonard scale, which is understood to be more exact in giving the quantity of boards to be produced from logs of the size of these than the Brunswick scale. * * * The presumption from these facts (stated) is that the defendants knew the general size and quality of the logs they purchased, and also the scale by which they were to be estimated; and if they did not, that it was in consequence of a want of such diligence as the law presumes every

man having a due regard to his own interests would be likely to use.

* * * It is evident that a scale founded on general principles cannot, in its application, be equally exact in all cases. If a given per cent. is to be deducted as waste from the contents of the log, it is apparent that if the deduction be correct in a large log it cannot be so in a small one. But it is not found, certainly is not to be presumed, that the defendants, dealers in lumber as they are, could be ignorant of a fact so apparent and important to the interests of all persons engaged in the lumber business." See *Barker v. Roberts*, 8 Me. 101.

was inserted in the contract would be entirely defeated.”³⁹ An inspection and measurement of sawlogs by a third person, acting as the vendor’s agent, had been made before the contract of sale and the contract was based upon them, referring to and adopting such person’s scaling. It was held they did not thereby become of the same conclusive nature as when made after the contract, pursuant to employment by both parties, unless the vendee was fully acquainted with the person’s qualifications.⁴⁰ Campbell, J., said: “If the parties had agreed on a sale before the logs were scaled and had agreed that W. should scale them he would have been made their joint agent and arbiter, and it would be difficult to impeach any act of his, honestly done, for a mere mistake of judgment. But when these logs were measured he was acting entirely as the agent of the vendors and on their behalf. Under these circumstances an offer to sell by his measurement already made involves an assertion that he is in all respects a competent person and that he has acted honestly. Nothing short of satisfactory evidence that the purchaser was fully acquainted with his qualifications would remove this burden from the vendor, who demands a sound price on the basis of his measurement. And where a person so employed, even by joint appointment, makes a mistake in a matter of fact, and not merely an error of judgment, there is no ground for holding that such a mistake cannot be corrected. An erroneous assay of silver or a mistaken count of bushels of grain has been held to bind no one.”⁴¹ A material representation or assumption need not be fraudulent in fact in order to authorize its correction.”

§ 644. Same subject; payment by bill or note. To entitle the seller to recover the full value—either the contract or the market price—the sale must be executed so as to pass the title to the purchaser; the property must be at his risk and he thus qualified to bring trover for it. Then, and not till then, an action either for goods sold and delivered, or bargained and sold may be maintained; the former if there has been delivery, and

³⁹ *Dustan v. McAndrew*, 44 N. Y. 76; *Sawyer v. Dean*, 114 id. 469, 478.

⁴⁰ *Ortman v. Green*, 26 Mich. 209.
⁴¹ *Cox v. Prentice*, 3 M. & S. 344; *Wheadon v. Olds*, 20 Wend. 174.

the latter if there has not.⁴² The sale of a specific chattel passes the property in it to the vendee without delivery,⁴³ and the risk of property which is the subject of a sale attends the title.⁴⁴ But where the sale is of goods generally no property in them passes until there is a subsequent appropriation according to the contract of the goods to which it applies.⁴⁵ Where by the

⁴² *Fairbanks v. Heltsley*, 135 Ky. 397, 26 L.R.A.(N.S.) 248; *Backs v. Schlick*, 82 Neb. 289; *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140; *Tufts v. Lawrence*, 77 Tex. 526; *Bailey v. Smith*, 43 N. H. 141; *Gordon v. Norris*, 49 id. 376; *Messer v. Woodman*, 22 id. 172, 53 Am. Dec. 241; *Davis v. Hill*, 3 N. H. 382, 14 Am. Dec. 373; *Ward v. Shaw*, 7 Wend. 404; *Outwater v. Dodge*, 7 Cow. 85; *Warren v. Buckminster*, 24 N. H. 336; *Fuller v. Bean*, 34 id. 290; *Newmarket I. Foundry v. Harvey*, 23 id. 395; *Williams v. Jones*, 1 Bush 621; *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374; *Penniman v. Hartshorn*, 13 Mass. 87; *Macomber v. Parker*, 13 Pick. 175; *Hart v. Tyler*, 15 id. 171; *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713; *Atkinson v. Bell*, 8 B. & C. 277; *Elliott v. Pybus*, 10 Bing. 512; *Simmons v. Swift*, 5 B. & C. 857; *Goodall v. Skelton*, 2 H. Black. 316; *Hanson v. Meyer*, 6 East 614; *Rhode v. Thwaites*, 6 B. & C. 388; *Nichols v. Morse*, 100 Mass. 523; *Morse v. Sherman*, 106 id. 430; *Dyer v. Libby*, 61 Me. 45; *Jenness v. Wendell*, 51 N. H. 63, 12 Am. Rep. 48; *Spicers v. Harvey*, 9 R. I. 582; *Scotten v. Sutter*, 37 Mich. 526; *Phillips v. Merritt*, 2 Up. Can. C. P. 513; *Bishop v. Minderhout*, 128 Ala. 162; *McFadden v. Henderson*, 128 Ala. 221; *Bates St. Shirt Co. v. Place*, 76 N. H. 448.

⁴³ *Dixon v. Yates*, 5 B. & Ad. 313, 340; *Simmons v. Swift*, 5 B. & C.

862; *Gilmour v. Supple*, 11 Moore, P. C. 566; *Arnold v. Delano*, 4 Cush. 40, 50 Am. Dec. 754; *Roper v. Lane*, 9 Allen 502, 510; *Marble v. Moore*, 102 Mass. 443; *Hinde v. Whitehouse*, 7 East 558; *Tarling v. Baxter*, 6 B. & C. 360; *Martindale v. Smith*, 1 Q. B. 389; *Spartali v. Benecke*, 10 C. B. 212; *Calcutta Co. v. De Mattos*, 32 L. J. (Q. B.) 322; *Wood v. Bell*, 6 El. & B. 355; *Dailey v. Green*, 15 Pa. 118; *Webber v. Davis*, 44 Me. 147, 69 Am. Dec. 87; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Bailey v. Smith*, 43 N. H. 141; *Sigerson v. Kahmann*, 39 Mo. 206; *Tome v. Dubois*, 6 Wall. 548, 18 L. ed. 943; *Dexter v. Norton*, 55 Barb. 272.

⁴⁴ *Willis v. Willis*, 6 Dana 48; *Dailey v. Green*, 15 Pa. 118; *Joyce v. Adams*, 8 N. Y. 296; *Terry v. Wheeler*, 25 id. 520; *Taylor v. Lapham*, 13 Allen 26; *Hollenberg M. Co. v. Barron*, 100 Ark. 403, 36 L.R.A.(N.S.) 594; *Jessup v. Fairbanks*, 38 Ind. App. 673; *La Valley v. Ravenna*, 78 Vt. 152, 2 L.R.A.(N.S.) 97, 112 Am. St. 898; *May v. Conn*, 23 Ont. L. R. 102. *Contra*, *Sharp v. Hawkins*, 129 Mo. App. 80, citing local cases.

⁴⁵ *River S. Co. v. Atlantic Mills*, 155 Fed. 466; *American H. & L. Co. v. Chalkley*, 101 Va. 458; *Lincold v. Aishuler Mfg. Co.*, 142 Wis. 475, 28 L.R.A.(N.S.) 780.

The foregoing propositions are quoted and applied in *Hamilton v. Finnegan*, 117 Iowa 623.

contract itself the vendor appropriates to the vendee a specific chattel and the latter thereby agrees to take that chattel and to pay the stipulated price the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.⁴⁶

Where the contract respecting specific property requires certain acts to be performed upon the property itself, necessary to its completion, or for the ascertainment of what shall be paid for it on the terms of the contract, or to place the property elsewhere for the benefit of the vendee, then whether the sale is complete and the title passes before the performance of these acts depends on the intention of the parties. The authorities are not quite harmonious as to when, in such cases, the title does pass.⁴⁷ If there are any conditions precedent they must

⁴⁶ Potthoff v. Hanson, 98 C. C. A. 595, 174 Fed. 983; Bill v. Fuller, 146 Cal. 50; Osgood v. Skinner, 211 Ill. 229; Henderson v. Jennings, 228 Pa. 188, 30 L.R.A.(N.S.) 827; Edson v. Magee, 43 Pa. Super. 297, citing the text; Dixon v. Yates, 5 B. & Ad. 313; Barrett v. Goddard, 3 Mason 107; Hotchkiss v. Hunt, 49 Me. 213; Merrill v. Parker, 24 id. 89; Mears v. Williamson, 37 id. 556; Waldron v. Chase, id. 414, 59 Am. Dec. 56; Page v. Carpenter, 10 N. H. 77; Felton v. Fuller, 29 id. 121; Willis v. Willis, 6 Dana 48; Crawford v. Smith, 7 id. 59; Sweeney v. Owsley, 14 B. Mon. 413; Buffington v. Ulen, 7 Bush 231; Martin v. Adams, 104 Mass. 262; Merchants' Nat. Bank v. Bangs, 102 id. 291; Thayer v. Lapham, 13 Allen 28; Warden v. Marshall, 99 Mass. 305; Gardner v. Lane, 9 Allen 498, 85 Am. Dec. 779; Rice v. Codman, 1 Allen 377; Bethel St.

M. Co. v. Brown, 57 Me. 9, 99 Am. Dec. 752; Dyer v. Libby, 61 Me. 45; Habenicht v. Lissak, 77 Cal. 139; Georgia Ref. Co. v. Augusta O. Co., 74 Ga. 497. See Waldon v. Murdock, 23 Cal. 540, 83 Am. Dec. 145; Russell v. Carrington, 42 N. Y. 118, 1 Am. Rep. 498; Adams M. Co. v. Senter, 26 Mich. 73; 1 Mechem on Sales, § 483 *et seq.*; Thayer v. Davis, 75 Wis. 205; Rail v. Little Falls L. Co., 47 Minn. 422; Burcham v. Griffeth, 31 Neb. 778.

⁴⁷ Barber v. Thomas, 66 Kan. 463; Woodbine C. Co. v. Goldnamer, 134 Ky. 538; Mayberry v. Lilly M. Co., 112 Tenn. 564; Benj. on Sales, book 2, ch. 3; Lingham v. Eggleston, 27 Mich. 324; Hatch v. Fowler, 28 id. 205; Wilkinson v. Holiday, 33 id. 386; Chamblee v. McKenzie, 31 Ark. 155. See Byles v. Colier, 54 Mich. 1; Hood v. Bloch, 29 W. Va. 244; Wadhams v. Balfour, 32 Ore. 313; Barker v. Freeland, 91 Tenn.

be performed or waived.⁴⁸ The title does not pass, and there is no right of action for the contract price, or for damages measured by the value of the subject of the sale, when the agreement is for the sale of goods generally and there is in the contract no identification of any particular goods until such steps are taken afterwards by one or both of the parties in pursuance of the contract as are necessary to the selection and appropriation of the specific property to it, unless there is a stipulation to pay while the contract is executory. When those steps have been taken the contract ceases to be executory; it becomes a complete bargain and sale; the title passes and the vendor is entitled to the price,⁴⁹ equally as if the property so appropriated had been at the making of the contract described and identified in it.⁵⁰

112; *Restad v. Engemoen*, 65 Minn. 148; *Pacific L. Co. v. Rudebeck*, 15 Wash. 336; *Towne v. Davis*, 66 N. H. 396; *Burke v. Shannon* (Ky.) 43 S. W. 223; *Joyce v. Adams*, 8 N. Y. 291.

The buyer may refuse acceptance and limit the seller's recovery to an action for damages. *Massman v. Steiger*, 79 N. J. L. 442.

⁴⁸ *Id.*; *United Society v. Brooks*, 145 Mass. 410; *Ehram Mfg. Co. v. Jackman*, 73 Kan. 435; *Aspegren v. Wallerstein P. Co.*, 111 Va. 570; *Badger State L. Co. v. Jones L. Co.*, 140 Wis. 73.

⁴⁹ In the absence of any stipulation as to the time for making payment it is due when the property is delivered. *Stum v. Hadrich*, 7 Cal. App. 241.

⁵⁰ *Hardwick v. American C. Co.*, 113 Tenn. 657; *Crofoot v. Bennett*, 2 N. Y. 258; *Crawford v. Earl*, 38 Wis. 312; *Thompson v. Alger*, 12 Metc. (Mass.) 428; *Thorndike v. Locke*, 98 Mass. 340; *Bement v. Smith*, 15 Wend. 493; *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Gordon v. Norris*, 49 N. H.

376; *Jenness v. Wendell*, 51 id. 63, 12 Am. Rep. 48; *Spicers v. Harvey*, 9 R. I. 582; *Scudder v. Worster*, 11 Cush. 573; *Browning v. Hamilton*, 42 Ala. 484; *Bailey v. Smith*, 43 N. H. 141; *Messer v. Woodman*, 22 id. 172, 53 Am. Dec. 241; *Garland v. Lane*, 46 N. H. 245; *Woolsey v. Bailey*, 27 id. 217; *Macomber v. Parker*, 13 Pick. 175; *Putnam v. Tillotson*, 13 Metc. (Mass.) 517; *Stanton v. Eager*, 16 Pick. 467; *Johnson v. Stoddard*, 10 Mass. 306; *Odell v. Boston & M. R.*, 109 Mass. 50; *Clafin v. Boston & L. R. Co.*, 7 Allen 341; *Ballentine v. Robinson*, 46 Pa. 179; *Dustin v. McAndrew*, 44 N. Y. 72; *Krulder v. Ellison*, 47 id. 36, 7 Am. Rep. 402; *Rodgers v. Phillips*, 40 N. Y. 519; *Torrey v. Corliss*, 33 Me. 336; *Barry v. Palmer*, 19 id. 303; *Dutton v. Solomonson*, 3 B. & P. 582; *Aldridge v. Johnson*, 7 El. & B. 885; *Brown v. Hare*, 3 H. & N. 484; *Fragano v. Long*, 4 B. & C. 219; *Elliott v. Pybus*, 10 Bing. 512.

In *Lamkin v. Crawford*, 8 Ala. 153, it was held that a purchaser at a sheriff's sale is liable to an

Several cases seem to affirm the right of a vendor to tender goods on an executory contract of sale and sue for the price though the agreement did not give him the right of selecting and appropriating the particular goods to it.⁵¹ When articles are ordered to be manufactured they are treated as the property of the vendee when made and notice thereof given to him with request to take them away. The vendor has then an immediate right of action for the price.⁵² After goods are sold it is the duty of the buyer to take them away within a reasonable time, and if he neglects to do so the seller may charge for warehouse room if prejudiced by the delay.⁵³ Where goods are sold to be paid for by bill or note, payable at a future day, and the bill or note is not given general *assumpsit* for goods sold and delivered cannot be maintained until the credit has expired;⁵⁴ but the vendor may sue at once on the special agreement and recover the whole amount for which the bill or note should have been

action by the sheriff, and the right to recover the full price cannot be controverted if the latter at the time of the trial has the ability to deliver the thing purchased, or if it has been placed at the disposal of the purchaser by tender.

⁵¹ *Bridgeford v. Crocker*, 60 N. Y. 627; *Westfall v. Peacock*, 63 Barb. 207. See *Bagley v. Findlay*, 82 Ill. 524; *McClure v. Williams*, 5 Sneed 718. *Contra*, *Massman v. Steiger*, 79 N. J. L. 442. See *Mayberry v. Lilly M. Co.*, 112 Tenn. 564.

It is said in a late case that the title to chattels passes at once upon the execution of the contract of sale, "for it is the general rule that a mere contract for the sale of goods, where the subject is identified and nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid nor the goods sold delivered to the purchaser." *Van Brocklen v. Smeallie*, 140 N. Y. 70.

In *Dayton v. Rowland*, 1 Daly 446, it was held that where, by the custom of trade, a purchaser of goods on shipboard is bound to unload them within a definite time and by reason of his failure to take the goods within that time the owner is obliged to pay lighterage and storage fees thereon the purchaser is liable for such payments.

⁵² *Acme F. Co. v. Older*, 64 W. Va. 255, 17 L.R.A.(N.S.) 807, quoting most of the preceding part of this section; *Higgins v. Murray*, 4 Hare 565; *Bement v. Smith*, 15 Wend. 493; *Ballentine v. Robinson*, 46 Pa. 179; *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Morse v. Sherman*, 106 Mass. 430; *Mixer v. Howarth*, 21 Pick. 205, 32 Am. Dec. 256.

⁵³ See *Greaves v. Ashlin*, 3 Camp. 426.

⁵⁴ *Dodge v. Waterman*, 36 N. H. 186; *Allen v. Ford*, 19 Pick. 217; *Yale v. Coddington*, 21 Wend. 175; *Scott v. Montague*, 16 Vt. 164.

given, or the value of the goods.⁵⁵ Such right of action rests not only upon the idea of the breach of a special promise to give the evidence of indebtedness, but also upon the theory that by the custom of merchants the note or bill might be made, by getting it discounted, the means of present payment. In a New York case it was suggested that there should be a rebate of interest during the stipulated period of credit.⁵⁶ Interest may be allowed the vendor up to the time of the finding of the amount due the vendee as damages for breach of the contract, then the latter should be deducted and interest given the vendor on the balance due him.⁵⁷

§ 645. Recovery for part of stipulated quantity. Where an entire contract is made for the sale and delivery of personal property, either for a gross sum or at a certain price per unit of its measure or weight, and it is only in part performed by the vendor no action, of course, can be maintained on the contract for such part performance, and formerly there could be no recovery in any form;⁵⁸ and that doctrine was long adhered to in some states.⁵⁹ But a more just and equitable rule generally prevails. If the vendee retains the part delivered after the

⁵⁵ *Copeland v. Fowler*, 151 N. C. 353; *Kelly v. Pierce*, 16 N. D. 234, 12 L.R.A.(N.S.) 180; *Thomas Mfg. Co. v. Watson*, 85 Me. 300; *Geiser Mfg. Co. v. Halzer*, 110 Minn. 138; *Hutchinson v. Reed*, 3 Camp. 329; *Mussen v. Price*, 4 East 147; *Dutton v. Solomonson*, 3 B. & P. 582; *Haskins v. Duperoy*, 9 East 498; *Adams v. Filer*, 7 Wis. 306, 73 Am. Dec. 410; *Loring v. Gurney*, 4 Pick. 16; *Hunneman v. Grafton*, 10 Metc. (Mass.) 454; *Fuller v. Sweet*, 30 Mich. 237, 18 Am. Rep. 122; *Barron v. Mullin*, 21 Minn. 374; *McCormick v. Basal*, 46 Iowa 235; *Rinehart v. Olwine*, 5 W. & S. 157; *Bicknell v. Buck*, 58 Ind. 354; *Stoddard v. Mix*, 14 Conn. 12; *Carnahan v. Hughes*, 108 Ind. 225; *Stephenson v. Repp*, 47 Ohio St. 551, 10 L.R.A. 620; *Han-*

na v. Mills, 21 Wend. 90, 34 Am. Dec. 216; *American Mfg. Co. v. Klarquist*, 47 Minn. 344; *Aultman v. Daggs*, 50 Mo. App. 280; *Girard v. Taggart*, 5 S. & R. 19, 9 Am. Dec. 327; *Manton v. Gammon*, 7 Ill. App. 201; *Foster v. Adams*, 60 Vt. 392, 6 Am. St. 120; *Young v. Dalton*, 83 Tex. 497; *Osborne v. Bell*, 62 Mich. 214. See §§ 659, 660 for the rule where the contract price is payable in the note of a third party or in other specific articles.

⁵⁶ *Copeland v. Fowler*, *Hanna v. Mills*, *supra*.

⁵⁷ *Masterson v. Heitmann*, 38 Tex. Civ. App. 476.

⁵⁸ 2 Kent's Com. 509.

⁵⁹ *Champlin v. Rowley*, 18 Wend. 187, 13 id. 258; *McMillan v. Vanderlip*, 12 Johns. 165, 7 Am. Dec. 299; *Youngs v. Kent*, 2 Sweeny 257;

vendor has made default in respect to the residue it is a severance of the contract, and the vendor is entitled to recover the contract price for what is so delivered and retained, subject to recoupment of such damages as the vendee sustains for non-performance of the entire contract,⁶⁰ or the value, subject to like counter-claim.⁶¹ The vendee may return the part delivered when delivery of the whole is due and not made if he chooses; but if he retains it it is deemed just that he should make compensation for it; and the same rule applies to other contracts, namely, that the party who accepts and appropriates the benefit of a partial performance should pay therefor to the extent of the benefit, but has the right to damages for the other party's failure to perform in full.⁶² A contract for property to be delivered in instalments, where each instalment is to be paid for separately, is not entire. The vendor will be entitled to recover for any delivered instalment, irrespective of default in the delivery of others.⁶³

Flanagan v. Demarest, 3 Robert. 183; *Moses v. Banker*, 2 Sweeny 267; *McCormick v. Sarson*, 1 id. 161; *Currie v. White*, id. 166; *Keen v. Tupper*, 33 N. Y. Super. 465, 52 N. Y. 550; *Catlin v. Tobias*, 26 id. 217, 84 Am. Dec. 183; *Mead v. Degolyer*, 16 Wend. 632; *Witherow v. Witherow*, 16 Ohio 238; *Williams v. Sherman*, 48 Barb. 402. See *Leavenworth v. Packer*, 52 id. 132.

The rule in New York has probably been changed. See *Brady v. Cassidy*, 145 N. Y. 171; *Avery v. Willson*, 81 N. Y. 341, 37 Am. Rep. 503; *Parke v. Franko-Am. T. Co.*, 120 N. Y. 51; *Dalzell v. Fahy's W. C. Co.*, 138 N. Y. 285.

⁶⁰ *Bowker v. Hoyt*, 18 Pick. 555; *Smith v. Foster*, 36 Vt. 705; *Abbott v. Wyse*, 15 Conn. 254; *Horn v. Batchelder*, 41 N. H. 86; *Richard v. Shaw*, 67 Ill. 222; *Polhemus v. Heiman*, 45 Cal. 573; *Brown G. Co. v.*

Tuggle (Tex. Civ. App.), 141 S. W. 821.

⁶¹ *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Clark v. Moore*, 3 Mich. 55; *Chapman v. Dease*, 34 id. 375; *Wilson v. Wager*, 26 id. 452; *Begale v. McKinzie*, id. 470; *Oxendale v. Witherell*, 9 B. & C. 386; *Cooke v. Munstone*, 1 P. & B. N. R. 351; *Read v. Rann*, 10 B. & C. 441; *United States v. Molloy*, 144 Fed. 321, 11 L.R.A. (N.S.) 487, 75 C. C. A. 283; *Craig v. Pierson L. Co.*, 169 Ala. 548; *Pittsburgh P. G. Co. v. Kerlin*, 122 Fed. 414, 58 C. C. A. 648; *Hills v. Peycke Co.*, 14 Cal. App. 32; *Mead v. Rat Portage L. Co.*, 93 Minn. 342; *Coal Co. v. Ice Co.*, 134 N. C. 574. See late New York cases cited in next to last preceding note.

⁶² *Chapman v. Dease*, 34 Mich. 375. See *Gorham v. Dallas*, etc. R. Co., 41 Tex. Civ. App. 615.

⁶³ *Gerli v. Poidebard S. Mfg. Co.*,

In contracts for the future delivery of goods, to be subsequently or concurrently paid for, the delivery being a condition on the performance of which the right to payment depends, if the contract is entire there must be a delivery of the whole to fulfill the condition.⁶⁴ But where delivery is to be made in parcels or instalments, severable not only in bulk but in prices and times of delivery, the delivery of each parcel is a condition only to payment *pro tanto*.⁶⁵ Nor will a default in respect to one severable part entitle the other party to rescind unless there is then a renunciation of the entire contract, persisted in afterwards.⁶⁶

57 N. J. L. 432, 30 L.R.A. 61, 51 Am. St. 611; Rock Island S. & D. Works v. Moore H. Co., 147 Ala. 581; Morris v. Wibaux, 159 Ill. 627, 648, quoting the text; Williams v. Robb, 104 Mich. 242; Loomis v. Eagle Bank, 10 Ohio St. 327; Moore v. Logan, 5 Up. Can. C. P. 294. See Seymour v. Davis, 2 Sandf. 239.

⁶⁴ Howe v. Huntington, 15 Me. 350; Warren v. Wheeler, 21 id. 484; Howland v. Leach, 11 Pick. 151; Swan v. Drury, 22 id. 485; Dana v. King, 2 id. 155; Lord v. Belknap, 1 Cush. 279; Gazley v. Price, 16 Johns. 267; Williams v. Henley, 3 Denio 363; Cornwall v. Haight, 8 Barb. 327; Champion v. Rowley, 18 Wend. 187; Jones v. Marsh, 22 Vt. 144; Shaw v. Turnpike Co., 2 P. & W. 454; Smith v. Liscomb, 13 Tex. 532; Barber v. Willard, 4 McLean 356; Grundy v. McClure, 2 Jones 142; Hough v. Rawson, 17 Ill. 588; Rawson v. Johnson, 1 East 203; Jackson v. Allaway, 6 M. & Gr. 942; Boyd v. Lite, 1 C. B. 222; Atkinson v. Smith, 14 M. & W. 695; Bankart v. Bowen, L. R. 1 C. P. 484; Murphy v. St. Louis, 8 Mo. App. 483.

⁶⁵ Briggs v. Morgan, 104 Mo. App. 62; Badger State L. Co. v. Jones L. Co., 140 Wis. 73; Racine S. Mfg. Co. v. Badger Mfg. Co., 123 Wis.

94; Cherry Valley I. Works v. Florence I. R. Co., 64 Fed. 569, 12 C. A. 306; McLaughlin v. Hess, 164 Pa. 570; McGrath v. Gegner, 77 Md. 331, 39 Am. St. 415; Kokomo S. Co. v. Inman, 134 N. Y. 92; Hess Co. v. Dawson, 149 Ill. 138; Smith v. Keith & P. C. Co., 36 Mo. App. 567; Johnson v. Allen, 78 Ala. 387, 56 Am. Rep. 34; Brown v. Muller, L. R. 7 Ex. 319. See Deming v. Kemp, 4 Sandf. 147; Seymour v. Davis, 2 id. 239.

⁶⁶ McDonald v. Kansas City B. & N. Co., 149 Fed. 360, 8 L.R.A. (N.S.) 1110, 79 C. C. A. 298; Clark v. Wheeling S. Works, 53 Fed. 494, 3 C. C. A. 600; German Sav. Inst. v. De La Vergne R. M. Co., 70 Fed. 146, 17 C. C. A. 34; Roper v. Johnson, L. R. 8 C. P. 167; Withers v. Reynolds, 2 B. & Ad. 882; Smoot's Case, 15 Wall. 36, 21 L. ed. 107; Simpson v. Crippin, L. R. 8 Q. B. 14; Frost v. Knight, L. R. 5 Ex. 322; Burtis v. Thompson, 42 N. Y. 246. See Bloomer v. Bernstein, L. R. 9 C. P. 588.

Shipping cattle that do not fulfill the requirements of a contract with others that do will not justify the purchaser in refusing other cattle subsequently shipped if they are such as were contracted for, the contract providing for shipments at

In *Norrington v. Wright*,⁶⁷ Mr. Justice Gray reviews the English and American cases and, speaking for the court, says that the seller is bound to deliver the quantity stipulated for and has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity. When the property is to be shipped in certain proportions monthly the failure to ship the required quantity in the first month gives the purchaser the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should have been delivered at once if such right is distinctly and reasonably asserted.⁶⁸

§ 646. **Same subject.** Where the contract provides for a series of deliveries and there is a renunciation of it by the seller and a consequent default in respect to all or several of them, it has been held, where action was delayed until after the time stipulated for the last delivery, that the proper measure of damages is the sum of the difference between the contract and market prices on the days when the several deliveries were due.⁶⁹ In *Barningham v. Smith*⁷⁰ the defendants contracted with the plaintiff to deliver from the 1st of January until the 31st of December, 1872, six thousand two hundred and sixty wagons of coal at 7s. 3d. per ton of two thousand pounds, at

different times, to be paid for as fast as delivery is made. *Morris v. Wibaux*, 159 Ill. 627.

⁶⁷ 115 U. S. 188, 29 L. ed. 366; *Lee v. Sickles S. Co.*, 38 Mo. App. 201. *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, has been approved in *Cleveland R. M. v. Rhodes*, 121 U. S. 255, 30 L. ed. 920; *Pope v. Porter*, 102 N. Y. 366.

⁶⁸ This rule is substantially in accord with *Hoare v. Rennie*, 5 H. & N. 19; *Coddington v. Paleologo*, L. R. 2 Ex. 193; *Bowes v. Shand*, 2 App. Cas. 455; *Reuter v. Sala*, 4 C. P. Div. 239; *Houck v. Muller*, 7 Q. B. Div. 92. It differs from that announced in *Simpson v. Crippin*, L. R. 8 Q. B. 14, and *Brandt v. Lawrence*, 1 Q. B. Div. 344. See *Hill v. Blake*, 97 N. Y. 216; *King Phil-*

lip's Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; *Smith v. Keith & P. C. Co.*, 36 Mo. App. 567; *Freeth v. Burr*, L. R. 9 C. P. 208; *Mersey S. & I. Co. v. Naylor*, 9 App. Cas. 439, 9 Q. B. Div. 648.

⁶⁹ *Cherry Valley I. Works v. Florence I. R. Co.*, 64 Fed. 569, 12 C. C. A. 306; *Brown v. Muller*, L. R. 7 Ex. 319; *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34; *Hill v. Chipman*, 59 Wis. 211; *Missouri F. Co. v. Cochran*, 8 Fed. 463; *Hamilton v. McGill*, 12 L. R. Ire. 186, 201; *Roper v. Johnson*, L. R. 8 C. P. 167.

⁷⁰ 31 L. T. (N. S.) 540; *Ex parte Llansamlet T. P. Co.*, L. R. 16 Eq. 155; *Simons v. Ypsilanti P. Co.*, 77 Mich. 185.

the fair average rate of twenty wagons per day; payment by three months' acceptance drawn on the 10th of each month for the previous month's supply. The deliveries were irregular in point of time and insufficient as to quantity; they failed to comply with the condition that they should be at the fair average rate of twenty wagons per day. At the end of the year there was a large deficiency. The plaintiff, although constantly complaining of the deliveries, did not go into the market and buy against the defendant at any time during 1872, but on the 13th of February, 1873, he bought coal in the market to supply the whole deficiency at a very much higher price, namely 19s. per ton. Coal had been gradually rising in price throughout the successive months of 1872; and it rose more rapidly in the months of January and February, 1873. The plaintiff claimed to be entitled to damages to the extent of the difference between the contract price of 7s. 3d. and the market price at the expiration of such a reasonable time after the 31st of December, 1872, as would have enabled him to go into the market and obtain it, calculated upon the whole deficiency left undelivered by the defendants throughout the year 1872. The defendants contended he was not entitled to wait until the expiration of the year before assessing his damages; that a breach was committed as often as a month expired without the proper quantity having been delivered and that the plaintiff was bound to assess his damages in respect of such breach from an estimate of that month's market price; or that the breaches were committed at some shorter periods, but that the damages should be calculated at the end of each month. It was held that as soon as the defendants failed to deliver a fair average of coal according to the terms of the contract a breach had taken place, for which at that time the plaintiff was entitled to damages as upon that breach, and so on from time to time, to the last; that it was an erroneous way of estimating the damages by waiting until the full period of the contract had expired and then claim the difference at that time.⁷¹ If the purchaser notifies the vendor that no more property will be received under the contract.

⁷¹ See *Tyers v. Rosedale, etc. Co., L. R. 8 Ex. 305*.

after a specified date and a tender is subsequently made of the undelivered portion, if there has been an advance in the price between the time of the notice and the tender and a diminution in the difference between the contract and the market price the variance between these when the tender is made measures the damages.⁷² If the purchaser's orders for the maximum quantity demandable in any month under the contract are not wholly filled and in subsequent months more than that quantity is delivered and accepted, there is a waiver *pro tanto* of the earlier breach. In determining the disposition to be made of the excessive deliveries courts will apply the rule which governs the application of payments of money when no application thereof is made by the parties, and apply the excess on the first surplus delivery to the earliest deficient delivery, and the second excessive delivery to the next insufficient one;⁷³ at least where it is not shown that the market price was higher when the first excessive delivery was made than when the earliest deficient one was.⁷⁴

Where the contract is to furnish an indefinite quantity of army supplies at a certain post for a specified time and no means exist by which it can be ascertained in advance how much will be required, each party owes the other the duty of exercising diligence in keeping himself and the other informed of facts which tend to lessen the uncertainty. The receiving officer may change or revoke his orders concerning the delivery of supplies any time before they are received. If he does so the government will be liable for such as the contractor had on hand ready to deliver and as to which he had incurred substantially all the cost and trouble which would have been taken if delivery had been made; as to these supplies it will be considered that he has complied with his agreement. For his preparations and progress towards furnishing other supplies, not substantially ready for delivery, he may recover the cost, expenses and losses actually incurred, but not the prospective profits.⁷⁵

⁷² Rhodes v. Cleveland R. M. Co.,
17 Fed. 426.

⁷³ Johnson v. Allen, 78 Ala. 387,
394, 56 Am. Rep. 34.

⁷⁴ Gallun v. Seymour, 76 Wis. 251.

⁷⁵ Field v. United States, 16 Ct.
of Cls. 434.

§ 647. **Liability for not accepting goods.** On the breach of a contract to accept goods the vendor has, in some states, the choice of three remedies: He may store the goods for the buyer and sue for the price; he may sell them as agent for the vendee and recover any deficiency between the price realized and that contracted to be paid, or keep the goods and recover the difference between the contract price and the market price at the time and place fixed upon for delivery. These remedies are not concurrent.⁷⁶ An executory agreement which requires a subsequent acceptance of the property by the buyer to consummate the sale does not become a complete bargain and sale so as to vest the title in him if he refuses to accept it.⁷⁷ In such case the vendor is entitled to recover damages only to the extent of his actual injury from the failure of the vendee to fulfill his contract.⁷⁸ Ordinarily this is the difference between

⁷⁶ See *Van Brocklin v. Smeallie*, 140 N. Y. 70; *Hayden v. Dennets*, 53 N. Y. 426; *Mason v. Decker*, 72 id. 595, 28 Am. Rep. 190; *Bridgeford v. Crocker*, 60 N. Y. 627; *Isaacs v. Terry*, 56 N. Y. Misc. 586; *Zinsmeister v. Rock Island C. Co.*, 145 Ky. 25; *Dustan v. McAndrew*, 44 N. Y. 72. *Contra*, *Acme F. Co. v. Older*, 64 W. Va. 255, 17 L.R.A. (N.S.) 807; *United Flour Mills Co. v. Kryda*, 185 Ill. App. 610; *Mitchell-Taylor Tie Co. v. Whitaker*, 158 Ky. 651.

⁷⁷ *Lange v. Interstate Sales Co.*, — Tex. Civ. App. —, 166 S. W. 900.

Where it is stipulated that an article to be furnished shall, unqualifiedly, be satisfactory to the party to whom it is to be supplied, the right to reject the article, as not being satisfactory, cannot be inquired into; the party's own determination is final and conclusive. *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 225, 57 Am. Rep. 318; *Andrews v. Belfield*, 2 C. B. (N. S.) 779; *McCarren v. McNulty*, 7 Gray 139; *Brown v. Foster*, 113 Mass.

136, 18 Am. Rep. 463; *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Rossiter v. Cooper*, 23 Vt. 522; *Hart v. Hart*, 22 Barb. 606; *Gibson v. Cranage*, 39 Mich. 49; *Wood R. & M. Mach. Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57; *Taylor v. Trustees of Poor*, 1 Penne. 555.

But this principle is not absolute where the stipulation is that the article to be supplied shall be such as shall be approved by, or be satisfactory to, some third person, though he be an agent of one of the parties to the contract. In such case the condition precedent is not binding if it be shown that the approval has been withheld because of selfish interest, bias, partiality or corruption; but no mere error of judgment will vitiate such person's determination. *Baltimore & O. R. Co. v. Brydon*, *supra*; *Sweeney v. United States*, 109 U. S. 618, 27 L. ed. 1053; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 29 L. ed. 255; *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 597.

⁷⁸ *Mayo v. Latham*, 159 Mich.

the contract price and the market value of the goods at the time and place of the breach of the contract, together with interest.⁷⁹

136; *Loftus v. Riley*, 83 Iowa 503; *Allen v. Jarvis*, 20 Conn. 38; *Dana v. Fiedler*, 12 N. Y. 48, 62 Am. Dec. 130; *Houston, etc. R. Co. v. Mitchell*, 38 Tex. 85; *Robinson v. Varnell*, 16 id. 382; *Home Pattern Co. v. W. W. Mertz Co.*, 88 Conn. 22; *Roswell Nursery Co. v. Mielenz*, 18 N. M. 417.

If part of the property refused has been sold to another the price received for it is relevant to show the plaintiff's damages. *Eagle I. Co. v. Baugh*, 147 Ala. 613.

⁷⁹ *Barrett v. Verdery*, 93 Ga. 526; *Hamilton v. Finnegan*, 117 Iowa 623; *Moffat v. Davitt*, 200 Mass. 452; *Tacoma M. Co. v. Gilcrest L. Co.*, 90 Neb. 104; *Avant v. Watson* (Tex. Civ. App.), 122 S. W. 586; *Oriental L. Co. v. Blades L. Co.*, 103 Va. 730; *Chapman v. Ingram*, 30 Wis. 290; *Hare v. Parkersburg*, 24 W. Va. 554; *Diels v. Kennedy*, 88 Neb. 777; *Malcomson v. Reeves P. Co.*, 167 Fed. 939, 93 C. C. A. 339; *Gate City C. Mills v. Rosenau H. Mills*, 159 Ala. 414; *First M. E. Church of Strong City v. North*, 92 Kan. 381; *Sullivan v. Boswell*, 122 Md. 539; *Poel v. Brunswick-Balke-Collender Co. of New York*, 159 App. Div. (N. Y.) 365; *Spears v. Henry F. Michell Co., Inc.*, 56 Pa. Super. Ct. 294; *Denver E. Works Co. v. Elkins*, 179 Fed. 922; *Salmon v. Helena B. Co.*, 158 Fed. 300, 85 C. C. A. 551; *River S. Co. v. Atlantic Mills*, 155 Fed. 466; *Benjamin v. Maloney*, id. 494; *Habeler v. Rogers*, 131 Fed. 43, 65 C. C. A. 281; *Lincoln v. Levi C. M. Co.*, 128 Fed. 865, 63 C. C. A. 333; *Ketcham v. United States*, 40 Ct. of Cls. 220; *Scruggs v. Riddle*, 171 Ala. 350; *Stafsky v. Southern R. Co.*, 143 Ala.

272; *Kirchman v. Tuffi B. P. I. & C. Co.*, 92 Ark. 111 (interest not mentioned); *Hassell I. Works Co. v. Cohen*, 36 Colo. 353 (interest not referred to); *Great Western C. & C. Co. v. St. Louis, etc. C. Co.*, 140 Ill. App. 368 (interest not mentioned); *Hollerbach & M. C. Co. v. Wilkins*, 130 Ky. 51 (no reference to interest); *Louisville & N. R. Co. v. Coyle*, 123 Ky. 854, 8 L.R.A. (N.S.) 433, 124 Am. St. 384; *Bell v. Hatfield*, 121 Ky. 560, 2 L.R.A. (N.S.) 529; *Woodstock I. Works v. Standard P. Mfg. Co.*, 115 La. 829; *Bonney v. Blaisdell*, 105 Me. 121; *Barrie v. Quimby*, 206 Mass. 259; *Pittsburgh C. Co. v. Northy*, 158 Mich. 530; *Kellogg v. Frolich*, 139 Mich. 612; *Mohr H. Co. v. Dubey*, 136 Mich. 677, citing the text, but not mentioning interest; *Alger-F. Co. v. Tracy*, 98 Minn. 432; *Brown v. Trinidad Mfg. Co.*, 210 Mo. 260; *Frederick v. Willoughby*, 136 Mo. App. 244; *Brazell v. Cohn*, 32 Mont. 556; *Trinidad A. Mfg. Co. v. Buckstaff Mfg. Co.*, 86 Neb. 623, 136 Am. St. 710; *Murphy v. Exchange Nat. Bank*, 76 Neb. 573; *Backes v. Black*, 5 Neb. (Unof.) 74, 97 N. W. 321; *Massman v. Steiger*, 79 N. J. L. 442; *Haddam G. Co. v. Brooklyn Heights R. Co.*, 186 N. Y. 247; *Lehmaier v. Standard S. & T. Co.*, 123 App. Div. (N. Y.) 431; *Belle of Bourbon Co. v. Leffler*, 87 App. Div. (N. Y.) 302; *Krebs H. Co. v. Livesley*, 50 Ore. 574; *Webb v. Novelty H. Co.*, 231 Pa. 297; *Mayer B. Co. v. Kennedy*, 230 Pa. 98; *Sharpville F. Co. v. Snyder*, 223 Pa. 372; *Woldert G. Co. v. Wilkinson*, 39 Pa. Super. 100 (silent as to interest); *Boyd v. Merchants' & Farmers' P. Co.*, 25 id. 199; *Gibbes Mach. Co. v. Johnson*,

To this sum, however, there would properly be added any costs of disposal of the goods in excess of those contemplated by the con-

- 81 S. C. 10; *Brooke v. Laurens M. Co.*, 78 S. C. 200, 125 Am. St. 780; *Mayberry v. Lilly M. Co.*, 112 Tenn. 564; *Sour Lake T. Co. v. Deuster F. Co.*, 39 Tex. Civ. App. 86, citing the text; *Parker v. McKannon*, 76 Vt. 96; *American C. Co. v. Flat Top G. Co.*, 68 W. Va. 698, citing the text; *Acme F. Co. v. Older*, 64 W. Va. 255, 17 L.R.A.(N.S.) 807; *Carle v. Nelson*, 145 Wis. 593; *Lincoln v. Alshuler Mfg. Co.*, 142 Wis. 475, 28 L.R.A.(N.S.) 780; *Badger State L. Co. v. Jones L. Co.*, 140 Wis. 73; *Saveland v. Western Wisconsin R. Co.*, 118 Wis. 267; *Gray's Harbor C. Co. v. Turnbull-J. L. Co.*, 163 Ill. App. 231; *Baessetti v. Shenango F. Co.*, 122 Minn. 335; *Ajax-G. R. Co. v. Byars* (Tex. Civ. App.), 153 S. W. 921; *Taylor v. Trustees of Poor*, 1 Penne. 555; *Morris v. Wibaux*, 159 Ill. 627; *Murray v. Doud*, 167 Ill. 368, 59 Am. St. 302 (interest may be recovered if the contract of purchase was evidenced by "bought and sold notes"); *Beardsley v. Smith*, 61 Ill. App. 340; *Rice Co. v. Penn P. G. Co.*, 88 id. 407; *Ridgley v. Mooney*, 16 Ind. App. 362; *Gardner v. Caylor*, 24 Ind. App. 521; *Lawrence C. Co. v. Lee M. Co.*, 5 Kan. App. 77; *Tufts v. Bennett*, 163 Mass. 398; *Williams v. Robb*, 104 Mich. 242; *Stresovich v. Kesting*, 63 Mo. App. 57; *Parlin v. Boatman*, 84 Mo. App. 67; *Funke v. Allen*, 54 Neb. 407, disapproving *Lincoln S. Mfg. Co. v. Sheldon*, 44 Neb. 279, 69 Am. St. 716; *Tripp v. Forsaith Mach. Co.*, 69 N. H. 233; *Van Brocklen v. Smeallie*, 140 N. Y. 70; *Gray v. Central R. Co.*, 82 Hun 523; *National C. R. Co. v. Schmidt*, 48 App. Div. (N. Y.) 472; *Heiser v. Mears*, 120 N. C. 443 (compare the case last cited with *Williams v. Crosby L. Co.*, 118 N. C. 928, where it is held, one judge dissenting, that the measure of damages for the breach by a vendee of a contract for the purchase of timber to be delivered at a designated point is the contract price less the cost of delivery); *Hooper v. Bromley C. Co.*, 11 Pa. Super. 634; *Corser v. Hale*, 149 Pa. 274; *Jones v. Jennings*, 168 Pa. 493; *Guillon v. Earnshaw*, 169 Pa. 463; *Woldert v. Arledge*, 4 Tex. Civ. App. 692; *Adler v. Kiber*, 5 Tex. Civ. App. 415; *Scott L. Co. v. Hafner-L. Mfg. Co.*, 91 Wis. 667; *Gehl v. Milwaukee P. Co.*, 105 Wis. 573; *Cherry Valley I. Works v. Florence I. R. Co.*, 64 Fed. 569, 12 C. C. A. 306; *Fisher v. Newark City I. Co.*, 62 Fed. 569, 10 C. C. A. 546, 76 Fed. 427, 22 C. C. A. 261; *Friedenstein v. United States*, 35 Ct. of Cls. 1; *Georgia Ref. Co. v. Augusta O. Co.*, 74 Ga. 497, 507; *Thurman v. Wilson*, 7 Ill. App. 312; *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140; *Schramm v. Boston S. R. Co.*, 146 Mass. 211; *Windmuller v. Pope*, 107 N. Y. 674; *Cullen v. Bimm*, 37 Ohio St. 236; *White v. Matador L. & C. Co.*, 75 Tex. 465; *Geiss v. Wyeth H. & Mfg. Co.*, 37 Kan. 130; *Unexcelled F. Co. v. Polites*, 130 Pa. 536, 17 Am. St. 788; *Girard v. Taggart*, 5 S. & R. 19, 539, 9 Am. Dec. 327; *Davis v. Adams*, 18 Ala. 264; *Clement, etc. Mfg. Co. v. Meserole*, 117 Mass. 362; *Danforth v. Walker*, 37 Vt. 239; *Beals v. Terry*, 2 Sandf. 127; *Whitmore v. Coats*, 14 Mo. 9; *Rand v. White Mountains R. Co.*, 40 N. H. 79; *Andrews v. Hoover*, 8 Watts 239; *Ganson v. Madigan*, 13 Wis. 67; *Rider v. Kelly*, 32 Vt. 268,

tract, that could be shown to have been necessary in order to effect the sale. Likewise would be deducted expenses he would

76 Am. Dec. 176; *Weltner v. Riggs*, 3 W. Va. 445; *Pickering v. Bardwell*, 21 Wis. 562; *Hale v. Trout*, 35 Cal. 229; *Dustan v. McAndrew*, 44 N. Y. 72; *Lewis v. Greider*, 49 Barb. 606, 51 N. Y. 231; *Pollen v. Le Roy*, 10 Bosw. 38, 30 N. Y. 549; *Bridgeford v. Crocker*, 60 N. Y. 627; *Metzler v. Moore*, 1 Blackf. 342, 12 Am. Dec. 248; *Lucas v. Heaton*, 1 Ind. 264; *Ellison v. Dove*, 8 Blackf. 571; *Zehner v. Dale*, 25 Ind. 433; *Williams v. Jones*, 12 id. 561; *Young v. Mertens*, 27 Md. 114; *Hall v. Pierce*, 4 W. Va. 107; *Springer v. Berry*, 47 Me. 330; *Hall v. O'Hanlan*, 1 Brev. 471; *Clifton v. Newsum*, 1 Jones 108; *Haskell v. McHenry*, 4 Cal. 411; *Nixon v. Nixon*, 21 Ohio St. 114; *Barr v. Logan*, 5 Harr. 52; *Hewitt v. Miller*, 61 Barb. 567; *Rickey v. Tenbroeck*, 63 Mo. 563; *McNaught v. Cassally*, 4 McLean 530; *Chapman v. Cochran*, 30 Wis. 295; *Marshall v. Piles*, 3 Bush. 249; *Camp v. Hamlin*, 55 Ga. 259; *Sanborn v. Benedict*, 78 Ill. 309; *Pittsburgh, etc. R. Co. v. Heck*, 50 Ind. 303, 19 Am. Rep. 713; *Schnebley v. Shirtcliff*, 7 Phila. 236; *McNaught v. Dodson*, 49 Ill. 446; *Gibbons v. United States*, 8 Wall. 269, 18 L. ed. 453; *Jochams v. Ong*, 45 La. Ann. 1289; *Peters v. Cooper*, 95 Mich. 191; *Cole v. Zucarello*, 104 Tenn. 64, citing the text; *Hill v. McKay*, 94 Cal. 5; *Minneapolis T. M. Co. v. McDonald*, 10 N. D. 408; *Duluth F. Co. v. Iron Belt M. Co.*, 117 Fed. 138, 55 C. C. A. 154; *Gehl v. Milwaukee P. Co.*, 116 Wis. 263; *Nelson v. Hirschberg*, 70 Ark. 39, citing the text; *Kincaid v. Price*, 18 Colo. App. 73; *Blick v. Fabian* (N. Y. Misc.), 86 Supp. 207.

The value of timber on the land

of the seller is to be fixed there though the buyer was to remove it and it was to be measured elsewhere. *Wheeler v. Cleveland*, 170 Ala. 426.

The depreciation in the value of cattle and the expense of keeping them after the vendee's default may be proven without being specially pleaded. *Peters v. Cooper*, 95 Mich. 191; *Smith v. Sloss Marblehead L. Co.*, 51 Ohio St. 518.

It is no objection to the recovery of such damages that the contract was for purchase of all the ice which should be stored for five years. The profits are not too remote, contingent or speculative to be brought within a reasonable estimate of damages. *Tahoe I. Co. v. Union I. Co.*, 109 Cal. 242.

Under the code of South Dakota the vendor may also recover the expenses incurred in carrying the property to market over those which would have been incurred therefor if the buyer had accepted it. *Dowagiac Mfg. Co. v. White Rock L. & H. Co.*, 18 S. D. 105.

Where the contract was for the purchase of 5,000,000 bricks, the entire output of the vendor's plant for one year, as rapidly as they could be produced, the vendee could not limit its liability to the number actually made, but was liable for the profit on the number represented by the difference between 5,000,000 and those accepted. *Mayer B. Co. v. Kennedy Co.*, 230 Pa. 98.

In determining the profits which could have been made on a contract the cost of performance may be arrived at by considering the cost of

have incurred had he fulfilled his contract.⁸⁰ The rule as respects the time for computing value is not without flexibility where justice requires it, as where the property may be without its usual market value when the breach occurred and the seller fails to exercise his option to sell it on the buyer's account. In such a case if the season for its sale is about to open the jury may consider that fact and the sales of similar property within a reasonable time after the breach, together with the cost of keeping it, for the purpose of fixing its value.⁸¹ Where the buyer leads the seller to believe he will accept the goods at a later time than was fixed for their delivery and at the agreed price the damages may be assessed on the basis of their value after the lapse of a reasonable time for their acceptance.⁸² Where the buyer has the right to fix the time for the delivery of the goods his refusal to receive them fixes the point for determining their value.⁸³ But interest may be recovered on the profits which would have resulted if the contract had been performed; it will be computed from the time the complaint was filed.⁸⁴ As is shown in the third note to this section the courts do not always specifically designate interest, and where it is expressly allowed, at least in some cases, it is done by way of

performing a like contract. *Hare v. Parkersburg*, 24 W. Va. 554.

Where the repudiation occurred prior to the time fixed for one of several deliveries the recovery was based on the difference between the contract price of the goods and what the seller could have sold a like quantity of similar goods deliverable at the times and place specified in the contract. *Jebeles & C. C. Co. v. Stephenson*, 6 Ala. App. 103.

If the time for delivering is extended at the request of the buyer until a fixed date, when the contract is repudiated by the buyer, the state of the market when the repudiation occurs governs the recovery. *Ogle v. Earl Vane*, L. R. 3 Q. B.

272; *Rogers v. Union I. & F. Co.*, 167 Mo. App. 228.

⁸⁰ *Newark City I. Co. v. Fisher*, 76 Fed. 427, 22 C. C. A. 361.

⁸¹ *Redhead v. Wyoming C. I. Co.*, 126 Iowa 410.

⁸² *Moss T. Co. v. Phelps*, 143 Ky. 839.

⁸³ *Huguenot Mills v. Jempson*, 68 S. C. 363, 102 Am. St. 673.

The difference between the contract and the market price at the time the buyer declines to order goods to be delivered at his option is the measure of his liability. *Hopkinsville M. Co. v. Gwin*, 179 Ala. 472.

⁸⁴ *Central O. Co. v. Southern Ref. Co.*, 154 Cal. 165.

indemnity, and not as interest strictly so called.⁸⁵ Interest may be recovered from the date of the termination of the contract;⁸⁶ the right to it is not dependent upon making a demand for the exact sum due.⁸⁷ Under the code of California there cannot be a recovery of interest on the excess of the contract price over the value of the property to the seller if the property had no established or reasonably well-known market value.⁸⁸ The difference between the contract price and the market value may be ascertained and fixed by a resale within a reasonable time,⁸⁹

⁸⁵ *Best M. Co. v. Brewer*, 50 Colo. 455; *Parkins v. Missouri Pac. R. Co.*, 76 Neb. 242; *McCall Co. v. Icks*, 107 Wis. 232.

The conduct of the parties may affect the time for which interest may be recovered. *Huebel v. Leaper*, *post*.

⁸⁶ *Huebel v. Leaper*, 188 Fed. 769, 110 C. C. A. 475.

⁸⁷ *International C. Co. v. McNichol*, 105 Fed. 553.

If the quantity of goods delivered when the breach of the contract occurred was uncertain and the defendant was not informed thereof interest may be recovered only from the commencement of suit. *Nelson v. Hirsch*, 102 Mo. App. 498.

⁸⁸ *Hewes v. Germain F. Co.*, 106 Cal. 441.

Under the Montana Code the vendor may sell the property as a pledge at auction and recover the difference between the contract price and the net proceeds, or he may sell it as his own in the market at the best available price and recover the difference between the contract price and its value to the seller with the excess of the expense incurred in getting the property to market over what it would have been had the buyer accepted it. *Welch v. Nichols*, 41 Mont. 435.

⁸⁹ *Rice v. Penn P. G. Co.*, 117 Ill. App. 356; *Moffat v. Davitt*, 200 Mass. 452; *Hardwick v. American C. Co.*, 113 Tenn. 657; *Palestine I., F. & G. Co. v. Connally* (Tex. Civ. App.), 148 S. W. 1109 (the place of sale is not cause for complaint in the absence of evidence that the buyer suffered injury).

The election, it has been said, must be made at the time of the breach. *Sour Lake T. Co. v. Deutscher F. Co.*, 39 Tex. Civ. App. 86.

If possession is taken in the exercise of a right with the view of recovering under the general rule of damages the vendor is bound by the market price of the goods as of that time; but if it was taken to preserve them from loss he may sell within a reasonable time. *Zinsmeister v. Rock Island C. Co.*, 145 Ky. 25.

"The rule is, where facts are undisputed or admitted, what is reasonable time is a question of law, but where what is reasonable time depends upon controverted points, or where the motives of the parties enter into the question the whole is necessarily submitted to the jury to be determined from the facts whether the time was or was not reasonable." *Morris v. Wibaux*, 159 Ill. 627, 645, citing *Hill v. Ho-*

and after notice to the vendee of the vendor's intention to resell, taking all proper measures to secure as fair and favorable a sale as possible.⁹⁰ These rules apply to all sales of personal prop-

erty, 16 Me. 168. See *Duke v. Norfolk & W. R. Co.*, 106 Va. 152.

Though the price of goods was declining and the vendor retained them for two months or more his right to recover was not thereby affected. *Rosenbaums v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737. Compare *Jochams v. Ong*, 45 La. Ann. 1289, 1294, where it is said that the sale should be made at the earliest practicable period after an absolute refusal to accept.

A delay of ten days after the time fixed for delivery, the market price of the goods having declined and the season for them being almost over, was not such diligence as made the price on the resale the measure of the vendee's liability. *Gehl v. Milwaukee P. Co.*, 116 Wis. 263. Compare *Frisbie v. Rosenberg*, 11 Cal. App. 638 (sale of pears thirteen days after refusal).

⁹⁰ *Speare v. Hubinger*, 129 Fed. 538, 64 C. C. A. 68; *Lincoln v. Levi C. M. Co.*, 128 Fed. 865, 63 C. C. A. 333; *Levis v. Royal P. & D. Co.*, 1 Cal. App. 241; *Best M. Co. v. Brewer*, 50 Colo. 455; *Speakman v. Price*, 2 Boyce (Del.) 377; *Henderson E. Co. v. North Georgia M. Co.*, 126 Ga. 279; *Penn P. G. Co. v. Rice*, 216 Ill. 567; *Indiana T. Co. v. Landrum*, 137 Ky. 769; *Regester v. Regester*, 104 Md. 1 (jury may allow interest); *Nelson v. Hirsch*, 102 Mo. App. 498; *Tacoma M. Co. v. Gilcrest L. Co.* 90 Neb. 104; *Fox v. Woods* (N. Y. Misc.) 96 N. Y. Supp. 117; *Vanstory C. Co. v. Stadium*, 149 N. C. 6; *Snyder v. Bougher*, 14 Pa. Dist. 757 (sale of leasehold and retail liquor license); *Ziegler v.*

Gerlach (Tex. Civ. App.), 125 S. W. 80; *Carver v. Graves*, 47 Tex. Civ. App. 481; *American H. & L. Co. v. Chalkley*, 101 Va. 458; *Peterson v. Lone Lake L. Co.*, 58 Wash. 72; *American C. Co. v. Flat Top G. Co.*, 68 W. Va. 698; *Carle v. Nelson*, 145 Wis. 593; *Slaughter v. Marlow*, 3 Ariz. 429 (vendor must show sum realized from the sale); *Southern F. & G. Co. v. St. Louis G. Co.*, 11 Ga. App. 401; *Chattanooga R. & F. Co. v. Vickrey* (Tex. Civ. App.), 158 S. W. 1159; *Weld & Co. v. Victory Mfg. Co.*, 205 Fed. 770; *Leonard v. Portier* (Tex. App.), 15 S. W. 414, quoting the text and holding that notice is necessary; *Scribner v. Schenkel*, 128 Cal. 250; *Colorado Springs L. Co. v. Godding*, 2 Colo. App. 1; *Magnes v. Sioux City N. & S. Co.*, 14 Colo. App. 219; *Davis S. O. Co. v. Atlanta G. Co.*, 109 Ga. 607, citing the text; *Rice Co. v. Penn P. G. Co.*, 88 Ill. App. 407; *Ridgley v. Mooney*, 16 Ind. App. 362, citing the text as to the necessity of giving notice; *Ingram v. Wackernagel*, 83 Iowa 82; *Clore v. Robinson*, 100 Ky. 402; *Mattingly v. Mathews*, 14 Ky. L. Rep. 300 (Ky. Super. Ct.); *Williams v. Robb*, 104 Mich. 242; *Croak v. Owens*, 121 Mass. 28 (breach of contract to bid a certain sum for land); *Strauss v. Labsap*, 59 Mo. App. 260; *Van Brocklen v. Smeallie*, 140 N. Y. 70; *Ackerman v. Rubens*, 167 N. Y. 405, 53 L.R.A. 867; *Baltimore S. Co. v. Ammonia Co.*, 2 Pa. Super. 555; *Woldert v. Arledge*, 4 Tex. Civ. App. 692; *Scott L. Co. v. Hafner-L. Mfg. Co.*, '91 Wis. 667; *Pratt v. Freeman & Sons Mfg. Co.*, 115 Wis. 648; *Gehl*

erty, including a partnership in the assets of realty and personalty,⁹¹ to corporate stocks,⁹² and to the sale of a lease in connection with a stock of goods.⁹³ There is some question whether they apply to executory contracts; the affirmative is held in Tennessee.⁹⁴ On the refusal of the receiver of a vendee to accept

v. Milwaukee P. Co., 105 Wis. 573; Penn v. Smith, 93 Ala. 476, 98 Ala. 560; Strickland v. McCulloch, 8 New South Wales (law) 324; Whitney v. Boardman, 118 Mass. 242; McEachron v. Randles, 34 Barb. 301; Williams v. Godwin, 4 Sneed 558; Rickey v. Tenbroeck, 63 Mo. 563; Saladin v. Mitchell, 45 Ill. 79; Barr v. Logan, 5 Harr. 52; Pollen v. Le Roy, 30 N. Y. 549; Cook v. Brandies, 3 Met. (Ky.) 555; Dustan v. McAndrew, 44 N. Y. 72; McClure v. Williams, 5 Sneed 718; Jackson v. Covert, 5 Wend. 139; Young v. Mertens, 27 Md. 114; Hall v. O'Hanlan, 1 Brev. 471; Lewis v. Greider, 49 Barb. 606; Lamkin v. Crawford, 8 Ala. 153; Camp v. Hamlin, 55 Ga. 259; Ullman v. Kent, 60 Ill. 271; Hughes' Case, 4 Ct. of Cls. 64; Bell v. Offutt, 10 Bush 632; Van Horn v. Rucker, 33 Mo. 391, 84 Am. Dec. 52; Bigelow v. Legg, 102 N. Y. 652; Anderson v. Frank, 45 Mo. App. 482; Tufts v. Grewer, 83 Me. 407; Woods v. Cramer, 34 S. C. 508; White Walnut C. Co. v. Crescent C. & M. Co., 254 Ill. 368; Person v. Lipps, 219 Pa. 99.

A considerable disparity between the original price and that realized on the resale may be accounted for by showing a decline in the market value of the property intermediate those events. Penn v. Smith, 104 Ala. 445.

⁹¹ Van Brocklen v. Smeallie, 140 N. Y. 70.

⁹² Cowan v. De Hart (N. Y.

Misc.), 84 N. Y. Supp. 576; Sullivan v. Frank, 13 Ohio N. P. (N. S.) 505; Flannery v. Wessels, 244 Pa. 321; Herd v. Thompson, 149 Pa. 434. But see Reynolds v. Callender, 19 Pa. Super. 610, as to the sale of specific shares represented by a particular certificate.

One who breaches his contract to sell the stocks of another at a specified price must respond for the difference between it and their value at the expiration of the time fixed for performance. Aken v. Clark, 146 Iowa 436.

A vendor may not recover for any loss of interest in the corporation or to stock previously held by him because of the failure of the vendee to perform his contract. Eustice v. Meytrott, 100 Ark. 510.

⁹³ Schott v. Stone, 35 Wash. 252. In this case it was held that the failure to accept the remnant of a stock of goods after a sacrifice sale did not impose liability for damages based on the loss on goods there sold, loss of customers because of failure to keep the stock full during the sale and because of inability to procure goods for the following trade, nor for loss to business reputation and credit.

⁹⁴ Mayberry v. Lilly M. Co., 112 Tenn. 564, noting that McClure v. Williams, 5 Sneed 718, is overruled; Hardwick v. American C. Co., 113 Tenn. 657, and cases cited, disapproving Cherry Valley I. Works v. Florence I. R. Co., 64 Fed. 569.

and pay for chattels the vendor may resell them in order to fix the amount of his damages without violating an order of court prohibiting the transfer of any property of the vendee except to deliver it to the receiver.⁹⁵ The right to recover damages is not affected because the purchaser made a deposit with the seller, which was to be considered as part of the cash payment if the contract was executed, otherwise to be forfeited and become the absolute property of the seller; but in estimating the damages the deposit was to be considered.⁹⁶ Nor is the vendor's right to recover affected by his refusal to accept the vendee's subsequent offer to buy the goods at a price in excess of their market value; he was not required to imperil his rights under the original contract.⁹⁷ According to some authorities if the buyer has notice of the facts which give the vendor the right to resell and absolutely refuses to comply with his contract notice of an intention to resell is not essential;⁹⁸ and a resale need not be made.⁹⁹ Where a resale is necessary it need not be at auction unless such is the customary method of selling the sort of property in question, "nor is it absolutely essential that notice of the time and place of sale should be given to the vendee.¹ Still, as the sale must be fair and such as is

⁹⁵ *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. 692.

⁹⁶ *Leslie v. Macnichol*, 2 New South Wales (law) 250 (1881). The court relied upon *Icely v. Grew*, 6 Nev. & Man. 467.

⁹⁷ *Krebs H. Co. v. Livesley*, 59 Ore. 574.

⁹⁸ *Magnes v. Sioux City N. & S. Co.*, 14 Colo. App. 219; *Wrigley v. Cornelius*, 162 Ill. 92; *Morris v. Wibaux*, 159 Ill. 627, 646; *Clore v. Robinson*, 100 Ky. 402; *Rosenbaums v. Weeden*, 18 Gratt. 785, 98 Am. Dec. 737; *Waples v. Overaker*, 77 Tex. 7, 19 Am. St. 727; *Ullman v. Kent*, 60 Ill. 273.

If the purchaser is informed that on his failure to accept the property the vendor will take the steps authorized by law to protect himself

it is sufficient; the notice need not state what that action would be. *Ingram v. Wackernagel*, 83 Iowa 82.

⁹⁹ *Hollerbach C. Co. v. Wilkins*, 130 Ky. 51.

¹ *Anderson C. Co. v. Gilmore*, 123 Mo. App. 19 (the price realized would be some evidence of market value); *Fox v. Woods* (N. Y. Misc.), 96 N. Y. Supp. 117; *Pratt v. Freeman & Sons Mfg. Co.*, 115 Wis. 648.

Notice need not be given in order that the vendor may recover the difference between the contract price and the market value. *Kellogg v. Frohlich*, 139 Mich. 612.

In the absence of evidence that the price obtained at a private sale was fair, no efforts being made to

likely to produce most nearly the full and fair value of the article, it is always wisest for the vendor to give notice of his intention to resell, and quite unsafe to omit it;" it should also be pleaded.² In California the seller is not required, in order to recover from the purchaser the difference between the contract price and the value of the goods to him, to sell in the manner prescribed by the code for the sale of pledged property; if he does so sell them such sale is conclusive as to their value; if they are not so sold he must prove their value to him in the action against the buyer.³ The resale is made on the theory (which is a mere legal fiction) that the property is that of the vendee retained by the vendor as a means of realizing the contract price; he acts as the agent of the vendee,⁴ and deducts from the proceeds all the expenses incurred.⁵ He is not entitled to compensation for his own services in making the sale,⁶ nor for loss of time or the recovery of expenses in connection therewith;⁷ though it is so generally held it is not compatible with the doctrine of full compensation to deny a recovery of necessary travel-

sell except to the purchaser, such price will not bind the vendee. *Case v. Simonds*, 7 N. Y. Supp. 253.

² *Case v. Simonds*, 7 N. Y. Supp. 253; *Davis S. O. Co. v. Atlanta G. Co.*, 109 Ga. 607, citing the text (unless the refusal to take the goods or to pay for them has rendered the notice superfluous); *Van Brocklen v. Smeallie*, 140 N. Y. 70; *Dill v. Mumford*, 19 Ind. App. 609; *Ridgley v. Meoney*, 16 Ind. App. 362.

The only difference between a public and a private sale or use of the goods is that in case of the latter the vendor must show he has accounted for the market value. *Mayberry v. Lilly M. Co.*, 112 Tenn. 564.

³ *Hewes v. Germain F. Co.*, 106 Cal. 441. See *Frisbie v. Rosenberg*, 11 Cal. App. 638.

⁴ "It is not required that the resale shall be made by the vendor as

the agent of the vendee." *Morris v. Wibaux*, 159 Ill. 627, 646. See *Moore v. Potter*, *supra*.

⁵ *Regester v. Regester*, 104 Md. 1; *Vanstory C. Co. v. Stadiem*, 149 N. C. 6; *Hardwick v. American C. Co.*, 113 Tenn. 657; *American H. & L. Co. v. Chalkley*, 101 Va. 458; *Pollen v. Le Roy*, 30 N. Y. 549; *Dustan v. McAndrew*, 44 id. 72; *Westfall v. Peacock*, 63 Barb. 209; *Crooke v. Moore*, 1 Sandf. 297; *Bagley v. Findlay*, 82 Ill. 524; *Young v. Mertens*, 27 Md. 114; *Chapman v. Larin*, 4 Can. Sup. Ct. 349; *Mattingly v. Mathews*, 14 Ky. L. Rep. 300 (Ky. Super. Ct.); *Weld & Co. v. Victory Mfg. Co.*, 205 Fed. 770; *Mansur T. I. Co. v. Willet*, 10 Okla. 383 (code rule); *Woods v. Cramer*, 34 S. C. 508.

⁶ *Gehl v. Milwaukee P. Co.*, 105 Wis. 573.

⁷ *Penn v. Smith*, 93 Ala. 476.

ing expenses on account of the sale and for the resulting loss of time.⁸ A purchaser who refuses to comply with the terms of the sale is liable for the necessary expense of keeping and storing the property pending a second sale.⁹ A vendor may not add to the expense of storing property the cost of clearing land to make space for so doing;¹⁰ nor can he recover the profits he would have made by manufacturing other goods and piling them on the occupied space. These are too speculative and remote, as are losses sustained because of inability to secure advances for carrying on business.¹¹ Taxes paid on unaccepted property may be recovered, as may the expense of labor put upon it,¹² and other reasonable expenses proximately resulting from the default of the vendee.¹³ A purchaser of flour for future delivery is not liable for the decline in the price of wheat reserved for its manufacture where the contract does not call for its manufacture from particular wheat.¹⁴ Where the vendor takes pos-

⁸ Best M. Co. v. Brewster, 50 Colo. 455; Vanstory C. Co. v. Stadtem, *supra*.

⁹ Louis P. Hyman & Co. v. H. H. Snyder Co., 159 Ky. 354; Maddox v. Washburn-C. M. Co., 135 Ga. 539; Edson v. Magee, 43 Pa. Super. 297; Barnes v. Bluthenthal, 101 Ga. 598, 65 Am. St. 339; Robertson v. Smith, 37 Ga. 604, and cases cited in the next two following notes.

In a case which arose in Quebec a merchant bought the assets of an insolvent trader, but refused to receive them. The curator of the estate obtained judgment against the purchaser, who thereupon accepted the goods and paid the purchase-money. Thereafter the curator sued to recover special damages incurred in the care and preservation of the goods from the time of their sale until delivery. His right to recover was sustained, and the judgment in the first mentioned action was not *res judicata* on that question. Hyde v. Lindsay, 29 Can. Sup. Ct. 595 (1899). On the other

hand, it is said in a recent case that the vendor cannot by any act of his increase the damages. Upon the refusal of the vendee to accept the goods they were at the risk and cost of the vendor, who could not charge the former with the storage of them nor with the taxes upon them; that the vendee was not chargeable with the expense of the auction sale as such. It must be deducted from the gross proceeds in order to obtain the net auction price; but that is quite another and different thing in principle. Tripp v. Forsaith Mach. Co., 69 N. H. 233.

¹⁰ Huebel v. Leaper, 188 Fed. 769, 110 C. C. A. 475.

¹¹ Coles v. Standard L. Co., 150 N. C. 183.

¹² Huebel v. Leaper, *supra*. *Contra*, Tripp v. Mach. Co., *supra*.

¹³ Fox v. Woods (N. Y. Misc.), 96 N. Y. Supp. 117; Davidor v. Bradford, 129 Wis. 524.

¹⁴ Russell Miller Milling Co. v. Bastasch, 70 Ore. 475.

session of the goods sold in the exercise of one of its options as stated in the opening paragraph of this section the value thereof is determined by the market price upon the day he did so; but if he does so to preserve them from loss, he has a reasonable time in which to sell them. On failure to sell within such time the increased expense of keeping the goods and any depreciation in their value must be borne by the vendor.¹⁵ Liability may extend to other consequential damages. Where there was a failure to repurchase bank stock of the vendee the party in default was liable to the other for the amount of an assessment levied upon him to pay the debts of the bank, the levy being made during the life of an option to sell the stock held by the vendee and also after the breach of the contract; liability may also extend to all necessary expenses incurred by the vendee on account of the breach, he holding the stock as trustee for the vendor.¹⁶ The breach of a contract to buy stock and to indemnify the seller against all claims upon him in consequence of his having been a stockholder covers liability for a judgment rendered against the vendor for the balance of his unpaid subscription for the stock.¹⁷ The liability of a party who fails to provide a sum of money for the preferred stock of a corporation is measurable by the difference between that amount and the amount he did supply or was the means of supplying.¹⁸ The agency or trusteeship of the seller is coupled with an interest, and if he deems it necessary to protect his interest he may buy the goods; having done so, he holds them subject to redemption if the buyer acts seasonably. The latter may have the goods bought by the seller returned to him upon tender of the contract price, less the amount realized from that part of them sold to third parties; or, if the return is impossible, upon tendering the original purchase price the buyer is entitled to a credit

¹⁵ *Zinsmeister v. Rock Island C. Co.*, 145 Ky. 25.

¹⁶ *Gay v. Dare*, 103 Cal. 454 (the code provides that in case of the breach of a contract the damages shall be such sum as will compensate the party aggrieved for all det-

riment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom).

¹⁷ *Orr v. Bigelow*, 20 Barb. (N. Y.) 21.

¹⁸ *Person v. Lipps*, 219 Pa. 99.

for the actual market value of the goods which his vendor bought regardless of what they brought at the resale.¹⁹ A vendor does not become the agent of the vendee in reselling property which the latter has refused to accept, and the beneficial title does not pass to the vendee although the vendor purchases at the sale.²⁰ The fact that the vendor outbid all the competitors at a sale conducted by a licensed auctioneer, made at a reasonable time and place after adequate opportunity to see the property, due advertisement to the public and personal notice to the vendee, does not render the sale invalid, "for he had a right to bid, provided he took no advantage by trying to prevent others from bidding, or by disregarding any reasonable request of the defendant, or in any other way. If he had acted as auctioneer, or in collusion with the auctioneer, or there was any evidence of furtive effort on his part, or anything to challenge the fairness of the sale the action of the trial court in virtually withdrawing the case from the jury might have been justified, but the mere fact that he was the highest bidder at a public sale, the fairness of which was not questioned in any other respect," did not prevent the amount of the vendor's bid from being evidence of the value of the property.²¹ And it is immaterial, so far as the effect of the sale as evidence of value is concerned, that the vendor subsequently sold the property bought by him at the auction at a figure which equaled or exceeded the price at which he sold to the defendant. If the latter had accepted the property the vendor could have used his capital to buy other goods which might have made him an equal profit.²²

After notice of the vendor's intention to resell no notice of the time and place of the resale is required to be given, but it must be made according to the usage of trade.²³ If at the time fixed for its delivery there is a market for the property the

¹⁹ *Strauss v. Labsap*, 59 Mo. App. 260.

²⁰ *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. 692.

²¹ *Sour Lake T. Co. v. Deuster F. Co.*, 39 Tex. Civ. App. 86, citing the text; *Ackerman v. Rubens*, 167 N. Y. 405, 53 L.R.A. 867, 82 Am. St.

728; *Strickland v. McCulloch*, 8 New South Wales (law) 324, 343, 346 (1887).

²² *Strickland v. McCulloch*, *supra*.

²³ *Morris v. Wibaux*, 159 Ill. 627; *Pratt v. Freeman & Sons Mfg. Co.*, 115 Wis. 648.

In *Hickock v. Hoyt*, 33 Conn. 553,

vendor cannot keep it for a rise in price at the vendee's expense.²⁴ If the net proceeds of the sale are less than the contract price he may recover the deficiency in an action on the contract,²⁵ with interest thereon.²⁶ But if the vendor's contract was not fully performed the additional cost its completion would have entailed must be deducted from the contract price.²⁷ The vendor may, if necessary, transport the goods to another place

it was held that where the title to property passes by a sale and the vendor retains the possession as security for the purchase-money, and finally sells to other parties for a less price, and seeks to recover the difference from the first purchaser, it is necessary that specific notice of the time and place of sale should be given. But in a case where the contract is executory such notice is not necessary.

In Georgia where there is an executory contract and the buyer promises to pay for the goods at a time subsequent to their delivery and becomes insolvent before they are delivered, the seller who makes a resale of the goods after their stoppage *in transitu* cannot recover the difference between the contract price and the price realized upon the resale unless he gave the buyer notice of his intention to resell or made a tender of the goods and demanded payment and the buyer refused to take the goods or to pay for them. *Davis S. O. Co. v. Atlanta G. Co.*, 109 Ga. 607.

²⁴ *Friedenstein v. United States*, 35 Ct. of Cls. 1; *Sanders v. Bond*, 23 Ky. L. Rep. 2084; *Thurman v. Wilson*, 7 Ill. App. 312.

²⁵ *Id.*; *Baltimore & L. R. Co. v. Steel R. S. Co.*, 123 Fed. 655, 59 C. A. 419; *Louisville & N. R. Co. v. Coyle*, 123 Ky. 854; *Isaacs v. Terry*, 132 App. Div. (N. Y.) 657; *Springer v. Berry*, 47 Me. 330; *Williams v.*

Godwin, 4 Sneed 557; *Barr v. Logan*, 5 Harr. 52; *Hall v. O'Hanlan*, 1 Brev. 471; *Jackson v. Covert*, 5 Wend. 139; *Boorman v. Nash*, 9 B. & C. 145; *MacLean v. Dunn*, 4 Bing. 722; *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374; *McClure v. Williams*, 5 Sneed 718; *Pratt v. Freeman & Sons Mfg. Co.*, 115 Wis. 648; *Salem I. Co. v. Lake Superior C. I. Mines*, 112 Fed. 239, 50 C. C. A. 213.

Where the goods were sold at an unusual place and manner it was said that the buyer was entitled to the benefit of any evidence which tended to show their market value at the time fixed for delivery. It is not a hard and fast rule that the market price of property is to be determined by a public sale, though that be properly advertised. *Hopper v. Bromley C. Co.*, 11 Pa. Super. 634.

A seller who is liable for the freight on goods rejected by the buyer may sell them to others and recover of the buyer the difference between the price he agreed to pay and that realized, less freight and charges. The buyer may not be heard to assert he should have been sued for the entire purchase price. *Moody v. McTaggart*, 29 Pa. Super. 465.

²⁶ *Edson v. Magee*, 43 Pa. Super. 297; *General E. Co. v. National C. Co.*, *infra*.

²⁷ *General E. Co. v. National C. Co.*, 178 N. Y. 369.

at the expense of the vendee for a market.²⁸ The place of resale is not necessarily restricted to that where by the contract the vendees were bound to receive the property; the vendor is authorized to exercise a reasonable discretion as to the place of sale, and may also, at the expense of the vendee, store and insure the property.²⁹ If there are several modes of sale open to the vendor he may adopt such as his judgment approves; if he uses diligence in pursuing the one adopted nothing more can be required of him.³⁰ Unless it is absolutely necessary he is not bound to incur any expense involving an advance of money.³¹ The sale must be for cash, and the rejection of a larger offer for the property on credit does not affect the cash price as evidence of the market value of the property.³² If goods are to be delivered free on board their market value is to be ascertained as at the

²⁸ *Olson v. Rydl*, 25 S. D. 268, citing the text; *Salmon v. Helena B. Co.*, 147 Fed. 408, 77 C. C. A. 586; *Ingram v. Wackernagel*, 83 Iowa 82; *Sawyer v. Dean*, 114 N. Y. 481, 11 Am. St. 683; *White v. Matador L. & C. Co.*, 75 Tex. 465 (nearest market to place of delivery); *Jackson v. Covert*, 5 Wend. 139; *Lewis v. Greider*, 51 N. Y. 231, 49 Barb. 606; *Hill v. McKay*, 94 Cal. 5. *Contra*, *Chapman v. Ingram*, 30 Wis. 295 (remote market); *Rickley v. Tenbroeck*, 63 Mo. 563.

²⁹ *White Walnut C. Co. v. Crescent C. & M. Co.*, 254 Ill. 368; *American C. Co. v. Flat Top G. Co.*, 68 W. Va. 698, quoting the text; *Lewis v. Greider*, *supra*; *Waples v. Overaker*, 77 Tex. 7, 19 Am. St. 727; *Edson v. Magee*, 43 Pa. Super. 297.

But in the absence of proof that there was no market for the goods at the place fixed for their delivery a sale thereof, a month after the buyer refused to accept them, in a distant market, made without notice, is not evidence of their value. *Lawrence C. Co. v. Lee M. Co.*, 5 Kan. App. 77.

The sale of goods in St. Louis, it has been said, is not evidence of their value in Kansas City. *Wolpert v. Arledge*, 4 Tex. Civ. App. 692, 697.

³⁰ If the sale is made at a general market for which the purchaser intended the property he cannot object because it was not made at a nearer and less important market place. *Anderson v. Frank*, 42 Mo. App. 482.

If the vendor mixes with the goods an inferior grade of goods, which the vendee has not bought, to further the sale of the whole, and such mixture results in a less price than the market price of the goods sold to the vendee the vendor must account for the market price of the latter. *Guillon v. Earnshaw*, 169 Pa. 463.

³¹ *Wonderly v. Holmes L. Co.*, 56 Mich. 412.

³² *Pratt v. Freeman & Sons Mfg. Co.*, 115 Wis. 648.

The resale must be made before the vendor sues. *Hardwick v. American C. Co.*, 113 Tenn. 657.

place of delivery.³³ Insurance money received by the vendor for damage done property while in his possession is to be credited to the vendee.³⁴ Whatever remedy the seller elects to pursue must be with reference to all the property the buyer has refused to receive.³⁵

If the title to the property has passed the vendor is not bound to resell it; it may be abandoned and the contract price be recovered.³⁶ In some cases the vendor may tender the goods and recover the contract price; thereby in effect securing specific performance.³⁷ This doctrine is applied with full recognition of the existence of the general rules heretofore stated. It has been said that this rule is a just one both to the vendor and the vendee. The aim of the law is compensation and a practical way to secure it. To establish the market value of the goods by a resale puts the vendor to additional inconvenience for which the law gives him no compensation, and very often results in a serious loss to the vendee, particularly in cases where there is no ready market at the place of delivery.³⁸ If the refusal to accept a portion of the property is unauthorized the vendor may recover the market value of that accepted without deduction for the non-delivery of the remainder, which is excused by the vendee's act;³⁹ or the contract price less the value of that in the possession of the vendor.⁴⁰ The time at which the value of unaccepted property sold for delivery in instalments is to be fixed is

³³ *Kirchman v. Tuffli*, B. P. I. & C. Co., 92 Ark. 111.

³⁴ *Moritz v. Herskovitz*, 46 Wash. 192.

³⁵ *Ogburn-D. L. Co. v. Taylor* (Tex. Civ. App.), 128 S. W. 48.

³⁶ *Hunter v. Wetsell*, 84 N. Y. 549; *Edson v. Magee*, 43 Pa. Super. 297; *Livesley v. Krebs Hop Co.*, 57 Ore. 352.

³⁷ *International Text-Book Co. v. Anderson*, 179 Mo. App. 631.

³⁸ *Crown V. & S. Co. v. Wehrs*, 59 Mo. App. 493; *Campbell v. Woods*, 122 Mo. App. 719, citing local cases.

³⁹ *Smith v. Keith & P. C. Co.*, 36 Mo. App. 567.

⁴⁰ *Imperial R. S. Co. v. Steinfeld*, 232 Pa. 399; *Puritan C. Co. v. Clark*, 204 Pa. 556; *Home Pattern Co. v. W. W. Mertz Co.*, 88 Conn. 22.

Where but part of the goods are tendered and sold and there is no evidence of the market price of the remainder at the time the several deliveries were to be made, the damages will be fixed on the basis of the difference between the price contracted for and the market price when the breach occurred. *Weld & Co. v. Victory Mfg. Co.*, 205 Fed. 770.

the date stipulated for delivery, as is the case when the vendee sues the vendor for failure to deliver as agreed.⁴¹ If the vendor makes use of the property left on his hands the liability of the vendee is mitigated to the extent of the value of it for the purpose to which it was put.⁴² The vendee is to be credited with the proceeds of part of the property it agreed to take, a sale of it having been made by the creditors of the vendor with his knowledge and for his benefit.⁴³ Liability for failure to take all the clay on the land of the plaintiff suitable for a designated purpose, that not taken being without market value, is measured by the contract price less the cost of removing it.⁴⁴

The general rule of damages heretofore stated is sometimes regarded as inadequate to compensate the vendor for the loss he has sustained in consequence of the vendee's refusal to accept the goods. In a Virginia case⁴⁵ there was a refusal to receive crude iron ore, and it was adjudged that the vendor could recover damages for the loss resulting from the delay to receive it and also for the profits that would have been realized if the whole amount contracted for had been delivered. In answering the objection to such recovery the court said it would not be double. "The object of the law in awarding damages is to make amends or reparation. It aims to put the party injured in the same position, so far as money can do it, as he would have been in if the contract had been performed. He is entitled to recover all damages resulting directly from its violation. There may be several elements of damages. It may, as in this case, consist of the expense incurred in taking care of unemployed stock and paying the wages of idle employees that were necessary to the performance of the contract, while the plaintiff was unnecessarily and unreasonably prevented from doing the work contracted for, and may also consist of profits which would have been

⁴¹ *Alpha Portland C. Co. v. Oliver*, 125 Tenn. 135, 38 L.R.A.(N.S.) 416; *Johnson v. Allen*, 78 Ala. 392, 56 Am. Rep. 34, § 651; *Cherry Valley I. Works v. Florence Iron River Co.*, 64 Fed. 569, 12 C. C. A. 306. This rule is recognized by all the cases involving the question.

⁴² *Chamberlain v. Farr*, 23 Vt. 265.

⁴³ *Willis v. Jarrett C. Co.*, 152 N. C. 100.

⁴⁴ *Coburn v. California P. C. Co.*, 144 Cal. 81.

⁴⁵ *Alleghany I. Co. v. Teaford*, 96 Va. 372 (1898).

realized if the party had been allowed to complete the contract.⁴⁶ Otherwise a contract from which a profit was reasonably certain might result, without his fault, in an absolute loss to the party who should have realized the profit. One might enter into an agreement to do certain work at a stipulated time, which required for its performance teams and hands, and though ready to begin work at the appointed time, be prevented by the other party from doing so through one pretext or another until the daily expenses of his equipment, of idle teams and hands exceeded the entire profit to be expected from the performance of the work, and then finally not be allowed to do the work at all. Is it possible that, in an action for the breach of the contract, he could only recover the profits that he could show he would have made from the performance of the work if he had been allowed to do it, and nothing for the loss resulting from the delay induced by the misconduct of the other party to the contract? If so, instead of gains or profits, he would have to suffer an actual pecuniary loss without fault on his part, but caused solely by the misconduct of the other party. Such a result would directly conflict with the very object of the law in awarding damages for the violation of a contract, which is to place the party injured pecuniarily in the same condition that he would have been in if the contract had been kept and performed.”⁴⁷

The general rule was also departed from by Judge Dallas of the circuit court for the eastern district of Pennsylvania in a case⁴⁸ in which the purchaser gave notice of his refusal to accept the property contracted for. It was contended in his behalf that the damages were restricted to the loss, if any, upon the deliveries which should have been made prior to the bringing

⁴⁶ Where the purchaser of a staple commodity such as iron ore wrongfully refuses to accept and pay for what he has purchased, he cannot be held liable for a profit in excess of the difference between the contract price and the market price at the time he should have accepted, unless it is shown that at the time of the purchase he had knowledge

of the contract under which the seller could have made such a profit. *Samuel v. de la Sota*, 54 Pa. Super. Ct. 1.

⁴⁷ *Smoothing I. H. Co. v. Blakely*, 94 S. C. 224, quoting the text.

⁴⁸ *Horst v. Roehm*, 84 Fed. 565 (1898); *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953.

of the suit. The court refused assent to that proposition, because, it was said, "it conflicts with the principle that the measure of damages in every case must be such as, when applied, will result in ascertainment of the sum necessary to make good the entire loss sustained by reason of the act or default which constitutes the cause of action. The plaintiffs were, by the act of the defendant, prevented from making the deliveries called for by the contracts. It is this anticipatory denial and obstruction of the right to deliver, not a tender and refusal, which is the ground of suit, and the measure of damages which might otherwise have been applicable is therefore wholly inappropriate. The law of damages is not comprised in a set of arbitrary rules. Where a contract has been broken or a wrong has been committed compensation must be made. This is the underlying principle, and any standard or measure which does not accord with it cannot be applied, but some other, which is fairly compensatory to the one party, and not unjust to the other, must be resorted to."⁴⁹ In this case the plaintiffs have shown that they could have made subcontracts for the delivery of the hops, according to their contracts with the defendant; and, whatever might be the rule in a case in which this could not be shown, I am of opinion that where, as in this instance, that fact appears the difference between the price at which such subcontracts could have been obtained and the price named in the contracts between the parties is manifestly the amount of the loss actually suffered, and therefore must be the correct measure of the damages recoverable."⁵⁰ Where the defendant refused to accept the quantity of gravel per day which he had stipulated to receive, the same judge ruled that the damages could not be measured by the earning capacity of the vessels engaged in delivering the gravel, but that the measure was the costs and

⁴⁹ Citing *Carroll-P. B. & T. Co. v. Columbus Mach. Co.*, 55 Fed. 451, 5 C. C. A. 190.

⁵⁰ Citing *Hinckley v. Pittsburgh B. S. Co.*, 121 U. S. 264, 30 L. ed.

967; *Anvil M. Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814. To the same effect is *Carolina P. C. Co. v. Columbia I. Co.*, 3 Ga. App. 483, holding that the provisions of the code are not exclusive.

expense suffered by reason of the failure to take the full amount stipulated.⁵¹

Where there was a contract to take and pay cash for so many shares of a company as should not be otherwise subscribed for, in consequence of which the subscriber became liable for 25,000 shares at 1*l.* each, and after his bankruptcy the trustee in bankruptcy disclaimed the contract, it was ruled, the company having gone into liquidation, with liabilities of 16,000*l.* and assets of 4,000*l.*, that the estate was liable only for 10,500*l.*, that being the difference between the then estimated assets and liabilities of the company; that the trustee's disclaimer had terminated the contract and the company's claim could not exceed the damages resulting from the breach of the undertaking.⁵²

On the breach of a contract to take the output of a concern for an indefinite time the damages to the vendor cannot exceed the difference between the contract price and the price received for the product before the manufacture of it was discontinued in the absence of evidence showing that he could have continued to produce goods.⁵³ In awarding damages the doctrine of proximate cause is regarded; hence one who refuses to comply with a contract for the purchase of a business, though informed when the contract was made that the seller intended to remove from the vicinity, is not liable for the difference between the price received for other property sold in anticipation of removal and its value.⁵⁴ Where a vendor assumes liability for keeping the sold property in repair expense of so doing is to be deducted from his damages resulting from the vendee's refusal to accept.⁵⁵ A vendor's recovery is diminishable by the value of the use of the property the vendee refused to accept.⁵⁶ Where a contract for the purchase of coal to be delivered in monthly instalments during a year was repudiated before its performance was entered upon, the vendor was not bound to mine the coal during the period its market price was less than the cost of production;

⁵¹ *International C. Co. v. Mc-Nichol*, 105 Fed. 553.

⁵² *In re Hooley* [1899] 2 Q. B. 579.

⁵³ *Pool v. Walker*, 156 N. C. 40.

⁵⁴ *Bennett v. Dyer*, 102 Me. 361.

⁵⁵ *Ludlow v. Peck-W. H. & V. Co.*, 116 Ky. 608.

⁵⁶ *Willis v. Jarrett C. Co.*, 152 N. C. 100.

but in so far as, during the time fixed for the performance of the contract, the market price was in excess of the cost of production, coal was mined and sold to others at more than the contract price, the defendant was not liable for damages on that it failed to take during that period.⁵⁷

§ 648. **Effect of notice by vendee of refusal to accept goods; duty of vendor to mitigate liability of vendee.** It is not competent for the purchaser of property which is to be delivered in the future to impose upon the vendor the legal duty to take such steps with reference to the subject of the contract, as by at once reselling the property on the market on the buyer's account or making a forward contract for the purchase of other property of like amount to be delivered at the same time, as shall most effectually mitigate the damages to be paid by the buyer in consequence of his refusal, though no loss would thereby result to the vendor.⁵⁸ He is not bound to act upon a notice given by the vendee of his intention not to perform the contract. He may so act and treat the contract as at an end and immediately bring an action for the breach,⁵⁹ or he may await the time for its per-

⁵⁷ *Skeele C. Co. v. Arnold*, 200 Fed. 393, 118 C. C. A. 545.

⁵⁸ *Lincoln v. Alshuler Mfg. Co.*, 142 Wis. 475, 28 L.R.A.(N.S.) 780.

⁵⁹ *Dingley v. Oler*, 11 Fed. 372, citing *Hochster v. De Latour*, 2 El. & B. 678; *Frost v. Knight*, L. R. 7 Ex. 111; *Roper v. Johnson*, L. R. 8 C. P. 167; *Crabtree v. Messersmith*, 19 Iowa 179; *Holloway v. Griffith*, 32 Iowa 409, 7 Am. Rep. 208; *Fox v. Kitton*, 19 Ill. 519; *Burtis v. Thompson*, 42 N. Y. 246; *Howard v. Daley*, 61 N. Y. 362, 19 Am. Rep. 285, and disapproving *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384. To the same effect as *Dingley v. Oler* are *Foss-S. B. Co. v. Bullock*, 59 Fed. 83, 8 C. C. A. 14; *Hines L. Co. v. Alley*, 73 Fed. 603, 19 C. C. A. 599; *Horst v. Roehm*, 84 Fed. 565; *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953; *Goodrich v. Hubbard*,

51 Mich. 62; *Nichols v. Scranton S. Co.*, 137 N. Y. 471; *Hocking v. Hamilton*, 158 Pa. 107; *Walsh v. Myers*, 92 Wis. 397; *Southern F. & G. Co. v. St. Louis G. Co.*, 11 Ga. App. 401; *Cornwall v. Moore*, 132 Fed. 868; *Allen v. Field*, 130 Fed. 641, 65 C. C. A. 19; *Golden C. M. Co. v. Rapson C. M. Co.*, 188 Fed. 179, 112 C. C. A. 95; *Kirchman v. Tuffi B., P. I. & C. Co.*, 92 Ark. 111; *Caley v. Mills*, 79 Kan. 418; *Alger-F. Co. v. Tracy*, 98 Minn. 432; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Sherman N. Co. v. Aughenbaugh*, 93 Minn. 201; *Backus v. Black*, 5 Neb. (Unof.) 74; *Lehmaier v. Standard S. & T. Co.*, 123 App. Div. (N. Y.) 431; *Krebs H. Co. v. Livesley*, 59 Ore. 574. *Contra*, *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760; *Haueter v. Marty*, 156 Wis. 208.

formance and hold the buyer responsible for all the consequences of his breach. If he does this he perpetuates the contract for the latter's benefit as well as his own.⁶⁰ If he exercises his option to terminate it it will be his duty to make a resale of the property within a reasonable time for the buyer's benefit.⁶¹ If the purchaser's notice to the vendor has been acted upon by the latter it cannot be retracted if he has changed his position.⁶² The vendee's communicated repudiation of the contract to accept goods in instalments gives the right to recover for instalments tendered and those that were to be made.⁶³ The vendee cannot claim any advantage from the subsequent inability of the vendor

⁶⁰ *Louisville P. Co. v. Crain*, 141 Ky. 379.

⁶¹ *Haueter v. Marty*, 156 Wis. 208; *Bullard v. Eames*, 219 Mass. 49; *Edson v. Magee*, 43 Pa. Super. 297; *North Shore L. Co. v. South Side L. Co.*, 176 Ill. App. 96; *Palestine I. T. & G. Co. v. Connally* (Tex. Civ. App.), 148 S. W. 1109, citing the text; *Skeele C. Co. v. Arnold*, 200 Fed. 393, 118 C. C. A. 545 (the contract for resale should be similar to the repudiated contract as to the period for delivery); *Rice Co. v. Penn P. G. Co.*, 88 Ill. App. 407; *Roth v. Taysen*, *infra*; *Roebeling Sons Co. v. Lock Stitch F. Co.*, 130 Ill. 660; *Leigh v. Patterson*, 8 Taunt. 540; *Philpots v. Evans*, 5 M. & W. 475; *Ripley v. McClure*, 4 Ex. 359; *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548; *Windmuller v. Pope*, 107 N. Y. 674. See *Stewart v. Cauty*, 8 M. & W. 160; *Boorman v. Nash*, 9 B. & C. 145; *Cort v. Ambergate, etc. R. Co.*, 17 Q. B. 127; *Ripley v. McClure*, 4 Ex. 345; *Reid v. Haskins*, 6 El. & B. 953; *Clement & H. Mfg. Co. v. Meserole*, 107 Mass. 362; *Smith v. Lewis*, 25 Conn. 624; *Haines v. Tucker*, 50 N. H. 307; *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760; 2 *Mechem on Sales*, §§ 1707-1713, § 647, *supra*.

If the repudiation takes place before the goods are delivered the vendor may sue at once and have his damages assessed at the time he does so. "In such case the damages are not the difference between the contract and market price on the day the action is brought. It is the duty of the jury to assess them, having regard to, and making allowance for, the fact that the plaintiff is receiving damages before the date of delivery has arrived." *Roth v. Taysen*, 1 Com. Cas. 306 (1896), 73 L. T. 628, 8 Asp. Marit. Cas. 120.

Under a contract giving the vendor the option to substitute for the market price on the day appointed for performance the prices realized by a resale, he may resell on that day or not as he pleases; but a resale made then would not fix the vendee's liability if the time fixed for performance had passed before the trial; that is measurable by the difference between the contract price and the market price when the goods should have been accepted. *Brooke v. Laurens M. Co.*, 78 S. C. 200, 125 Am. St. 780.

⁶² *Windmuller v. Pope*, *supra*.

⁶³ *Barrie v. Quimby*, 206 Mass. 259.

to furnish goods, the recovery sought being the difference between the contract and market price.⁶⁴ The rights of the parties are governed by the conditions existing when notice was given.⁶⁵

It is a well established rule that a party to a contract which has been broken by the other party must so conduct his affairs, after he has knowledge of the breach, as to lessen the damage he may sustain as the result of it; and to the extent that loss can thus be avoided the vendee will be relieved from liability.⁶⁶ Thus, where the defendant contracted with the plaintiff for a quantity of potatoes to be delivered during the ensuing winter, as called for, and before they were all purchased by the plaintiff the defendant notified him not to purchase any more until further advices, this order was not a rescission of the contract, but a refusal to receive any more than the potatoes already purchased, and that the measure of damages as to the residue to be purchased when the direction was received was the difference between the price the defendant had stipulated to pay and what it would cost the plaintiff to procure and deliver the potatoes according to the contract. The general principle was stated that in executory contracts a party has the power to stop the performance on the other side by an explicit order to that effect, by subjecting himself to such damages as will compensate the other party for being stopped at that point or stage in the execution of the contract.⁶⁷ The vendor in that case had no right, after receiving the direction to buy no more, to proceed with his pur-

⁶⁴ The court said that upon the defendant's repudiation of the contract the plaintiff was not bound to continue in the business and that in selling it the presumption is he sold on the basis of the market value of the goods at the time, which, being less than the contract price, entitled him to recover as stated. *Brazell v. Cohn*, 32 Mont. 556.

⁶⁵ *Badger State L. Co. v. Jones L. Co.*, 140 Wis. 73.

⁶⁶ *Rice Co. v. Penn P. G. Co.*, 88 Suth. Dam. Vol. II.—64.

Ill. App. 407; *Frost v. Knight*, L. R. 7 Ex. 111; *Sonka v. Chatham*, 2 Tex. Civ. App. 312, quoting the text; *American P. & E. Co. v. Walker*, 87 Mo. App. 503, §§ 88, 89; *Kincaid v. Price*, 18 Colo. App. 73, quoting the text; *Baessetti v. She-nango F. Co.*, 122 Minn. 335, quoting the text; *Sackville v. Storey* (Tex. Civ. App.), 149 S. W. 239; *Palestine I., F. & G. Co. v. Connally*, *supra*, citing the text.

⁶⁷ *Parkins v. Missouri Pac. R. Co.*, 76 Neb. 242, citing the text;

chases and afterwards recover for loss sustained on the potatoes by frost and rot. His damages as to such after-purchases must be limited to the difference between the agreed price and what it would cost the plaintiff to procure and deliver them.⁶⁸ Where a party contracted to take a certain quantity of ice each month at a fixed price and the seller bound himself not to sell ice to any other person the seller could not recover for the buyer's refusal to take the ice when he neither tendered it nor tried to dispose of it at the market price. The prohibition in the contract became inoperative when the buyer refused to accept the ice, and the seller was bound to make reasonable exertion to render the loss as light as possible.⁶⁹ The duty of the vendor in this respect does not require that a wholesaler shall sell the contracted goods at retail.⁷⁰

§ 649. Rule of damages where property produced according to order; liability for remote loss. The rule which measures the vendor's damages on the refusal to accept goods contracted for by the difference between the contract price and the market value at the time and place of the breach, with interest, will not, some courts have said, always afford compensation when there is a breach of a contract to accept an article which has been manufactured after a prescribed measure, pattern or style.⁷¹ The measure of damages in such a case, varying from the ordinary standard and style has been held to be the full amount of the contract price.⁷² The reason for the distinction was thus stated by Bunn, J., in a case where a water-wheel so

McCall v. Jennings, 26 Utah 459; Lincoln v. Alshuler Mfg. Co., 142 Wis. 475, 28 L.R.A.(N.S.) 780; Kingman v. Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489; Danforth v. Walker, 37 Vt. 239; Collins v. Delaporte, 115 Mass. 159.

⁶⁸ Danforth v. Walker, 40 Vt. 357. But compare Southern C. O. Co. v. Hefflin, 99 Fed. 339, 39 C. C. A. 546.

⁶⁹ Gardner v. Caylor, 24 Ind. App. 521.

⁷⁰ Brazell v. Cohn, *supra*.

⁷¹ Poppenberg v. R. M. Owen & Co., 84 Misc. (N. Y.) 126; Spears v. Henry F. Michell Co., Inc., 56 Pa. Super. Ct. 294; the rule discussed in this section does not apply to orders for the manufacture of goods of the ordinary standard and style. Sharpville F. Co. v. Snyder, 223 Pa. 372; Frederick v. Willoughby, 136 Mo. App. 244, and cases cited; In re Bellevue P. & F. Co., 189 Fed. 169.

⁷² Roswell Nursery Co. v. Mielenz, 18 N. M. 417.

made was not accepted: There is presumably no certain market value for goods made according to such specific order, and the manufacturer, having done all that is required of him to entitle him to the full benefit of his contract, cannot, with any certainty, have this full benefit in any other way. If he was required to resell an article of this kind before he could maintain his action he might be compelled to wait until the vendee should become irresponsible, and the article might have no market value or no appreciable value at all for any person except the one ordering it. In such a case it seems more just and equitable that the loss and inconvenience of having a cumbrous article like the one in suit on hand for sale and the chances of finding a purchaser should fall upon the party who is in fault in not fulfilling his contract rather than upon the party who is in no fault and is claiming nothing but just what the other party agreed to do.⁷³ The same principle applies where the purchaser fails to give directions for the completion of an article which cannot be finished without them, and then refuses to take it. The manufacturer is not bound to complete it, make a tender of it and on the purchaser's refusal to accept sell it in the market. He may recover the difference between the cost of making the article and the price agreed to be paid for it,⁷⁴ or the purchase

⁷³ *Bookwalter v. Clark*, 11 Biss. 126, 10 Fed. 793; *Black River L. Co. v. Warner*, 93 Mo. 374; *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313; *Smith v. Wheeler*, 7 Ore. 49; *Ballentine v. Robinson*, 46 Pa. 177; *Scott v. Kittaning C. Co.*, 89 Pa. 231, 33 Am. Rep. 753; *Muskegon C. R. Co. v. Keystone Mfg. Co.*, 135 Pa. 132; *Bement v. Smith*, 15 Wend. 493; *Dustan v. McAndrew*, 44 N. Y. 72; *Cody v. American E. Co.*, 131 Ill. App. 240, quoting the text; *Kinhead v. Lynch*, 132 Fed. 692; *Register Co. v. Hill*, 136 N. C. 272, 68 L.R.A. 100, approving *White v. Solomon*, 164 Mass. 516, 30 L.R.A. 537. But see latter part of this section.

The rule has been applied in Massachusetts where a certificate of stock was made in the name of the vendee. *Thompson v. Alger*, 12 Mete. (Mass.) 428.

⁷⁴ *Cleveland-C. S. Co. v. Goldsboro B. Co.*, 148 N. C. 533; *Portland Co. v. Searle*, 169 Fed. 968; *Delker v. Hess S. & A. Co.*, 138 Fed. 647, 71 C. C. A. 97; *United E. & C. Co. v. Broadnax*, 136 Fed. 351, 69 C. C. A. 177; *Allen v. Field*, 130 Fed. 641, 65 C. C. A. 19; *Broadnax v. United E. & C. Co.*, 128 Fed. 649; *Laswell v. National H. Co.*, 147 Mo. App. 497; *Oswego Falls P. & P. Co. v. Stecher L. Co.*, 146 App. Div. (N. Y.) 241; *Belle of Bourbon Co. v. Leffler*, 87 App. Div.

price, less the cost of finishing the article according to the contract.⁷⁵ It has been said that in cases of this class the maker may, if he choose, sell the article and recover of the person who ordered it the difference between the price received for it and the

(N. Y.) 302; *Mitchell v. Baker*, 208 Pa. 377; *Gardner v. Deeds*, 116 Tenn. 128, 4 L.R.A.(N.S.) 740; *Cleveland-C. Springs Co. v. Goldsboro B. Co.*, 148 N. C. 533; *Imperial R. S. Co. v. Steinfeld*, 232 Pa. 399; *Hinckley v. Pittsburgh B. S. Co.*, 121 U. S. 264, 30 L. ed. 967, 17 Fed. 584; *Black River L. Co. v. Warner*, 93 Mo. 374; *Crescent Mfg. Co. v. Nelson Mfg. Co.*, 100 Mo. 325; *Cort v. Ambergate & N. R. Co.*, 17 Q. B. 127; *Knowlton v. Oliver*, 28 Fed. 516; *Tufts v. Lawrence*, 77 Tex. 526; *Dolph v. Troy L. M. Co.*, 28 Fed. 553; *Olyphant v. St. Louis O. & S. Co.*, id. 729; *Kimball v. Derre*, 108 Iowa 676, 685, quoting the text, and citing *Walsh v. Myers*, 92 Wis. 297; *Collins v. Delaporte*, 115 Mass. 159; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Atkinson v. Morse*, 63 Mich. 276; *Hale v. Trout*, 35 Cal. 229; *Muskegon C. R. Co. v. Keystone Mfg. Co.*, 135 Pa. 109; *Tahoe I. Co. v. Union I. Co.*, 109 Cal. 242; *Tufts v. Weinfeld*, 88 Wis. 647. To the same effect, *Gaither v. Bland*, 7 Ky. L. Rep. 518 (Ky. Ct. of App.); *Kingman v. Hanna W. Co.*, 176 Ill. 545, aff'g 74 Ill. App. 22; *Bishop v. Autographic R. Co.*, 19 App. Div. (N. Y.) 268; *American P. & E. Co. v. Walker*, 87 Mo. App. 503; *Dryfoos v. Uhl*, 69 App. Div. (N. Y.) 118; *Masterton v. Mayor*, 7 Hill 61; *Cooke Co. v. Hill*, 175 Ill. App. 532; *Gorton M. Co. v. Bartels B. Co.*, 206 N. Y. 528; *Stroock P. Co. v. Talcott*, 150 App. Div. (N. Y.) 343; *Ahlers v. Smiley*, 163 Cal. 200.

Before an order for machinery was revoked the seller had placed

orders for the larger part of it with manufacturers and after the revocation completed and shipped it to the point where it was required to be delivered. This was contrary to his duty to stop performance under the contract. The stipulated price was regarded as the standard by which to measure the seller's loss; from it should be deducted the market value of such parts of the machinery as he had in stock and the cost of their shipment; also such further sums as the parts purchased cost unless it should be shown that they could not be sold for their cost, in which case the amount which could have been reasonably realized therefrom had they not been shipped should be deducted, as also the cost of shipping. *Sonka v. Chatham*, 2 Tex. Civ. App. 312.

A subscription for a work published in series of parts is equivalent to a contract for a manufacture to order, and where some only of the parts have been accepted it seems that the publishers sustain a loss of the whole price. *Jessup v. Picturesque A. Pub. Co.*, 10 New Zeal. 358.

⁷⁵ *Eastern G. Co. v. Heim*, 89 Iowa 698; *Ridgeway D. & E. Co. v. Pennsylvania C. Co.*, 221 Pa. 160, 18 L.R.A.(N.S.) 813; *Thistle C. Co. v. Rex C. & M. Co.*, 132 Iowa 592; *Silkstone & D. C. & I. Co. v. Joint Stock C. Co.*, 35 L. T. Rep. (N. S.) 668; *Pratt v. Auto Springs R. Co.*, 196 Fed. 495, 116 C. C. A. 261, 199 Fed. 431; *Shaenfield v. Hull S. & F. Co.* (Tex. Civ. App.), 157 S. W. 462.

contract price or recover its full value.⁷⁶ The vendor's right to recover the profits he would have made on goods to be manufactured is not affected because he was to procure others to manufacture them or was to buy them in the market.⁷⁷ The breach of a contract to take all the output of a factory by refusing to accept a single carload does not excuse the vendor from proceeding with the manufacture of other goods and enable him to recover the profits he would have made on them in the absence of particular stipulations as to the length of time goods should be accepted.⁷⁸ Under a contract which gave the licensee the right to use an article having a limited market value in a restricted territory only, the damages were measured by the difference between the cost of its manufacture and its value at the time and place of delivery.⁷⁹ In estimating the profits to be recovered account should be taken of the incidental advantages resulting from the storage of goods by the vendor for the vendee, that having been in their minds when they contracted.⁸⁰ Where completed articles are on hand when the buyer refuses to receive them they may be sold and the difference between the price received for them and the contract price recovered.⁸¹ Where no time is fixed for the performance of a contract and the notice of its termination is not reasonable the difference

An allowance may be made to the vendee for so much of the manufactured material as has been supplied though it was not up to the stipulated standard unless other material could have been substituted within a reasonable time. *Rantoul Co. v. Claremont P. Co.*, 196 Fed. 305, 116 C. C. A. 125.

The vendor's recovery may also be lessened by any expense saved him in the cost of doing business, or on account of the probable loss of accounts. *Rantoul Co. v. Claremont P. Co.*, 196 Fed. 305, 116 C. C. A. 125.

No abatement is to be made because the vendor subsequently sold the articles made to others, they

being marketable. *Pratt v. Auto Spring R. Co.*, 196 Fed. 495, 116 C. C. A. 261.

Charges for storage and insurance may be recovered as well as the profits which would have been realized from fully executing the order. *Smoothing I. H. Co. v. Blakely*, 94 S. C. 224.

⁷⁶ *Gordon v. Noxres*, 49 N. H. 376.

⁷⁷ *Taylor v. Niagara B. Co.*, 52 N. Y. Misc. 356.

⁷⁸ *Laswell v. National H. Co.*, 147 Mo. App. 497.

⁷⁹ *Fisher Hydraulic S. & M. Co. v. Warner*, 188 Fed. 465.

⁸⁰ *Allen v. Field*, *supra*.

⁸¹ *Louisville & N. R. Co. v. Coyle*, 123 Ky. 854, 8 L.R.A.(N.S.) 433.

between the contract price and the cost of production is to be based upon the conditions governing performance within a reasonable time.⁸²

If an order for an article to be manufactured at a specified price is countermanded after labor has been put upon it and materials used in its construction, but before its completion, so long as the materials remain in the manufacturer's hands he cannot recover on the common counts for their value, nor the cost of the labor. He must sue on the special contract and claim his damages for its breach or for being wrongfully prevented from completing it. In such a case the defendant has no interest in the materials and no concern with the amount of labor; the plaintiff's labor is upon his own materials to increase their value for the purpose of effecting a sale to the defendant of the article ordered when completed. The law, however, will not compel the plaintiff, after such countermand, to go on and complete the article ordered before he can recover pay for what he has done, but he may treat the countermand and refusal as a prevention of performance on his part, and sue upon the contract on that ground.⁸³ The value of the labor expended on the materials is not the proper criterion of the damages, for it may have enhanced their worth to the plaintiff; if so, he is to that extent compensated; but it may have diminished their value, and in that event payment for the labor will not be adequate compensation. Whether the labor has enhanced or diminished the value of the materials is a question for the jury in estimating the damages.⁸⁴ The vendee may show the value

⁸² *Duke v. Norfolk & W. R. Co.*, 106 Va. 152.

⁸³ *Holliday v. Highland I. & S. Co.*, 43 Ind. App. 342; *Portland Co. v. Searle*, 169 Fed. 968; *Cameron v. White*, 74 Wis. 425, 5 L.R.A. 493; *Puritan C. Co. v. Clark*, 204 Pa. 556.

⁸⁴ *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Keeler Co. v. Schott*, 1 Pa. Super. 458; *Heiser v. Mears*, 120 N. C. 443. See *Chicago v. Greer*, 9 Wall. 726, 19 L. ed. 769;

Beattie v. New York, etc. C. Co., 196 N. Y. 346.

In *Silkstone & D. C. & I. Co. v. Joint Stock C. Co.*, 35 L. T. Rep. (N. S.) 668, there was a breach of contract to accept coal at the pit's mouth. The coal contracted for was perishable if stacked or stored above ground; it was not the usual course of business to bring coal to the surface except to supply contracts. The plaintiff alleged readiness to deliver the coal. The

of the manufactured product which is in the possession of the vendor or the price he has realized for it.⁸⁵ But the better view is that the plaintiff must show that value as a basis for the recovery of damages.⁸⁶ The fact that such product may be marketable does not preclude the recovery of damages beyond the profits that would have been made on the contract unless the value of the product in the condition it was when the buyer repudiated his contract was equal to the cost of the labor and materials put into it.⁸⁷ In such a case the damages are based on the difference between the cost of complying with the contract and the agreed price.⁸⁸ On the countermand of an order for the manufacture of a part of a larger number of articles the damages for those not furnished are measured by the difference between the cost of manufacturing and the contract price, less a reasonable deduction because of the trouble, risk and responsibility attendant upon a full execution of the contract.⁸⁹ The right to complete the goods in

damages were arrived at by the difference between the cost of raising the coal, added to the value of the coal as it lay undisturbed in the mine and the price agreed to be paid. The court (of exchequer) thought the value of the unmined coal and the cost of raising it could be accurately ascertained without actually raising it, and that, because the effect of exposing the coal would be to deteriorate its quality, the plaintiff was not bound to raise it and offer it for sale in the general market and limit the recovery to the difference between the price thus received for it and the contract price. This case is followed in *Thistle C. Co. v. Rex C. & M. Co.*, 132 Iowa 592.

⁸⁵ *Beattie v. C. Co., Keeler Co. v. Schott*, *supra*; *Isaacs v. Terry*, 132 App. Div. (N. Y.) 657; *Silkstone Co. v. Joint Stock C. Co.*, *supra*.

⁸⁶ *Imperial R. S. Co. v. Steinfeld*, 232 Pa. 399.

⁸⁷ *Portland Co. v. Searle*, 169 Fed. 968; *Deery v. Williams*, 27 App. Div. (N. Y.) 131; *Keeler Co. v. Schott*, *supra*.

It has been considered cause for measuring the damages by the difference between the contract price and the market price that there was no market at the place of delivery for the property except such as was made by the defendant. *Louisville & N. R. Co. v. Coyle*, 123 Ky. 854, 8 L.R.A.(N.S.) 433.

⁸⁸ *Hinckley v. Pittsburg S. Co., Black River L. Co. v. Warner*, *supra*.

⁸⁹ *Bullard v. Eames*, 219 Mass. 49; *Kimball v. Deere*, 108 Iowa 676, 684; *Thistle C. Co. v. Rex C. & M. Co.*, *supra*.

If the vendor proceeds with the execution of the contract after notice that the vendee will not accept any more of the product, which has a market value, such value, and not the cost of completing the contract, is the basis upon which the

process of manufacture when the buyer countermands his order and to recover therefor has been recognized.⁹⁰ Where a contract may be filled in either of two ways the recovery of profits will be based on the method of performance least burdensome to the vendee.⁹¹ The profits made by a manufacturer after the breach of a contract to take the output of his factory up to the time of the trial may be shown to mitigate the liability of the vendee.⁹²

In Maine acquiescence in the rule of damages stated in the first proposition in this section is withheld on the theory that the title to the property remains in the vendor until acceptance by the vendee.⁹³ In answer to the contention that the difference between the contract price and the price which may be realized on a resale is inadequate to afford compensation because the manufactured article may be of little value to any one beside the vendee, it is observed that the less the goods are worth to sell in the market the more the plaintiff recovers, and if they are worth nothing at all, then he recovers the full contract price.⁹⁴ This seems to be in accordance with the rule in Eng-

damages are to be estimated. If he sells the product to another purchaser his recovery is measured by the difference between the price received and the contract price. *Baessetti v. Shenango F. Co.*, 122 Minn. 335.

Where there was a refusal to accept a part of an order of suits of clothing made to order, the balance of the order not being filled, the damages were measured by the difference between the cost of manufacture and the contract price, including the material and labor for the entire order, and the difference between the cost of manufacturing that part of the order filled, less the value of the goods made and tendered when rejected. *Schloss v. Josephs*, 98 Minn. 442.

On the breach of a contract to buy the output of a concern for a series of years a reasonable deduction from the profits which might have been

made during the life of the contract should be made because of the lessened time, care, trouble, risk and responsibility attending its complete performance. What the deduction should be may be shown by expert testimony. *Allen v. Field*, 130 Fed. 641, 65 C. C. A. 19.

⁹⁰ *Stroock P. Co. v. Talcott*, 150 App. Div. (N. Y.) 343.

⁹¹ *Dryfoos v. Uhl*, 69 App. Div. (N. Y.) 118.

⁹² *Allen v. Field*, *supra*.

⁹³ A vendor of goods manufactured according to the order of the vendee is entitled to the stipulated price when they are completed and held for the latter. A judgment therefor vests the title in him. *Moline S. Co. v. Beed*, 52 Iowa 307, 35 Am. Rep. 272; *McCormick H. M. Co. v. Markert*, 107 Iowa 340; *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112.

⁹⁴ *Tufts v. Grewer*, 83 Me. 407.

land, though the cases depend upon such varying circumstances that the deduction of a rule from them is a matter of no little difficulty. In a case⁹⁵ on a contract for supplying three thousand nine hundred tons of iron railway chairs, deliverable from time to time, the buyer refused to accept or pay for more than one-half of them and gave notice to that effect. It was shown that the plaintiff had bought premises necessary for carrying out so large a contract, had made contracts for iron, and had put himself in a situation to fill the contract; he also had a quantity of chairs ready for delivery. The damages were measured by such sum as would leave him in the situation he would have occupied if the contract had been performed. In another case⁹⁶ there was a breach of a contract to take the quantity of coal stipulated to be accepted each month. The coal was of a perishable nature and could not readily or profitably be disposed of in the market except occasionally and in small quantities. The plaintiff was not bound to raise and sell the coal or to have made other forward contracts; he was entitled to recover the difference between the cost of raising the coal, added to the value of the coal itself remaining unraised in the mine, and the contract price. In an action by the vendor for the breach of a contract for the manufacture of iron rails at 5*l.* 7*s.* 6*d.* per ton for American shipment, brought before any rails were made the plaintiff offered evidence of what his profit would have been if the contract had been carried out and of his loss because the works lay idle. He proved that the demand for rails ceased soon after the contract was made and that he had been unable to obtain an offer for the rails to be manufactured at 5*l.* per ton. The trial judge said that the ordinary rule was that the plaintiff was entitled to the difference between the contract price and the market price at the date of the breach, and he could not find that it made any difference whether for a manufactured or for an unmanufactured article. If there was no market some other means of estimating the damage must be resorted to. The plaintiff was

⁹⁵ *Cort v. Ambergate, etc. R. Co.*, 17 Q. B. 127. approved in *Todd v. Gamble*, 148 N. Y. 382, 390, 52 L.R.A. 225, and

⁹⁶ *Silkstone & D. C. & I. Co. v. Joint Stock C. Co.*, 35 L. T. 668; in *Thistle C. Co. v. Rex C. & M. Co.*, 132 Iowa 592.

awarded the sum of 7s. 6d. per ton, that being assumed to be his loss.⁹⁷ "The result of these cases," as has been said by a Canadian judge, "seems to be that while there are general principles on which the damages are to be estimated for the breach of such contracts, yet there is, nevertheless, a considerable degree of elasticity in their application, whether the damages are assessed by a jury or a judge; and where the evidence does not admit of their being assessed with precise accuracy, or, as it were, in moneys numbered, they are, within certain limits, left somewhat at large." In the case quoted from⁹⁸ the buyer of a large number of shells for electric light lamps, which were to be delivered monthly for twenty months, gave notice that he would not accept them; at the time this was done no steps were taken toward carrying out the contract. The right to recover the full amount of the expected profits was denied because of the many contingencies involved in the period for fulfilling the contract, and because of the doubt as to whether there was proof of any substantial damage. An allowance of \$250 was made.

A case in the New York court of appeals goes far toward removing the obscurity involved in the question being considered. The subject of the contract of sale was an article perishable in its nature when kept for any length of time, for which there was but a limited demand and no real market, and which was only manufactured in quantities upon orders by consumers. The purchaser gave notice that he would not continue to receive the article, whereupon the plaintiff ceased to manufacture under the contract. The jury found that there was no market value for the article, and awarded damages based upon the difference between the cost of production and the contract price of the quantity used by the defendant during the period covered by the contract, which provided for the purchase of whatever quantity the latter would require. That rule of damages was approved because there was no market value for the article. To justify a departure from the rule that the damages are measurable by the difference between the contract

⁹⁷ Tredegar I. & C. Co. v. Gielgud, Cab. & Ell. 27.

⁹⁸ Ontario L. Co. v. Hamilton B. Mfg. Co., 27 Ont. App. 343.

price and the market value, it must appear that there is no such value, in which case the measure is the difference between the contract price and the cost of production. It was contended that because the plaintiff sold to dealers from one hundred to one hundred and fifty barrels of the article during the year and usually kept about fifteen barrels on hand to meet the demands of the trade a market price was shown to exist. The answer was that to so hold would be doing great injustice and result in the establishment of a commercial rule which would work injuriously in similar cases.⁹⁹ The case last referred to has been approved in Pennsylvania where there was a breach of a contract to accept an article made for the purchaser, which was likely to depreciate in value, and was ordinarily without market value; some of the product was sold after the buyer's breach; about two-thirds of the specified quantity had not been manufactured. As to that sold, the plaintiff was entitled to recover the difference between the price obtained and the contract price, and as to that not manufactured, the difference between the cost of manufacturing it and the contract price.¹ If the vendor treats articles made to order as his own his recovery is measured by the difference between the contract price and their market value if they have such value; in its absence the rights of the parties are ascertained by the difference between the agreed price and the reasonable value of the articles when and where delivery was to be made. Such value might be shown by sales made (for which the vendee was to be credited), the frequency with which they were made and expert testimony.²

Where only part of the stipulated quantity of manufactured

⁹⁹ *Todd v. Gamble*, 148 N. Y. 382, 52 L.R.A. 225, distinguishing *Dolph v. Troy L. M. Co.*, 28 Fed. 553; *Kelso v. Marshall*, 24 App. Div. (N. Y.) 128.

¹ *Puritan C. Co. v. Clark*, 204 Pa. 556.

² *St. Louis Range Co. v. Kline-D. M. Co.*, 120 Mo. App. 438. In this case it was said, the property being ready for delivery before the buyer

gave notice he would not receive it, that the vendor might treat it as belonging to the buyer, hold it subject to his order and recover the price; or sell it for the buyer's account and recover the difference between the proceeds and the agreed price, or, if the property had a market value, treat it as his own and recover the difference between that and the market price.

goods had been received, and less than the quantity ordered had been manufactured, though more than had been accepted, the court announced the following rules for the measurement of damages as applied to the facts, the goods being marketable and the market price being proven: 1. The measure of damages for a breach of a contract to purchase personal property is the difference between the market value and the contract price at the time of the breach. 2. The same rule is applicable to the measure of damages resulting from the failure to accept articles which have been made and are ready for delivery at the time of the breach by the purchaser of the contract to purchase goods of a manufacturer,³ but it is not the rule for the measure of damages resulting from the breach on account of those not then made and ready for delivery. 3. Where materials have been purchased and labor has been bestowed upon such articles under such a contract before the manufacturer has notice of the breach, his damages on these articles are the difference between the amount it would cost him to make and deliver them and their

³ *Heiser v. Mears*, 120 N. C. 443, applying the rule to an executory contract for the manufacture of shoes, finished after notice given that they would not be received; *Worrell v. Kinnear Mfg. Co.*, 103 Va. 719. See *Southern C. O. Co. v. Heffin*, 99 Fed. 339, 39 C. C. A. 546, which is in harmony with the text, and distinguishes the case next stated.

In *Hemmingway Mfg. Co. v. Council Bluffs C. Co.*, 62 Fed. 897, an order was given for two machines which were to be made, the sale being at the usual price, which did not change after the order was given. The machines were of the seller's usual make and were covered by a patent held by him. The rule of damages applicable in cases of sale generally was applied. It was sought to take the case out of that rule because of the patent, it

being contended that all purchasers of the article must buy from the plaintiff, thereby giving it a profit upon each sale, and that if the plaintiff were required to sell the article made for the defendant it would thereby be deprived of the profit of the sale which it could make to the second buyer of another set of the patented articles. This contention was pronounced plausible, but it did not prevail. There were other machines used for the same purpose as the plaintiff's; hence it could not be known that a purchaser would buy of the plaintiff; and, furthermore, if the defendant should be compelled to pay for the machines, they would become his property, and he could sell them, thereby causing the plaintiff to lose the profit of a sale to a third party.

contract price, if greater, plus the difference between the value of the partly manufactured articles and the cost of the labor and materials that had been bestowed upon them at the time of the breach, if the cost be greater than the value.⁴ 4. If materials have been purchased with which to fulfill the contract, but no work has been bestowed upon them at the time of the breach, the measure of the manufacturer's damages upon the articles which might have been made with such materials under the contract is the difference between the amount it would cost him to make and deliver them, including the cost of the materials, and their contract price, if greater, plus the difference between the cost and market value of the materials that have been purchased at the time of the breach if the market value be less than the cost. 5. The measure of damages upon articles covered by such a contract for which no materials had been bought and upon which no work had been expended at the time of the breach is the difference between the amount it would cost the manufacturer to make and deliver them and their contract price if that price is greater than the cost.⁵

A manufacturer who has bought materials long in advance of the time needed for filling a contract may not, after the refusal to perform the contract, sell them and hold the defaulting buyer liable for the loss, they being suitable for filling other orders and the opportunity having been available to it to make use of them at an earlier date. So far as the materials were bought merely to cover the manufacturer's obligations to deliver goods, as a protection against a change in their price as distinguished from providing them for the contract in question, the transaction was a collateral enterprise for the results of which the vendee was not responsible.⁶ A vendee must bear the result of his own negligence in doing what the contract requires; if an advance in the price of materials takes place during the time

⁴ Holliday v. Highland I. & S. Co., 43 Ind. App. 342.

⁵ Kingman v. Western Mfg. Co., 92 Fed. 486, 34 C. O. A. 489, 493; River S. Co. v. Atlantic Mills, 155 Fed. 466, citing the text; Bullard v.

Eames, 219 Mass. 49; Mangold S. & C. Co. v. Moore S. Co., 197 Fed. 20, 116 C. C. A. 542.

⁶ River S. Co. v. Atlantic Mills, *supra*.

the work is delayed by him the loss is his.⁷ The failure to supply material may be attended with responsibility for loss sustained by the manufacturer because of the idleness of machinery and employees.⁸ In arriving at the difference between the cost of manufacturing and delivering the goods and the contract price a deduction must be made of the fixed charges or the general running expenses of the business. These may be shown approximately without exposing the trade secrets of the plaintiff.⁹ The scope of the recovery may be materially affected by the conduct of the parties in respect to treating a breach as terminating the contract. In a recent case the contract required the defendant to buy all the material he should need for a year from the plaintiff; he made purchases from others, but did not refuse to carry out the contract, and the plaintiff did not require him to accept any particular amount of the material, but began an action to enforce the contract, subsequently amending the complaint by setting up a breach of the contract. It was ruled that each purchase made by the defendant from other parties was a partial breach of the contract; that the plaintiff elected to keep the contract alive, and the defendant was entitled to the benefit of the election; that the liability of the latter was for the difference between the cost of manufacturing the material the plaintiff had bought for the purpose of filling the contract and the price stipulated to be paid for the product during the time that such material had not advanced in price; but that, from the period of such advance, if no profit would have resulted from the performance of the contract, only nominal damages could be recovered.¹⁰ By breaching his contract to accept and pay for the goods the buyer forfeits any benefit from a stipulation therein giving a discount for payment as agreed.¹¹ The difference between the cost of cutting and delivering timber and the contract price measures the liability of a defaulting vendee.¹²

⁷ *Michigan L. Co. v. Waite L. Co.*, 53 Wash. 604.

⁸ *Hargraves Mills v. Gordon*, 137 App. Div. (N. Y.) 695.

⁹ *Worrell v. Kinnear Mfg. Co.*, 103 Va. 719.

¹⁰ *Lehmaier v. Standard S. & T. Co.*, 123 App. Div. (N. Y.) 431.

¹¹ *Stroock P. Co. v. Talcott*, 150 App. Div. (N. Y.) 343.

¹² *Hughes L. Co. v. Knuckles*, 146 Ky. 472.

§ 650. **Vendee's right to return property.** The recovery of damages by a vendor against a vendee for not accepting and paying for goods contracted for proceeds on the ground that the former has been ready to do his part and has offered performance of the precedent or concurrent condition of delivering goods which will answer the requirements of the contract in all respects—in time, quality and quantity, and confer a good title.¹³ A want of punctuality may be waived by accepting for inspection of quality after the date fixed for delivery¹⁴ and afterwards rejecting the goods on other grounds. In a contract for the sale of goods by sample the seller agrees to deliver, and the buyer to accept, goods of the same kind and quality as the sample. The identity of those sold in kind, condition and quality with the sample is of the essence of the contract.¹⁵ In such cases it is the privilege of the vendee to decline and return the goods if they are found not to correspond with it.¹⁶ Where the vendor delivers property on an executory contract which requires a particular quality or description and the vendee has not had an opportunity to examine it, he may receive and retain it sufficiently long to make a fair examination, and if found substantially inferior to that described in the contract he may, within a reasonable time, return it to the vendor and refuse to accept it.¹⁷ He may decline to receive it if not conformable to the contract, by being superior to, or other-

¹³ *Kirkpatrick v. Alexander*, 44 Ind. 595; *Baker v. Higgins*, 21 N. Y. 397; *Newberry v. Furnival*, 46 How. Pr. 139; *Byers v. Bonsall*, 3 Pittsb. 482; *Bell v. Offutt*, 10 Bush 632.

¹⁴ *Newberry v. Furnival*, *supra*.

¹⁵ *Gunther v. Atwell*, 19 Md. 157; *Young v. Cole*, 3 Bing. N. C. 724; *Mondel v. Steel*, 9 M. & W. 858, 871; *Beirne v. Dord*, 5 N. Y. 95; *Hargous v. Stone*, *id.* 73; *Waring v. Mason*, 18 Wend. 425; 1 Smith's Lead. Cas. (5th ed.) 256 *et seq.*

¹⁶ *Id.*; *Eaton v. Blackburn*, 52 Ore. 300, 132 Am. St. 705, 20 L.R.A. (N.S.) 53; *Field v. Kinnear*, 4 Kan. 476; *Beebee v. Robert*, 12 Wend.

413; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Bradford v. Manly*, 13 Mass. 139; *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. 831; *Hudson v. Germain F. Co.*, 95 Ala. 621; *Holmes v. Gregg*, 66 N. H. 621; *Holt v. Pie*, 120 Pa. 425; *Schloss v. Feltus*, 96 Mich. 619, 36 L.R.A. 161; *Charles v. Carter*, 96 Tenn. 607.

¹⁷ *Hodge v. Tufts*, 115 Ala. 366; *Wolf v. Dietsch*, 75 Ill. 205; *Haase v. Nonnemacher*, 21 Minn. 486; *Knoblauch v. Kronschnabel*, 18 *id.* 300; *Cahen v. Platt*, 40 N. Y. Super. 483; *Neaffie v. Hart*, 4 Lans. 4.

wise different from, the goods described therein.¹⁸ If the vendee fails to give notice within a reasonable time that he declines to receive the goods because not conformable to the contract, or if he exercises ownership over them, as by selling part, he cannot afterwards repudiate the contract or refuse the goods.¹⁹ If those sent upon a contract or order, when received, are found to be inferior or otherwise not conformable to the contract, and the vendee rejects them after having paid freight or incurred other expenses in obtaining the temporary posses-

¹⁸ *Rheinstrom v. Steiner*, 69 Ohio 452, 100 Am. St. 699; *Newmarket I. Foundry v. Harvey*, 23 N. H. 395.

¹⁹ *Miller v. Zander*, 85 Misc. (N. Y.) 499; *Southern Gas & Gasoline Engine Co. v. Adams & Peters*, — Tex. Civ. App. —, 169 S. W. 1143; *Bowman L. Co. v. Anderson*, 70 Ohio 16; *Taylor v. Saxe*, 134 N. Y. 67; *McFadden v. Wetherbee*, 63 Mich. 390; *Watkins v. Paine*, 57 Ga. 50; *Wolf v. Dietsch*, 75 Ill. 205. See *Nelson v. Overman*, 19 Ky. L. Rep. 161; *Cream City G. Co. v. Friedlander*, 84 Wis. 53, 36 Am. St. 895, 21 L.R.A. 135; *Holmes v. Gregg*, 66 N. H. 621.

In *Kidd v. Belden*, 29 Barb. 266, it appeared that the plaintiff had manufactured and put into the defendant's steamboat a boiler, engines and other machinery, under a contract by which he was to be paid a certain specified price, a portion of which was to be secured by a chattel mortgage upon the property to be executed by the defendant when the plaintiff had completed his contract. After the engine and boiler had been placed and partially fastened in the boat, but before the work was completed or ready to be delivered, the defendant clandestinely went off with the boat to Canada, and, on his return, refused either to execute the mortgage, pay for the

machinery or permit the plaintiff to remove it. In replevin by the plaintiff, the jury having found that there had been no absolute and unconditional delivery of the machinery to defendant, nor such an annexation of it that it could not be removed without injury to the boat, it was held that plaintiff had not lost his title to the property, but might maintain the action. It was also held that in estimating the damage the plaintiff had sustained the jury were to be governed by the value of the machinery as established by the parties in their contract, so far as it could be applied; and that its value was to be assessed in the condition it was at the time of the demand. The defendant was not permitted to show, in mitigation of damages, that the machinery was not placed in the boat in a workmanlike manner. He was concluded by his election to take the work in its unfinished condition and held to have accepted the job as finished, and to have waived all objection on account of defects. The defendant was not allowed to show, in mitigation of damages what would be the value of the machinery detached from the boat. The plaintiff's labor in putting it into the boat entered into and formed part of the value to be assessed by the jury.

sion he has a claim on the vendor for reimbursement.²⁰ And if they are of a kind which must be used to ascertain their quality and a test proves that they are inferior to those ordered the purchaser cannot be charged for the quantity necessarily used for that purpose if he promptly rejects the remainder on being assured of that fact.²¹ The vendee may, in addition to recovering payments made for freight, duty and storage, recover damages for the failure to deliver goods of the quality specified upon the basis of the difference between the value of those contracted for at the place of delivery and the contract price,²² but may not recover both the purchase-money and the consequential damages resulting from the failure of the article to meet the warranty of it.²³

SECTION 2.

VENDEE AGAINST VENDOR.

§ 651. Recovery for non-delivery of property contracted for if it is in the market. The breach of contract now to be considered is that of a vendor who has violated his executory agreement to sell goods or other property of a personal nature by not delivering it. The same rule or measure of damages will not apply where there is a sale of specific property and the vendor subsequently refuses to deliver it. The general rule is, where payment and delivery are concurrent acts and the vendor refuses to deliver, that the vendee is entitled to recover as damages the difference between the contract price and the market value of the goods at the time and place appointed for delivery and interest;²⁴ in order to bring this rule into operation, how-

²⁰ Houser & H. Mfg. Co. v. McKay, 53 Wash. 337, 27 L.R.A. (N.S.) 925; Taylor v. Saxe, *supra*; Rucker v. Donovan, 13 Kan. 251; Coit v. Schwartz, 29 id. 344; Philadelphia W. Co. v. Detroit W. L. Works, 58 Mich. 29 (also cost of insurance); Barnett v. Terry, 42 Ga. 283.

²¹ Philadelphia W. Co. v. Detroit W. L. Works, *supra*.

²² Taylor v. Saxe, *supra*.

²³ Houser & H. Mfg. Co. v. McKay, *supra*.

²⁴ Vulcan I. Works Co. v. Roquemore, 175 Fed. 11, 99 C. C. A. 77; Cassell's Mill v. Strater G. Co., 166 Ala. 274; Baer v. Mobile C. & B. Mfg. Co., 159 Ala. 491; Alabama C. Co. v. Geiss, 143 Ala. 591; Lanier v. Little Rock C. Co., 88 Ark. 557;

ever, it must clearly be made to appear that there has been a refusal or failure to deliver the specific goods or property

- Central O. Co. v. Southern R. Co., 154 Cal. 165; Terrace W. Co. v. San Antonio L. & P. Co., 1 Cal. App. 511; Schon-K. M. & G. Co. v. Snow, 43 Colo. 538; Chany v. Hotchkiss, 79 Conn. 104; Marshall v. Clark, 78 Conn. 9, 112 Am. St. 84; Hartnett v. Baker, 4 Penne. 431; Ford v. Lawson, 133 Ga. 237; Sizer v. Melton, 129 Ga. 143; Sanders v. Allen, 124 Ga. 684; Gagnon v. Molden, 15 Idaho 727; Pope M. Co. v. Sandoval Z. Co., 148 Ill. App. 444; Finch v. Zenith F. Co., 146 id. 257; Houston v. Wendnagel, 135 id. 95; Connersville W. Co. v. McFarlan C. Co., 166 Ind. 123, 3 L.R.A. (N.S.) 709; Williams v. De Soto Oil Co., 129 C. C. A. 538, 213 Fed. 194; Sugg v. George B. Hendricks & Son, — Tex. Civ. App. —, 169 S. W. 394; Eaton v. J. B. Crowe Coal & Mining Co., 178 Mo. App. 320; Brewer v. Neatherly, — Tex. Civ. App. —, 162 S. W. 1185; Interboro Brewing Co., Inc. v. Independent Consumers' Ice Co., Inc., 83 Misc. (N. Y.) 119; Richardson Const. Co. v. Whiting Lumber Co., 116 Va. 490; Langstroth v. J. C. Turner Cypress Lumber Co., 162 App. Div. (N. Y.) 818; International Paper Co. v. Rockefeller, 161 App. Div. (N. Y.) 180; W. H. Coyle Consol. Companies v. Swift & Co., 42 Okla. 613; Holliday v. Highland I. & S. Co., 43 Ind. App. 342; Blaul v. Wandel, 137 Iowa 301; Kelley v. Hart-P. Co., 137 Iowa 713; Tuttle-C. Co. v. Coaldale F. Co., 136 Iowa 382; Iowa B. Mfg. Co. v. Herrick, 126 Iowa 721; Acme M. & E. Co. v. Johnson, 141 Ky. 718; Same v. Rives, 141 Ky. 783; Roberts v. Lee, 125 Ky. 709, 128 Am. St. 265; Hafner Mfg. Co. v. Lieber L. & S. Co., 127 La. 348; Jefferson S. Co. v. Iowa & L. L. Co., 122 La. 983; Southern S. Co. v. Ducote, 120 La. 1052; Williams v. Bienvenue, 109 La. 1023; Bell v. Jordan, 102 Me. 67; Darrin v. Whittingham, 107 Md. 46; Canton L. Co. v. Liller, 107 Md. 146; Noel C. Co. v. Atlas P. C. Co., 103 Md. 209; Potomac B. Works v. Barber, 103 Md. 509; Talcott v. Freedman, 149 Mich. 577; Frohlich v. Independent G. Co., 144 Mich. 278; Coxe Bros. & Co. v. Anoka Water Works, Elec. Light & Power Co., 91 Minn. 50; Eaves v. Harris, 95 Miss. 607; Howard v. Haas, 139 Mo. App. 591, 131 Mo. App. 499; Diels v. Kennedy, 88 Neb. 777; Carter v. Roberts, 85 Neb. 480; Strohmeier v. Hartley S. Mfg. Co., 130 App. Div. (N. Y.) 102; Atlas P. C. Co. v. Hopper, 116 App. Div. (N. Y.) 445; Woolf v. Schaefer, 103 App. Div. (N. Y.) 567; Tillinghast-S. Co. v. Cotton Mills, 143 N. C. 268; Coal Co. v. Ice Co., 134 N. C. 574; Caldwell F. Co. v. Peck-W. H. & V. Co. 27 Ohio C. C. 665; Livesley v. Johnston, 48 Ore. 40; Bussard v. Hibler, 42 Ore. 500; David v. Whitmer, 46 Pa. Super. 307; Rotograph Co. v. Cressman, 14 id. 14; Maybank v. Rogers, 88 S. C. 572; Leesville Mfg. Co. v. Morgan W. & I. Works, 75 S. C. 342, citing the text; California P. B. & L. Co. v. Wasatch O. Co., 39 Utah 325, citing the text; Oriental L. Co. v. Blades L. Co., 103 Va. 730; Nottingham C. & I. Co. v. Preas, 102 Va. 820; Curtis v. Parks, 57 Wash. 223; Carney v. Vogel, 52 Wash. 571; Malueg v. Hatten L. Co., 140 Wis. 381; Anderson v. Savoy, 137 Wis. 44; Central L. Co. v. Arkansas Valley L. Co., 86 Kan. 131;

contracted to be sold, and not merely a shortage in number or amount due to mutual error. Earnest money paid to be applied

- Smith v. Curry, 148 Ky. 166; Pope M. Co. v. Sadek, 149 Wis. 394; New England B. Co. v. Prentiss, 76 N. H. 313; Honesdale I. Co. v. Lake Lodge I. Co., 232 Pa. 293; Bunch v. Potts, 57 Ark. 257; Staab v. Borax S. Co., 12 Colo. App. 296; Pitcher v. Lowe, 95 Ga. 423, 429; Rau v. Trumbull, 68 Ill. App. 490; Delaware & H. C. Co. v. Mitchell, 92 Ill. App. 577; York-D. M. Co. v. Lusk, 6 Kan. App. 629; Belcher v. Sellards, 19 Ky. L. Rep. 1571; McGrath v. Gegner, 77 Md. 331, 39 Am. St. 415; Leo Austrian & Co. v. Springer, 94 Mich. 343, 34 Am. St. 359, citing the text; Hewson-H. S. Co. v. Minnesota B. Co., 55 Minn. 530; Boyer v. Cox, 34 Neb. 813; Graham v. Frazier, 49 Neb. 90; Saxe v. Penokee L. Co., 159 N. Y. 371; Ellis v. Miller, 164 N. Y. 434; Smith v. Sloss M. L. Co., 57 Ohio St. 518; Lloyd L. Co. v. Solon, 17 Ohio C. C. 194; Arnold v. Blabon, 147 Pa. 372; Kinports v. Breon, 193 Pa. 309; Paragon Ref. Co. v. Lee, 98 Tenn. 643; Lawrence v. Porter, 63 Fed. 62, 11 C. C. A. 27, 26 L.R.A. 167; Yellow Poplar L. Co. v. Chapman, 74 Fed. 444, 20 C. C. A. 503; Moffitt-W. D. Co. v. Byrd, 92 Fed. 290, 34 C. C. A. 351; Ashmore v. Cox, [1899] 1 Q. B. 436; Fleming v. Grigg, 14 New Zeal. 499; Reeve v. Gallivan, 89 Hun 59; Buist v. Guice, 96 Ala. 256; Cawthon v. Lusk, 97 Ala. 674; Davis v. Grand Rapids S. F. Co., 41 W. Va. 717; Warren v. Mayer Mfg. Co., 161 Mo. 112; Kuhn v. McKay, 7 Wyo. 42, 65; Cole v. Cheovenda, 4 Colo. 17; Capen v. De Steiger G. Co., 105 Ill. 185; Young v. Cureton, 87 Ala. 727; Trunkey v. Hedstrom, 131 Ill. 204; Buckley v. Holmes, 19 Ill. App. 530; Wire v. Foster, 62 Iowa 114; Osgood v. Bauder, 75 Iowa 550, 1 L.R.A. 655; Black v. De Camp, 78 Iowa 718; Faulkner v. Closter, 79 Iowa 15; Gray v. Hall, 29 Kan. 704; Crawford v. Geiser Mfg. Co., 88 N. C. 554; West Republic M. Co. v. Jones, 108 Pa. 55; Ullman v. Babcock, 63 Tex. 68; Koch v. Godshaw, 12 Bush 318; Harris v. Rodgers, 6 Heisk. 626; Pinckney v. Dambmann, 72 Md. 173; Coit v. Schwartz, 29 Kan. 344; Rahm v. Deig, 121 Ind. 283; Sweeney v. Jamieson, 2 Wash. Ty. 254; Bush v. Holmes, 53 Me. 417; Furlong v. Polleys, 30 id. 491, 50 Am. Dec. 635; Tradewater C. Co. v. Lee, 24 Ky. L. Rep. 215; Trask v. Hamburger, 70 N. H. 453; Trotter v. Tousey, 131 Mich. 624; Crug v. Gorham, 74 Conn. 541; Emory Mfg. Co. v. Salomon, 178 Mass. 582; Randon v. Barton, 4 Tex. 289; Williamson v. Dillon, 1 H. & G. 444; Duncan v. McMahon, 18 Tex. 597; Fessler v. Love, 48 Pa. 407; Gilpin v. Consequa, 3 Wash. C. C. 184; Kipp v. Wiles, 3 Sandf. 585; Bartlett v. Blanchard, 13 Gray 429; Clark v. Pinney, 7 Cow. 681; Northup v. Cook, 39 Mo. 208; Somers v. Wright, 115 Mass. 292; Worthen v. Wilmot, 30 Vt. 555; Doak v. Snapp, 1 Cold. 180; Blackwood v. Brennan, 1 Harp. 144; Hinde v. Liddell, 32 L. T. (N.S.) 449, L. R. 10 Q. B. 265; Paine v. Sherwood, 21 Minn. 225; Miles v. Miller, 12 Bush 134; Brown v. Muller, L. R. 7 Ex. 319; Pendergast v. Reed, 29 Md. 398, 96 Am. Dec. 539; Camp v. Hamlin, 55 Ga. 259; Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Watrous v. Bates, 5 Up. Can. C. P. 366; Woodworth v. Curtis, 7 Wend. 112; Ruiz v. Norton, 4 Cal. 355, 60 Am. Dec. 618; Crosby v. Watkins, 12 Cal. 85;

to the purchase price may be recovered,²⁵ as may money paid to a third person in pursuance of the contract.²⁶ The general rule applies whether the vendor manufactures the goods or obtains them from others if the contract is violated before they were manufactured and they were not then in his possession.²⁷ A vendor who breaches his contract to aid in selling goods must answer for the buyer's loss on that account.²⁸ Where delivery is to be made at stated periods and in designated quantities, on the total

Burnham v. Roberts, 70 Ill. 19; Davis v. Shields, 24 Wend. 322; Sanborn v. Benedict, 78 Ill. 309; Duncan v. Post, 3 Cal. 373; Pittsburg, etc. R. Co. v. Heck, 50 Ind. 303, 19 Am. Rep. 713; Harrolson v. Stein, 50 Ala. 347; Hill v. Smith, 32 Vt. 433; Parsons v. Sutton, 66 N. Y. 92; Stewart v. Power, 12 Kan. 596; Boies v. Vincent, 24 Iowa 387; Brent v. Richards, 2 Gratt. 539; Meserve v. Ammidon, 109 Mass. 415; Shepherd v. Hampton, 3 Wheat. 200, 4 L. ed. 369; Dey v. Dox, 9 Wend. 129, 24 Am. Dec. 137; Gregory v. McDowell, 8 Wend. 435; Boorman v. Nash, 9 B. & C. 145; Barrow v. Arnaud, 8 Q. B. 604; Valpy v. Oakeley, 16 id. 941; Josling v. Irvine, 6 H. & N. 512; Chinery v. Viall, 5 id. 288; Griffiths v. Perry, 1 E. & E. 680; Peterson v. Ayre, 13 C. B. 353; Donald v. Hodge, 5 Hayw. 85; Connell v. McClean, 6 Harr. & J. 297; Kitlinger v. Sanborn, 70 Ill. 146; Wilson v. Lancashire, etc. R. Co., 9 C. B. (N.S.) 632; Orr v. Bigelow, 14 N. Y. 556; Bailey v. Clay, 4 Rand. 346; Cahen v. Platt, 69 N. Y. 348, 25 Am. Rep. 203; Brackett v. McNair, 14 Johns. 170, 7 Am. Dec. 447; Gordon v. Norris, 49 N. H. 376; Stevens v. Lyford, 7 id. 360; West v. Pritchard, 19 Conn. 212; Shaw v. Nudd, 8 Pick. 9; Quarles v. George, 23 id. 400; Davis v. Richardson, 1 Bay 105; Whitmore v.

Coates, 14 Mo. 9; Lippert v. Saginaw M. Co., 108 Wis. 512; Jordan v. Patterson, 67 Conn. 473; Laporte I. Co. v. Brock, 99 Iowa 485; Seaboard B. Co. v. Bonacci, 153 App. Div. (N. Y.) 43; Banks v. Warner, 85 Conn. 613; Ladoga C. Co. v. Corydon C. Co., 52 Ind. App. 23; Gordon M. Co. v. Bartels B. Co., 206 N. Y. 528; Stock v. Snell, 213 Mass. 449; Chandler G. & M. Co. v. Shea, 213 Mass. 398; American S. & W. Co. v. Copeland, 159 N. C. 556; Pope v. Ferguson, 82 N. J. L. 566; Cooke v. Big Muddy C. & I. Co. (Tex. Civ. App.), 155 S. W. 1019; Burgie v. Hicks, 203 Fed. 340; Gaunt v. Ralston P. Co., 198 Fed. 60, 117 C. C. A. 168; Sharpe v. White, 25 Ont. L. R. 298. See Harrison v. Charlton, 37 Iowa 134.

A vendor who wrongfully stops goods *in transitu* is liable for interest to the vendee who has pledged the bills of lading. Pope v. Baltimore W. Co., 103 Md. 9.

²⁵ Joyce v. Adams, 8 N. Y. 291; Gossard v. Woods, 98 Ind. 195; Weber v. Squier, 51 Mo. App. 601.

²⁶ Curtis v. Parks, 57 Wash. 223; Bullard v. Stone, 67 Cal. 477.

²⁷ Holliday v. Highland I. & S. Co., 43 Ind. App. 342, disapproving Dolph v. Troy L. M. Co., 28 Fed. 553.

²⁸ Simpson v. Crane, 149 Mich. 352.

or partial failure of the vendor the damages are to be estimated on those quantities and as of such periods.²⁹ And if the vendor absolutely repudiates his contract at any period previous to the final date specified and the vendee elects to treat the contract as at an end the damages are to be estimated with reference to the times stipulated for performance. "If this were not the rule there might be great injury and injustice done to a party where the periods of performance extended through a great many years, and the market prices or values might vary during the different periods of performance."³⁰ In such cases the vendee may go into the market and make needed purchases from time to time as his business may require.³¹ Where no time is fixed for delivery and the delay has not been unreasonable damages are computed as of the time delivery was refused;³² and if no definite date is fixed for delivery of the whole quantity sold the value may be fixed as of the time the vendee is informed of the extent to which delivery will be made.³³ The price on the last day of the month determines the rights of the parties when delivery is to be made during the month.³⁴ If the vendor has an alternative right as to the times for delivery on violation of

²⁹ *Haff v. Pilling*, 134 Fed. 294; *Sizer v. Melton*, 129 Ga. 143.

³⁰ *Paris Flouring Co. v. Imperial Cotton Milling Co.*, 181 Ill. App. 215; *Youghiogeny & O. C. Co. v. Verstine*, 176 Fed. 972; *Sagola L. Co. v. Chicago T. & T. Co.*, 121 Ill. App. 292; *Stahr v. Hickman G. Co.*, 132 Ky. 496; *Benton F. Co. v. Shipman*, 136 Mich. 523; *Rosenthal v. Empire B. & S. Co.*, 123 App. Div. (N. Y.) 503; *Hosiery Co. v. Cotton Mills*, 140 N. C. 452, citing the text; *Caldwell F. F. Co. v. Peck-W. H. & V. Co.*, 6 Ohio C. C. (N.S.) 629; *Alpha P. C. Co. v. Oliver*, 125 Tenn. 135, 38 L.R.A.(N.S.) 416, citing the text; *Long Pole L. Co. v. Saxon L. & L. Co.*, 108 Va. 497; *Honesdale I. Co. v. Lake Lodore I. Co.*, 232 Pa. 293; *Hewson-H. S. Co. v. Min-*

nesota B. Co., 55 Minn. 530, 535; *Bainbridge O. Co. v. Crawford O. Mill*, 138 Ga. 741.

The time of the final failure to deliver is that at which the value of the property is fixed if the original contract has been extended. *Crescent Mfg. Co. v. Slattey*, 132 La. 917.

It is competent for the parties to agree upon the place at which the market price shall be fixed. *Harvey v. Pettaway*, 156 N. C. 375.

³¹ *Delaware & H. C. Co. v. Mitchell*, 113 Ill. App. 429.

³² *United R. & E. Co. v. Wehr*, 103 Md. 323; *Langstroth v. J. C. Turner Cypress Lumber Co.*, 162 App. Div. (N. Y.) 818.

³³ *Howard v. Haas*, 139 Mo. App. 591.

³⁴ *Gentry v. Margolius*, 110 Tenn. 669.

his contract the measure of damages least burdensome to him will be applied if he invokes it.³⁵ Where the contract is such that the vendee must make demand from time to time there can be a recovery for the non-delivery of only such quantities as were called for, and each stipulated period during which a demand might have been made stands by itself and any deficiency in delivery because of failure to call for the goods cannot be carried over into any following period.³⁶

If the contract is for goods at wholesale the vendee is not entitled to recover damages on the basis of what they are worth at retail.³⁷ Nor will this general standard of damages be departed from though one or both of the parties were mistaken in respect to material facts affecting the market price. Thus, in an action against a vendor for not delivering goods the court say: "The relation of buyer and seller is not a confidential one, and each of the parties is supposed to judge of his ability to perform his part for himself;"³⁸ declarations of the plaintiff that he knew at the time of making the contract that the article contracted for could not be procured were not admissible in evidence to mitigate the damages.³⁹ A contract to perform an impossible thing may be void; but it is never impossible to procure and deliver

³⁵ *Holliday v. Highland I. & S. Co.*, 43 Ind. App. 342.

³⁶ *Thedford v. Herbert*, 135 App. Div. (N. Y.) 174.

³⁷ *Blaul v. Wandel*, 137 Iowa 301; *Tuttle-C. C. Co. v. Coaldale F. Co.*, 136 Iowa 382; *Kilpatrick v. Whitmer*, 118 App. Div. (N. Y.) 98; *Stecker v. Weaver C. & C. Co.*, 116 App. Div. (N. Y.) 772; *Duncan v. Post*, 3 Cal. 373; *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1139; *Marshall v. Clark*, 78 Conn. 9, 112 Am. St. 84.

Where a contract was for the sale of the entire product of a sawmill during a certain period, not to be less nor more than designated quantities, at a fixed price per thousand feet, certain proportions of the

product to grade as to quality as specified, and in the deliveries there was an excess in some of the grades and a shortage in others, it was ruled that the vendee's damages were the amount of the difference between the value of the product of the mill so contracted for and the value of that which was delivered, and that to establish such difference evidence was admissible respecting the value of the various grades of lumber as well as concerning the value of the entire product of the mill. *Sloan v. Alleghany Co.*, 91 Md. 501.

³⁸ *Del Curto v. Billingsley*, — Tex. Civ. App. —, 169 S. W. 393.

³⁹ *Reid, Murdock & Co. v. Somerset Canning Co.*, 182 Ill. App. 112.

an article of commerce which may be had in the market in some quarter in the world.⁴⁰ So, where alcohol was contracted to be delivered on board a vessel under the tax law from August 20 to August 31, 1862, duty paid at a fixed price, the subsequent suspension, until after the time fixed for delivery, of an act of congress which practically rendered alcohol sold for exportation duty free did not relieve the vendor from the obligation to make delivery according to his contract, although such suspension was not contemplated by the parties.⁴¹ But where goods are sold in close packages and there is a mutual mistake of the parties as to the quantity it will be corrected in an action between them on the basis of the purchase price.⁴² If the sale is of a car load of goods, no particular car being specified, the damages are to be assessed on the basis of the quantity which an ordinary car will contain.⁴³ If the vendor may select the kind of goods to be supplied and has an option as to the quantity the damages will be estimated on the theory that he would have furnished the grade most advantageous to himself and only the minimum quantity thereof.⁴⁴

If a purchaser for a price below the market agrees that, should he desire to sell the property, he will sell it back to his vendor at the same price and afterwards sells to another for more than the market price, he will be liable on his agreement for the difference between the amount he paid and the sum he sold for.⁴⁵ This rule of damages, the difference between the contract and the market price, is founded on the consideration that the articles withheld are worth the market price to the vendor and the vendee may immediately after the breach of the contract go into the market and supply himself at the market price and, having done so, he is in as good condition as if the contract had

⁴⁰ *Wilson v. Alcatraz A. Co.*, 142 Cal. 182; *Myers v. Drake*, 10 Watts 110.

⁴¹ *Baker v. Johnson*, 2 Robert. 570.

⁴² *Hargous v. Ablon*, 3 Denio 406, 45 Am. Dec. 481.

⁴³ *Seefeld v. Thacker*, 93 Wis. 518; *Floyd v. Mann*, 146 Mich. 356;

Menz L. Co. v. McNeeley, 58 Wash. 223, 28 L.R.A.(N.S.) 1007.

⁴⁴ *American H. L. Co. v. Dent*, 151 Mo. App. 614; *Holliday v. Highland I. & S. Co.*, *supra*.

⁴⁵ *Brent v. Richards*, 2 Gratt. 539; *Duncan v. McMahon*, 18 Tex. 597; *Ackley v. Hunter-Benn & Co.'s Co.*, 166 Ala. 295.

been performed.⁴⁶ If the property cannot be purchased in the market where the delivery was to be made the vendee may go into the nearest market and buy, and add the cost of transportation to the purchase price;⁴⁷ or, if circumstances are such as to

⁴⁶ *Hebron Mfg. Co. v. Powell K. Co.*, 171 Fed. 817, 96 C. C. A. 489; *Haff v. Pilling*, 134 Fed. 294; *Central Georgia B. Co. v. Carolina P. C. Co.*, 136 Ga. 693; *Pope M. Co. v. Sandoval Z. Co.*, 148 Ill. App. 444; *Loeb v. Homer C. & Mfg. Co.*, 111 La. 726; *Coal Co. v. Ice Co.*, 134 N. C. 574; *First Nat. Bank v. Snell*, 144 Wis. 433; *Kelley v. La Crosse C. Co.*, 120 Wis. 84, 102 Am. St. 971; *Frink v. Tatman*, 36 Ind. 259, 10 Am. Rep. 19; *Beard v. Straw*, 38 Ind. 128; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Furlong v. Polleys*, 30 Me. 493, 50 Am. Dec. 635; *Deere v. Lewis*, 51 Ill. 254; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Wire v. Foster*, 62 Iowa 114. See *Alder v. Keighley*, 15 M. & W. 117; *Arnold v. Blabon*, 147 Pa. 372; *Theiss v. Weiss*, 166 Pa. 9, 45 Am. St. 638; *Ralli v. Rockmore*, 111 Fed. 874; *Salt Fork C. Co. v. Eldridge C. Co.*, 170 Ill. App. 268.

An instruction to the jury in an action for breach of a contract to sell and deliver lumber that the proper measure of damages is the difference between the contract price of the lumber not delivered and the wholesale price at the place of delivery is erroneous. The true measure is the difference between the contract price and what it would have cost the plaintiff to procure, at the place of delivery and at the time or times when it was reasonable and proper to supply themselves, lumber of the kind and quantity they were to receive on the contract; and, if it were impracticable for them thus to supply

themselves, except at retail rates they were entitled to demand those rates of the defendants. *Haskell v. Hunter*, 23 Mich. 305.

⁴⁷ *McClesky v. Howell C. Co.*, 147 Ala. 573; *Fairchild v. Southern Ref. Co.*, 158 Cal. 264; *National C. T. Co. v. Malden & M. G. L. Co.*, 189 Mass. 234; *Cleveland v. Rowe*, 99 Minn. 444; *Fechheimer I. & S. Co. v. Baress* (N. Y. Misc.), 122 N. Y. Supp. 683; *Houston I. & B. Co. v. Tiemer* (Tex. Civ. App.), 139 S. W. 992; *Capper v. Manufacturers' P. Co.*, 86 Kan. 355; *Hewson-H. S. Co. v. Minnesota B. Co.*, 55 Minn. 530; *South Gardiner L. Co. v. Bradstreet*, 97 Me. 165; *Reeves v. Cress*, 89 Minn. 466; *Yellow Poplar L. Co. v. Chapman*, 74 Fed. 444, 20 C. C. A. 503; *Electric R. Co. v. Tennessee C. I. & R. Co.*, 98 Ga. 189; *Capen v. De Steiger G. Co.*, 105 Ill. 185; *Vickery v. McCormick*, 117 Ind. 594; *Gaunt v. Ralston P. Co.*, 198 Fed. 60, 117 C. C. A. 168.

It has been said that the cost of transportation is to be deducted. *National W. & S. Co. v. Toomey*, 144 Mo. App. 516.

In *Hewson-H. S. Co. v. Minnesota B. Co.*, *supra*, there was a failure to supply brick. It appeared that the vendee could obtain brick of a particular manufacture elsewhere, but that he could not sell such brick in some of the territory in which he was authorized to sell the brick made by the vendor. The vendee's duty to procure such brick was recognized, as was the vendor's liability for the increased cost of it.

make it prudent for the vendee to purchase from his vendor at a price in excess of that stipulated for in the broken contract, such excess may be recovered.⁴⁸ A vendee who is informed when the contract of sale is made that the vendor has not in his possession the goods sold is under an obligation to go into the market and supply himself.⁴⁹ The vendee must act with promptness in procuring other goods.⁵⁰ The general rule of damages applies whether the substituted goods are manufactured, mined or otherwise produced or bought in the open market. The cost of purchasing in the latter case or of procuring in the other cases measures the recovery.⁵¹ That rule also governs though the

Such duty and liability existed to the extent that the vendee could sell the substituted brick. The measure of damages as to the territory in which the brick obtainable by the vendee could not be sold by him was the difference between the contract price of that to which he was entitled from the vendor, at the place of manufacture, with the cost of freight to such territory added and the price which the plaintiff could, as a jobber or middleman, procure brick for at the lowest market value, or for a less price if reasonably possible, of a similar kind and in sufficient quantities, and at the times mentioned in the contract for delivery, to the amount or quantity which could be sold in such territory.

The time, trouble and expense of procuring the desired goods in another market have been held to be elements of the recovery. *North Shore L. Co. v. South Side L. Co.*, 176 Ill. App. 96.

There may be a market value for a commodity at a place though it is not constantly offered for sale there. *Coxe Bros. & Co. v. Anoka Water Works, Elec. Light & Power Co.*, 91 Minn. 50.

⁴⁸ *Pittsburg I. & S. Engineering*

Co. v. National T. W. Co., 184 Pa. 251; *Long Pole L. Co. v. Saxon L. & L. Co.*, 108 Va. 497, citing the text.

The duty to buy from the vendor on different terms from those stipulated in the original contract has been enforced in a case in which payment was not required until delivery of all the goods had been made and subsequently a tender of them was made on condition that each carload was to be paid for as delivered. The vendee's recovery was measured by the interest on the money required to be paid in advance of the time originally specified. *Borden v. Vinegar Bend L. Co.*, 7 Ala. App. 335.

⁴⁹ *Aronson v. Claffin* (N. Y. Misc.), 115 N. Y. Supp. 97.

⁵⁰ *David v. Whitmer*, 46 Pa. Super. 307.

While generally the measure of damages is to be fixed as of the time of the breach, it cannot be said as matter of law, where the seller has given assurances of early shipments and made requests for delay, that the vendee was bound to buy the stipulated quantity of goods at once. *Hardwood L. Co. v. Adam*, 134 Ga. 821, 32 L.R.A. (N.S.) 192.

⁵¹ *Erie County N. G. & F. Co. v. Carroll* (1911), App. Cas. 105.

vendee may have purchased an inferior article and used it in his business; he was entitled to the goods ordered, and the vendor may not escape liability because he made use of those which were available.⁵² The expense of performing the contract is not recoverable in addition to the damages measured by the foregoing rules.⁵³

The general rule that the difference between the contract and the market price on the day fixed for delivery measures the vendee's damages for nondelivery or delay in delivering⁵⁴ is sometimes varied if he has no knowledge or means of knowing on that date that a breach had occurred or was contemplated. If the vendee uses diligence in seeking to learn the cause of the delay and is informed that the delivery will not be made the recovery may be based on the market price on the day he is so notified,⁵⁵ or on the next following day.⁵⁶ Where the time for delivery was not fixed by the contract the difference between the agreed price and the value at the date of demand and refusal governs.⁵⁷ A vendee who buys before the date agreed upon for delivery can recover only the difference between the contract price and the price paid.⁵⁸ The vendee may so conduct himself as to forfeit his right to recover damages, as where he attempts to secure goods for the use of others in violation of his contract with his vendor. In such a case the latter may refuse to fill the order without becoming liable for damages, regardless of whether he had knowledge of the purpose for which they were ordered.⁵⁹ The vendor's liability is not lessened because a great part of the vendee's damages resulted from the breach of contracts made with persons who were engaged in a business pro-

⁵² *California P. B. & L. Co. v. Watsch O. Co.*, 39 Utah 325.

⁵³ *Globe Ref. Co. v. Landa C. O. Co.*, 190 U. S. 540, 47 L. ed. 1171.

⁵⁴ *McHenry v. Bulifant*, 207 Pa. 15.

⁵⁵ *Boyd v. Quinn*, 18 N. Y. Misc. 169, affirming 17 N. Y. Misc. 278; *Walnut Ridge M. Co. v. Cohn*, 79 Ark. 338. See *Louisville P. Co. v.*

Crain, 141 Ky. 378.

⁵⁶ *Barnett v. Elwood G. Co.*, 153 Mo. App. 458.

⁵⁷ *Menz L. Co. v. McNeeley*, 58 Wash. 223, 28 L.R.A. (N.S.) 1007.

⁵⁸ *Morris v. Supplee*, 208 Pa. 253.

⁵⁹ *Williams C. Co. v. Scofield*, 116 Fed. 119, 53 C. C. A. 23; *Trinidad A. Mfg. Co. v. Trinidad A. Ref. Co.*, 119 Fed. 134, 55 C. C. A. 566.

hibited by law and who would have used the property contracted to be sold in aid of the prosecution of that business.⁶⁰ Neither are the rights or liabilities of the parties affected because of the motive which prompted the vendor to break his contract—as that it had violated the anti-trust law. That fact did not impose liability for attorneys' fees.⁶¹ The purpose for which the goods were desired does not affect the general rule of liability.⁶² A vendee who substitutes goods he has on hand for those not delivered can recover only the difference between their cost to him and the contract price for those not delivered.⁶³ The rights and liabilities of the parties may be affected by their contract, as where the vendee binds himself to buy elsewhere at the lowest price and the seller to refund the difference. The failure to so buy precludes the recovery of lost profits.⁶⁴ The time, trouble and expense involved in making a repurchase should be elements of damage in favor of the vendee.⁶⁵ Notwithstanding the contract of sale was in writing, if the vendee delays going into the market and obtaining the property and the vendor is in default respecting the delivery at the request of the latter, the damages may be predicated upon the value of it when it was bought.⁶⁶ The damages for the breach of a contract to deliver property worth a stated sum is the money value of that sum.⁶⁷

§ 652. **Same subject; property not in the market; recovery of lost profits.** The agreement may relate to property which may not be found in the market and can only be produced at an expense greatly above the contract price. In such a case it has been held that if the course pursued by the purchaser in obtaining other like property, as timber, for example, was the only way it could be obtained, or was a reasonable and prudent way of obtaining it, irrespective of any special use or exigence, the

⁶⁰ *Crystal I. Co. v. Wylie*, 65 Kan. 104. See § 5.

⁶¹ *Id.* See *Ralli v. Rockmore*, 111 Fed. 874, denying a recovery of attorney's fees claimed because of stubborn litigiousness.

⁶² *Leesville Mfg. Co. v. Morgan W. & I. Works*, 75 S. C. 342.

⁶³ *Burton v. Miller*, 227 Pa. 143.

⁶⁴ *Gartner v. Richardson*, 123 La. 194.

⁶⁵ *Nottingham O. & I. Co. v. Preas*, 102 Va. 820; *Barker v. Mann*, 5 Bush 672, 96 Am. Dec. 373.

⁶⁶ *Ogle v. Earl Vane*, L. R. 2 Q. B. 275.

⁶⁷ *Sunset Orchard L. Co. v. Sherman N. Co.*, 121 Minn. 5.

difference between the contract price and the higher cost of the property thus obtained may be recovered by the purchaser as damages naturally arising from the breach itself.⁶⁸ Where a contract to furnish granite of a certain quality and color was abandoned after its partial completion and granite of the same quality and color could be procured in only two quarries, one of which was not accessible and the other unopened, the vendee was justified in opening the latter, and the expense of doing so, the payment of the freight and the cost of dressing the stone were elements in determining the cost of completing the contract, and such cost furnished the measure of damages.⁶⁹ Where machinery could not be procured from other vendors it was said the

⁶⁸ *McFadden v. Shanley*, 16 Ariz. 91; *Bliss v. Buffalo T. C. Co.*, 131 Fed. 51, 65 C. C. A. 289; *Wilson v. Alcatraz A. Co.*, 142 Cal. 182; *Hardwood L. Co. v. Adam*, 134 Ga. 821, 32 L.R.A. (N.S.) 192, citing the text; *Lowenstein v. Hargraves Mills*, 141 App. Div. (N. Y.) 232; *Lande v. Hyde*, 66 N. Y. Misc. 259; *Caldwell F. F. Co. v. Peck-W. H. & V. Co.*, 6 Ohio C. C. (N.S.) 629, 27 Ohio C. C. 665; *Anderson v. Savoy*, 137 Wis. 44; *McFadden v. Henderson*, 128 Ala. 221, 235; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52; *Paine v. Sherwood*, 21 Minn. 225, 19 id. 215; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Hamilton v. Kirby*, 199 Pa. 466; *Consolidated C. Co. v. Block & H. S. Co.*, 53 Ill. App. 565; *Canovan v. Neeld*, 189 Pa. 208; *Davis v. Grand Rapids S. F. Co.*, 41 W. Va. 717; *Border City I. & C. Co. v. Adams*, 69 Ark. 219; *Tradewater C. Co. v. Lee*, 24 Ky. L. Rep. 215; *Thomas I. Co. v. Jackson I. Co.*, 131 Mich. 130; *Den Bleyker v. Gaston*, 97 Mich. 354; *Wolfinger v. Mayo M. Co.*, 21 Pa. Dist. 189; *Graham v. Bigelow*, 46 Nova Scotia 116.

In the absence of evidence of the market prices of goods which were not obtainable in the market at the

various periods stipulated for their delivery the court took the prices at which the plaintiff, in order to fill contracts, paid the defendant's agent for the goods which should have been delivered to it, but which were put upon the market instead, as the basis upon which to assess compensation. *St. Helen's S. Co. v. Dominion A. Co.*, 42 Nova Scotia 385.

It must be ascertained what a reasonable man, acting sensibly on his own behalf and at his own risk, would be willing to pay in order to get the goods at the place and at the time stipulated. The amount is to be ascertained by taking the price at the place of manufacture or other source, together with the cost of carriage and a reasonable sum for the profit of the importer if they are bought in a foreign market. *Hasell v. Bagot*, 13 Anst. Com. L. R. 374.

⁶⁹ *Gallagher v. Baird*, 54 App. Div. (N. Y.) 398, citing *Forsyth v. Mann*, 68 Vt. 116, 32 L.R.A. 788; *Todd v. Gamble*, 143 N. Y. 382, 52 L.R.A. 225. See *Canovan v. Neeld*, 189 Pa. 208; *Puritan C. Co. v. Clark*, 204 Pa. 556.

vendee might have had it made, and could have employed draftsmen and mechanics for that purpose, and, without having done so, might show that the reasonable outlay would have been in excess of the contract price and the difference would have measured his recovery.⁷⁰ But in order to bring himself within the rule which allows recovery of the increased cost paid for an article the vendee must act with prudence.⁷¹ Where the defendant broke his contract to furnish lumber of a particular grade, cut into strips for a special purpose, and which could not be procured in the market, the vendee was not justified in buying mill stuffs and cutting it into strips for the purpose of using it as a substitute for the lumber he was entitled to. Instead, he should have selected lumber of the contract grade and cut the strips from logs, thereby materially lessening the waste.⁷² The difference between the cost of the strips thus substituted and the contract price would then have measured the vendor's liability. "If the plaintiff's business was interrupted by reason of his inability to procure materials another rule of damages would necessarily be resorted to, but the value of the material not supplied, and for which no substitute was procured, must be arrived at through persons qualified to judge by determining what strips, similar in kind, quality and amount, would have cost or would have been worth at that time and place."⁷³ The recovery must not exceed the sum which will compensate the vendee for his loss. If the property cannot be obtained in the place specified for its free delivery and was intended to be sent abroad there cannot be a recovery of transportation charges to the foreign market from that place if such charges exceed those from the place in which the property could be procured.⁷⁴ The value

⁷⁰ Bliss v. Buffalo T. C. Co., 131 Fed. 51, 65 C. C. A. 289.

⁷¹ The price paid may not be recovered where the purchase was made without competition, without notice to the seller and in the absence of evidence showing it was fair and reasonable. Seaboard B. Co. v. Bonacci, 153 App. Div. (N. Y.) 43.

⁷² Sauer v. McClintic-Marshall Const. Co., 179 Mich. 618.

⁷³ Den Bleyker v. Gaston, 97 Mich. 354. Two justices dissented as to the propriety of the vendee's action. See Hamilton v. Kirby, *supra*.

⁷⁴ Houston I. & B. Co. v. Tiemer (Tex. Civ. App.), 139 S. W. 992.

of other articles of a different pattern and make, though similar in character and of like efficiency, are not the equivalent of those bought. In other words, the rule making the cost of other goods the measure of the vendor's liability applies to marketable commodities the grades of which are recognized in commerce.⁷⁵ The price at which property is obtained elsewhere in lieu of that to which the vendee was entitled under his contract may mitigate the liability of his vendor. Thus, in a late case appealed to the Privy Council from the Court of Appeal for Ontario there was a breach of a contract to supply natural gas; the plaintiff secured a supply elsewhere by acquiring other gas leases and the construction of works necessary to utilize them. The measure of damages was held to be the cost of procuring the gas, and not the price at which that substituted could have been sold; but because the leases and uses from which such gas was obtained had been sold for more than they cost, the damages were a nominal sum only.⁷⁶

The recovery is governed by the market price if there be one, although it may be enhanced by the fact that the article is patented and the right to sell held exclusively by the vendor. The vendee has a right to the benefit of the patent in whatever degree it entered into the market value of the article.⁷⁷ Where the contract is for the sale of property which has no market value it is presumed that the parties have bargained with that fact in view; if the vendee cannot supply himself in the market he may recover the amount lost by reason of not receiving an advance or profit through agreements which he has made in reliance upon the fulfillment by the vendor of his contract.⁷⁸

⁷⁵ *Connell v. Harron*, 7 Cal. App. 745.

⁷⁶ *Erie County N. G. & F. Co. v. Carroll*, [1911] App. Cas. 105.

⁷⁷ *Frink v. Tatman*, 36 Ind. 259, 10 Am. Rep. 19.

⁷⁸ *Talcott v. Freedman*, 149 Mich. 577; *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 102 Am. St. 378; *McKay v. Riley*, 65 Cal. 623; *Loescher v. Deisterberg*, 26 Ill. App. 520;

Culin v. Woodbury G. Works, 108 Pa. 220; *Guetzkow B. Co. v. Andrews*, 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. 909.

Articles loaned by the vendor to the vendee to take the place of those sold and which were not delivered within the time agreed upon may be regarded in the award of damages. *Biele v. Levy* (N. Y. Misc.), 107 N. Y. Supp. 607.

Thus, on the breach of a contract to sell silver ore of a specified grade to the operator of smelting works the loss sustained by the buyer measures the damages.⁷⁹ If resort is necessarily had to an inferior article for use in manufacturing in order to fill contracts the resulting damage may be recovered, so far as it proceeds from experiments which it was prudent to make.⁸⁰ The purchaser may manufacture other goods to take the place of those which the vendor has failed to deliver and may recover the difference between the contract price and the raw material, plus the cost of manufacturing, but cannot add to the latter sum a manufacturer's profit.⁸¹ Knowledge of the fact that the article sold is not obtainable has the same effect to make the vendor liable for consequential losses as his knowledge of pre-existing contracts made by the vendee has to make him so liable when the market furnishes the needed article. The amount reasonably expended by a purchaser to avert the loss impending because of the non-delivery of goods which are not procurable in the market may be recovered.⁸² Thus, where the defendant had contracted to supply to the plaintiff two thousand pieces of shirting to be delivered on the 20th day of October certain, at so much per piece, and was informed that the property was intended for shipment, and shortly before the 20th of

⁷⁹ *Australian S. Co. v. British Broken Hill P. Co.*, 22 Vict. L. R. 190.

⁸⁰ *McHose v. Fulmer*, 73 Pa. 365; *Electric R. Co. v. Tennessee C., I. & R. Co.*, 98 Ga. 189; *Carroll-P. B. & T. Co. v. Columbus M. Co.*, 55 Fed. 451, 5 C. C. A. 190.

⁸¹ *Pittsburg S. Mfg. Co. v. West Penn S. S. Co.*, 201 Pa. 150.

⁸² § 89; *Hamilton v. Kirby*, *supra*. In *Watson v. Gray*, 16 T. L. Rep. 308 (1900), the defendant breached his contract to furnish steel plates which he knew were wanted by the plaintiff for building certain barges which were then at such stages of construction that delivery of the plates as agreed was of the utmost

importance to the plaintiff. The defendant also knew that the plates could not be procured elsewhere. He was liable for damages for loss and expenditure occasioned in connection with the barges for which the defendant knew the plaintiff required the plates. It was also sought to hold the defendant for the loss by the plaintiff of business generally, but Kennedy, J., thought such loss could not be recovered, there being no evidence to show that the defendant knew the extent of the business. Such a claim, he said, was purely speculative and could not be said to be within the contemplation of the parties.

October notified the plaintiff that he would not be able to complete his contract, whereupon the plaintiff endeavored to get the shirting elsewhere, but, being unable to do so, in order to ship according to his contract with his sub-vendee, procured two thousand pieces of other shirting of a somewhat superior quality at an increase of price, the sub-vendee, having accepted the substitute, but paying no advance in price to the plaintiff, he sued to recover against the defendant for the breach of his contract the difference between what he paid for the substituted shirting and the price contracted to be paid to him. It appeared that the shirting which the plaintiff bought was the nearest in quality and price that could be got by the 20th of October, and it was held that, there being no market for the article contracted for, the measure of damages was the value at the time of the breach, and the plaintiff, having done the best thing he could, was entitled to recover the difference in the price.⁸³ In *Barker v. Mann*,⁸⁴ after sale of specific goods, the vendors refused to make delivery and gave immediate notice to the vendee to that effect. The court say: "In this case the appellants promptly informed the appellees of their intention to abandon the sale, and there is no reason assigned or appearing why they could not procure a supply of the same articles within a few days from other vendors in the L. market [where the transaction took place]. Had they done so their necessary expense, together with their time and trouble, and any possible advance in the price of such goods at L. which they would have had to pay, should be regarded as elements making up their damages."⁸⁵ There are sufficient reasons for holding a vendor who controls the supply of the property agreed to be furnished liable for the reasonable and necessary expense

⁸³ *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Haskell v. Hunter*, 23 Mich. 305; *Miller v. Stern*, 25 N. Y. Misc. 690; *Lande v. Hyde*, 66 N. Y. Misc. 259.

⁸⁴ 5 Bush 672, 96 Am. Dec. 373.

⁸⁵ See *Taylor v. Reed*, 4 Paige 561; *Feehan v. Hallinan*, 13 Up. Can. Q. B. 440.

It is for the defaulting seller who has given the buyer notice that he will not deliver to show that the latter could have purchased the article in the market where the delivery was to have been made. *York-D. M. Co. v. Lusk*, 45 Kan. 182.

incurred by the vendee in preparation for its use, as where the contract relates to water for the purpose of irrigation.⁸⁶

A vendee is not bound to go into a foreign market and procure other goods until the vendor has given him notice that he will not fulfill his contract.⁸⁷ But the better rule is that "a notice which gives the vendee no right to damages cannot bind him as conclusive that the contract will not be performed, and so put upon him a responsibility to see that the damages are no greater than they need be. It is a mere prophecy, and as such may be disregarded. Until the moment when a refusal to perform is a wrong he has a right to expect that when the time comes a wrong will not be done."⁸⁸ Indeed, the vendee of property which has a marketable value is entitled, according to the weight of authority and upon reason, to the benefit of his bargain and may recover to that extent without availing himself of the opportunity to purchase like property elsewhere.⁸⁹ If, after receiving notice of the vendor's refusal

⁸⁶ *Gagnon v. Molden*, 15 Idaho 727. See § 81.

Where the goods sold are not obtainable in the market and there is a breach of a contract to furnish them and give an exclusive agency for their sale there is liability for the time, service and money expended in making preparations for their sale. *Taylor v. Spencer*, 75 Kan. 152.

⁸⁷ *Cockburn v. Ashland L. Co.*, 54 Wis. 619; *Shouse v. Neiswaenger*, 18 Mo. App. 236.

⁸⁸ *Emory Mfg. Co. v. Salomon*, 178 Mass. 582; *Frost v. Knight*, L. R. 7 Ex. 111; *Johnstone v. Milling*, 16 Q. B. Div. 460, 470, 473; *Roehm v. Horst*, 178 U. S. 1, 19, 44 L. ed. 953, 960; *South Gardiner L. Co. v. Bradstreet*, 97 Me. 165.

⁸⁹ *Follansbee v. Adams*, 86 Ill. 13; *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. 872; *Rau v. Trumbull*, 68 Ill. App. 490; *Jackson v. Washington, etc. E. R. Co.*, 35 App. D. C.

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41; *Roehm v. Horst*, *supra*; *Fairchild v. Southern Ref. Co.*, 158 Cal. 264; *Nottingham C. & I. Co. v. Preas*, 102 Va. 820; *Carney v. Vogel*, 52 Wash. 571; *Stahr v. Hickman G. Co.*, 132 Ky. 496. *Contra*, *Taussig v. Southern M. & L. Co.*, 124 Mo. App. 209; *Burgie v. Hicks*, 203 Fed. 340. See *Tradewater C. Co. v. Lee*, 24 Ky. L. Rep. 215.

Referring to the rule which imposes upon every injured party the duty to so act as to make his damages as small as he can, the New York court of appeals has said it is without practical application to a case where the subject-matter of the contract has a market value at the time and place of delivery. Very rarely can there come a case where the vendee suffers special damages if, at the time and place of delivery, there was a market value for the article purchased by him. A market value at a given place presupposes that merchandise of that character

to perform, and before the time fixed for the delivery of the property the vendee goes into the market and buys property of the same kind at its then value, which is an advance on the contract price, he cannot recover at the rate of the price paid if the market value of the property is at or below the contract price at the time the vendor was to make delivery.⁹⁰ But it is said in the Kansas case cited that if the defendant should show that the plaintiff could have bought at or below the contract price at any time between the notice of rescission and the time of delivery he could recover only nominal damages. The purchaser is not bound to consider the contract broken before the time fixed for its full performance.⁹¹ On the breach of a contract to sell and deliver a building the vendor is liable for everything which was the natural and probable consequence of the breach—the actual loss sustained.⁹² The damages for the refusal to deliver bonds may be based upon their price in the place which was the best available market for them.⁹³

Where the general rule concerning the market price applies the jury cannot give damages in excess of it⁹⁴ though the re-

was at that time and place sold or offered for sale, and thus the opportunity is presented the vendee of buying the article in the open market to be used for the special purpose intended, and of recovering of the defendant the difference between such market value and the contract price. But he cannot neglect to buy when he has the opportunity in the market and then charge the defendant with the special damages resulting. Nor does the law require him to buy in order to secure the damages actually sustained by a breach of the contract. It would not advantage the defaulting party if he should do so; for if he buys at the market value the result to the other party is the same as if he simply proved the market value. *Saxe v. Penokee L. Co.*, 159 N. Y. 371, 378.

The vendee cannot cast upon the vendor liability for any special loss if he fails to mitigate the damages as far as is reasonably possible. *Howard S. Co. v. Wells*, 176 Fed. 512, 100 C. C. A. 70. See § 89.

⁹⁰ *Missouri F. Co. v. Cochran*, 8 Fed. 463; *York-D. M. Co. v. Lusk*, 6 Kan. App. 629; *Sauer v. McClintic-Marshall Const. Co.*, 179 Mich. 618.

⁹¹ *Goodrich v. Hubbard*, 51 Mich. 62, 70 (the plaintiff did not elect to consider the contract ended until the time for performance arrived); *Leo Austrian & Co. v. Springer*, 94 Mich. 343, 34 Am. St. 350.

⁹² *Bradley v. McHale*, 19 Pa. Super. 300.

⁹³ *Zimmermann v. Timmermann*, 193 N. Y. 486.

⁹⁴ *Wellman v. O'Connor-Martin Co.*, 178 Mich. 682.

fusal to deliver may have been made with a view to profit.⁹⁵ But it is said if the price was not fixed and appears by the evidence to have ranged between different rates, the jury may take the highest, lowest or medium rate according to the conduct of the defendant.⁹⁶ It is the market price, when there is

⁹⁵ *Blydenburgh v. Welsh*, Baldwin 331; *Kincaid v. Price*, 18 Colo. App. 73, quoting the text. See *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71.

⁹⁶ *Blydenburgh v. Welsh*, *supra*. *Hopkinson, J.*, vindicating this rule, upon a motion for a new trial for excessive damages, said: "In assessing the damages for the breach of a contract [for the sale and delivery of coffee], the law has established a rule for both the court and jury, which, if it may fail sometimes to do exact justice in a particular case, affords generally as equitable and reasonable a rule as could be given. The damage to be recovered is to be governed by the *price* of the article at the time when it should have been delivered, compared with the contract price. This rule is founded on an hypothesis, not always true in fact, perhaps not often so, and very favorable to the plaintiff, that is, that he would certainly have sold the article if he had received it at the advance of that day, and not have retained it subject to the contingency of a depression. It is also true, on the other hand, that he must be content with the price of that day and cannot claim the benefit of a subsequent increase of value. Before we inquire, from the evidence, what was the price of the coffee on the day the defendant was bound to deliver this parcel to the plaintiff we must settle the true meaning or interpretation of the rule, what is intended by the *price* of the article? On the one side it is

contended that the plaintiff is entitled to recover so much money from the defendant as on that day would have enabled him to purchase the coffee; to make good the contract and put into his possession the article the defendant had contracted to deliver to him; in short, to compel against him a specific performance of his contract. We do not inquire whether there would be anything unjust in this rule—anything of which any one has a right to complain who has broken his engagements. But is it the rule which the law has adopted? Does it not introduce a new rule and a new principle into such cases? It is the price—the *market price*—of the article that is to furnish the measure of damages. Now, what is the price of a thing, particularly the market price? We consider it to be the *value*—the rate at which the thing is sold. To make a market there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar they may rate it much above what any one would give for it. Is that its value? Further, the holders of an article, as flour for instance, under a false rumor, which if true would augment its value, may suspend their sales or put a price upon it not according to its value in the *actual* state of the market, or the actual circumstances

one, at the date of the breach which governs in the estimate of damages. Whether the contract fixes a day for the delivery or allows a reasonable time delay of the vendor, although by consent but without any valid agreement for such delay which

which affect the market, but according to what, in their opinion, will be its market price or value provided the rumor prove to be true. In such a case it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day if the contingency shall happen which is to give it this additional value. To take such a price as a rule of damages is to make a defendant pay what never in truth was the value of the article, and to give the plaintiff a profit, by a breach of the contract, which he never could have made by its performance. The law does not intend this; it will give a full and liberal indemnity for the loss sustained by the injured party, and means to impose no higher penalty than this on the defaulter.

"With this explanation of the rule which prescribes the market price of the article on the day of delivery, we must examine whether the jury in this case have executed it clearly in the verdict which they have rendered. It is conceded by both parties that they have calculated the coffee which the defendant was bound to deliver to the plaintiff, on the 14th of April, 1825, at nineteen and three-fourths cents a pound. Does the evidence support this calculation or estimate for such coffee on so large a quantity on that day? Was this the buying and selling price? We feel, as the jury probably did, no inclination to force the testimony in favor of the defendant; on the contrary, his unac-

counted for and unaccountable conduct in this affair; the carelessness, to say nothing more harsh of it, with which he disregarded a deliberate, and to him a profitable, contract, was calculated to induce the jury to go all allowable lengths against him. The reason he gave for refusing to perform his bargain with the plaintiff has been given up at the trial, and never had any solid foundation even in his own opinion. The ground taken for his justification or apology here, so far as appears by the evidence, did not occur to him at the time of the transaction, and of course formed no part of his motive or reason for receding from his engagement. Unwilling to impute to [the vendor] a sordid design, we confess ourselves unable to discover the cause of his departure from the course it was so obviously his duty to pursue. If such considerations have influenced the jury, and very naturally too, in making up their verdict, we must not allow them to affect our judgment of the law of the case, and the application of it to the evidence. Juries may sometimes yield honestly to excitement which judges must not feel. To correct such errors is a prominent use of the calm review of a case on a motion for a new trial. The question of market value is one so peculiarly proper for the decision of a jury that we would not oppose ourselves to their opinion upon it unless where we were assured that they have either mistaken the rule of law or contradicted the clear purport of the

would preclude the purchaser from bringing an action at once, does not extend the time so that an advance in the market price meanwhile can be considered in computing damages on a failure to deliver after such delay.⁹⁷ And the market value

evidence. We inquire, then, have the jury erred on this point, and given to the plaintiff a higher rate of damages than he is entitled to; that is, have they estimated the coffee, which was the subject of the contract, at a greater value than it had in the market on the 14th of April, 1825? * * *

"There was a sudden and considerable excitement in the coffee market on the 7th, founded on circumstances and expectations which were not afterwards confirmed; and no sales were made from that day to the 14th, inclusive, which, in our minds, show such an advance as would have raised the value of this coffee to the price at which it has been estimated by the jury. Whatever prices the holders may have asked, no one was willing to give them. * * * It is enough that we think the jury have so far overrated the value of this coffee as to support the objection of excessive damages to their verdict. It is not unlikely that they may not have exactly understood what was the meaning of the court in instructing them in the range they might take between the lowest and the highest price, as they might deem the refusal of the defendant to perform his contract to be wilful or inadvertent; proceeding from an unjust violation of his engagement, or a conscientious although mistaken view of the obligation. While we then thought, and now think, that the jury might take such matters into their consideration in assessing the damages, we did not intend that they should go

out of the limits of the market price, nor take as that price whatever the holders of coffee might choose to ask for it, substituting a fictitious, unreal value which nobody would give, for that at which the article might be bought and sold. It has grown into a proverb that a thing is worth what it will bring, not what the caprice or speculating anticipations of its owner may induce him to ask for it."

⁹⁷ Pinckney v. Dammann, 72 Ml. 173; Norton v. Wales, 1 Robert 561; Sleuter v. Wallbaum, 45 Ill. 43; Fail v. McRee, 36 Ala. 61; Sullivan v. McMillan, 26 Fla. 543; Master-ton v. Mayor, 7 Hill 61, 42 Am. Dec. 38. Compare Hickman v. Haynes, L. R. 10 C. P. 598; Williams v. Woods, 16 Md. 220; Hill v. Smith, 34 Vt. 433, 34 id. 535; Ogle v. Earl Vane, L. R. 3 Q. B. 272, 2 id. 275.

In Hickman v. Haynes, *supra*, the plaintiff agreed in writing to deliver and the defendant to accept property at a specified date. The delivery was postponed pursuant to defendant's requests. In an action to recover for non-acceptance pursuant to the written contract the defendant contended that because of the verbal arrangement, made before there was a breach of the original contract, there could not be a recovery upon the latter on the ground that there was never any readiness and willingness to make delivery. It was held that the true effect of the verbal arrangement was that the plaintiff voluntarily withheld delivery at defendant's request; that no new contract resulted; plaintiff

at the place of delivery is that which must fix the measure of damages.⁹⁸ The postponement of delivery by agreement has the effect of extending the time for the ascertainment of the damages according to the state of the market at the time fixed

was entitled to recover damages estimated at the market price of the property at a reasonable time after the last request of the defendant to withhold delivery.

It is said in *Smith v. Snyder*, 77 Va. 432, that where the time for performing a contract of sale is postponed at the request of either party and is ultimately broken, the period at which the breach takes place is deferred until the final refusal to deliver.

If the property is to be furnished as needed the vendee may go into the market and supply himself as his necessities may require unless it is shown that he might have contracted for deliveries according to the vendor's contract. *Long v. Conklin*, 75 Ill. 32.

A refusal to deliver the first instalment of goods is a repudiation of the entire contract. *Delaware & H. C. Co. v. Mitchell*, 92 Ill. App. 577.

If no time is fixed for delivery the market value will be estimated as of the time of the refusal to deliver. *Guice v. Crenshaw*, 60 Tex. 344; *Summers v. Hibbard*, 153 Ill. 102, 111, 46 Am. St. 872; *Northwestern I. & M. Co. v. Hirsch*, *infra*. And so if the delivery has been postponed from time to time. *Roberts v. Benjamin*, 124 U. S. 64, 31 L. ed. 334.

If delivery is postponed by agreement the rights of the vendee are to be measured by the market price at the time fixed by the subsequent agreement. *Brown v. Sharkey*, 93

Iowa 157; *Northwestern I. & M. Co. v. Hirsch*, 94 Ill. App. 579.

Where delivery is to be made on or about a stated time the market price within a reasonable time after the date named governs. *Kipp v. Wiles*, 3 Sandf. 585.

If the delivery is made in instalments, but not according to the contract, and the property is received without protest or inducement, the market price will be determined as of the dates the shipments were received. *West Republic M. Co. v. Jones*, 108 Pa. 55.

Growing crops are deliverable at their maturity (*Smock v. Smock*, 37 Mo. App. 56); or when they can be harvested with ordinary diligence. *Harris v. Rodgers*, 6 Heisk. 626.

If the purchaser selects the carrier by which the property is to be shipped delivery to him is complete when made to the carrier; the latter is the purchaser's agent to receive and carry. *Scharff v. Meyer*, 133 Mo. 428, 54 Am. St. 672; *Gill v. Johnson-B. C. Co.*, 84 Mo. App. 456.

⁹⁸ *Southern F. & G. Co. v. McGeehan*, 144 Wis. 130; *Myer v. Wheeler*, 65 Iowa 390; *Merritt v. Wittich*, 20 Fla. 27; *Adams v. Sullivan*, 100 Ind. 8; *McCormick H. M. Co. v. Jensen*, 29 Neb. 102; *Pape v. Ferguson*, 28 Ind. App. 298; *Phelps v. McGee*, 18 Ill. 155; *Deere v. Lewis*, 51 id. 254; *Barker v. Mann*, 5 Bush 672, 96 Am. Dec. 373; *McKenney v. Haines*, 63 Me. 74; *Young v. Lloyd*, 65 Pa. 199; *Hill v. Canfield*, 56 id. 454; *Gregory v. McDowell*, 8 Wend. 435; *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L.

thereby; if the postponement is for an indefinite time the measure of damages will be the difference between the contract price and the market value at a reasonable time after demanding delivery.⁹⁹ The value of unperformed labor on the property, which the vendor was to perform, may be deducted from his recovery.¹

§ 653. Same subject; how loss shown; effect of unlawful combinations; loss of profits. In the absence of a market² at the value there is to be ascertained; this may be done by proving the market price at the nearest point where the goods of the quantity in question could be bought or sold, with such addition or deduction of the cost of transportation as will be necessary to determine the value at the place of delivery depending on its relation to the controlling market of sale.³ For the purpose of showing the plaintiff's loss from non-fulfillment of the con-

ed. 71; *Bennett v. Gregory*, 9 Ky. L. Rep. 194 (Ky. Super. Ct.).

Evidence as to the market price need not be restricted to property equal in quantity to that in question. It is not of substantial importance whether the supply is obtained from one or repeated purchases. *Faulkner v. Closter*, 79 Iowa 15.

Expenses incurred by the vendee in sending an agent to the vendor on account of the purchase are not recoverable. *Crawford v. Geiser Mfg. Co.*, 88 N. C. 554.

⁹⁹ *Summers v. Hibbard*, 153 Ill. 102; *Baringer v. Imperial C. M. Co.*, 164 Ill. App. 467.

¹ *Howell v. Dickerson*, 104 Mo. App. 658.

² If a great deal of lumber is bought and sold at a designated place and it may be disposed of there by barter or sale a market for it exists there, although it is not shown that just the kind and description of lumber which is the subject of litigation was at the time

thereof on sale in such place. *Bennett v. Gregory*, 9 Ky. L. Rep. 194 (Ky. Super. Ct.).

³ *Marshall v. Clark*, 78 Conn. 9, 112 Am. St. 84; *O'Gara v. Ellsworth*, 85 App. Div. (N. Y.) 216; *Nottingham C. & I. Co. v. Preas*, 102 Va. 820; *Lilly v. Lilly*, 39 Wash. 337; *Cobb v. Whitsett*, 51 Mo. App. 146; *Vanstone v. Hopkins*, 49 Mo. App. 386; *Capen v. De Steiger G. Co.*, 105 Ill. 185; *White v. Matador L. & C. Co.*, 75 Tex. 465, quoting the text; *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34; *Barry v. Cavanagh*, 127 Mass. 394; *Berry v. Dwinel*, 44 Me. 255; *Furlong v. Polleys*, 30 id. 491, 50 Am. Dec. 635; *Washington I. Co. v. Webster*, 68 Me. 463; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Harris v. Panama R. Co.*, 58 N. Y. 660; *Gregory v. McDowell*, 8 Wend. 435; *McHose v. Fulmer*, 73 Pa. 365.

A statute providing for the purchase of property in the market nearest to the place fixed upon for

tract he is not confined to any particular species of evidence to prove the value of the property at the place of delivery. He may show it by the market price there, if there have been sales enough to make such a price; or he may show its value at the market where such commodities are usually sent for sale and the cost of transportation from the place of delivery.⁴ There may be a custom of a particular trade so long and well established that the parties may be presumed to have contracted with that in view. If according to such a custom the damages are measured by the market price at the place of shipment the courts will give it effect.⁵ If the vendor knows when he makes his contract that the property is to be sold in another market his liability is measured by adding to the contract price at the agreed time and place of delivery the cost of transporting the property to such market, less the price there at the time it would have reached its destination if there had been no breach,⁶

delivery is for the benefit of the vendor; if his liability is lessened by a purchase made elsewhere he cannot complain. *Alaska S. Co. v. Standard B. Co.*, 158 Cal. 567.

⁴ *McDonald v. Unaka T. Co.*, 88 Tenn. 38; *Pape v. Ferguson*, 28 Ind. App. 298, citing the text; *Simons v. Ypsilanti P. Co.*, 77 Mich. 185; *Stevens v. Lyford*, 7 N. H. 360; *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71; *Hanson v. Lawson*, 19 Kan. 201; *Hazelton C. Co. v. Buck Mt. C. Co.*, 57 Pa. 301; *Sellar v. Clelland*, 2 Colo. 532; *Wemple v. Stewart*, 22 Barb. 154; *Muller v. Eno*, 14 N. Y. 597; *Durst v. Burton*, 37 id. 167.

If there is no general market in the place of delivery for raw material bought for manufacturing purposes and the cost of transportation from the place where there is such a market will largely exceed the contract price, the market value may be arrived at by deducting the cost of manufacturing and of such

material from the market value of the manufactured article. *Equitable G. L. Co. v. Baltimore C., T. & Mfg. Co.*, 65 Md. 73.

⁵ *Haas v. Hudmon*, 83 Ala. 174.

⁶ *Langan & T. S. & M. Co. v. Tennyly*, 122 Ky. 808; *Cockburn v. Ashland L. Co.*, 54 Wis. 619; *Hendrie v. Neelon*, 12 Ont. App. 41, 3 Ont. 603; *Louis Cook Mfg. Co. v. Randall*, 62 Iowa 244; *McCormick H. M. Co. v. Jensen*, 29 Neb. 102; *Campbellsville L. Co. v. Bradley*, 96 Ky. 494; *Loughridge v. Allen*, 18 Ky. L. Rep. 894; *Boyd v. Quinn Co.*, 17 N. Y. Misc. 278; *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 428; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Hockersmith v. Hanley*, 29 Ore. 27.

If the purchaser is compelled to pay a carrier for specially furnishing and holding in readiness the necessary cars for shipping cattle to the market with reference to which they were bought and sold, and the buyer and seller understood that such spe-

with interest at the legal rate from the date of the breach.⁷ Where the inquiry is properly confined to the ascertainment of the actual value at the place and time of delivery it is not admissible to inquire as to the probable effect of adding the goods in question to the quantity in market;⁸ nor of the plaintiff's going into the market to buy goods of the kind and in the quantity contracted for and not delivered.⁹

If the market is fluctuating, and especially if it be raised or depressed by transient causes, or by interested and illegitimate combinations for temporary, special and selfish objects, independently of the influences of lawful commerce, the market price on the precise day of delivery will not necessarily govern. The law in regulating the measure of damages contemplates a range of the entire market and the average of prices as thus found, running through a reasonable period of time.¹⁰ Where there is a stimulated market price, created by

cial arrangement would necessarily be made, the latter is liable for the expense thereof. *Hockersmith v. Hanley*, *supra*, citing *Borries v. Hutchinson*, 18 C. B. (N.S.) 460; *Harrow Spring Co. v. Whipple H. Co.*, 90 Mich. 147, 30 Am. St. 421.

⁷ *Vogt v. Schienebeck*, 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. 989.

⁸ *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130. In this case questions to witnesses had been excluded. Referring to them Johnson, J., said: "The evident object of all these inquiries was to show that if the defendant had performed and the plaintiff had desired to sell the whole quantity [one hundred and fifty tons of madder], the market price would have been lowered by throwing so large a quantity at once upon the market. A sufficient answer to all these exceptions is that they are founded upon an attempt to substitute a hypothetical market value for the actual market value. They call upon the jury to specu-

late as to the consequences which would have resulted to the plaintiff if the defendant had performed his contract. The rule of damages was correctly laid down by the court (*Clark v. Pinney*, 7 Cow. 681; *Dey v. Dox*, 9 Wend. 129, 24 Am. Dec. 137; *Davis v. Shields*, 24 Wend. 322), and the market value of the article on the day of delivery, which that rule fixes as a test, requires an investigation of the actual condition of the market, and does not warrant the consideration of the conjectural consequences of a state of things which did not exist."

⁹ *Jemmison v. Gray*, 29 Iowa, 537.

¹⁰ *O'Gara v. Ellsworth*, 85 App. Div. (N. Y.) 216; *Adams v. Sullivan*, 190 Ind. 8, quoting the text; *Smith v. Griffith*, 3 Hill 333, 38 Am. Dec. 639; *Durst v. Burton*, 47 N. Y. 167, 7 Am. Rep. 428; *Cahen v. Platt*, 69 N. Y. 343, 25 Am. Rep. 199; *Paragon Ref. Co. v. Lee*, 98 Tenn. 643.

artificial or fraudulent practices, it is not the true or only test of value.¹¹ The market price being only evidence of value the law adopts it as a natural inference of fact and not as a conclusive legal presumption. It stands as a criterion of value because it is a common test of the ability to purchase the thing.¹² In such cases what is called the market price, or the quotations of the articles for a given day, is not the only evidence of value; the true value may be drawn from other sources.¹³

The defaulting vendor cannot be charged with more than that price merely because the vendee had a contract for resale at a higher price;¹⁴ nor can he claim any mitigation where the vendee has contracted for a resale at less than the market price.¹⁵ The vendor is not liable for the profits made on a resale, of which he was informed by the vendee, because he breaches his contract to make sales on credit, but offers to deliver the property at a reduced price for cash, the reduction being in excess of the interest demandable during the period of credit, notwithstanding the vendee was unable to obtain the goods from others than the vendor, it not appearing that he could not pay cash for them. The vendee was bound to minimize his loss by buying from the vendor upon the terms offered or prove that he was unable to meet those terms.¹⁶ To have done so would not have resulted in the surrender or waiver of any right of action for the breach of the original contract.¹⁷ A vendee

¹¹ See *Zimmermann v. Timmermann*, 193 N. Y. 486.

¹² *Lovejoy v. Michels*, 88 Mich. 15,

¹³ L.R.A. 770, stated in § 642; *Kountz v. Kirkpatrick*, 72 Pa. 376, 13 Am. Rep. 687; *Muller v. Eno*, 14 N. Y. 597. See *Trout v. Kennedy*, 47 Pa. 387.

¹³ *Id.*; *Pape v. Ferguson*, 28 Ind. App. 298; *Henry v. North American R. C. Co.*, 158 Fed. 79, 85 C. C. A. 409, quoting the text.

¹⁴ *Hewson-H. S. Co. v. Minnesota B. Co.*, 55 Minn. 530; *Coffin v. State*, 144 Ind. 578, 55 Am. St. 188; *Williams v. Reynolds*, 6 B. & S. 495; *Cole v. Swanston*, 1 Cal. 51, 52 Am.

Dec. 288. But see *Trigg v. Clay*, stated in § 662.

¹⁵ *Josling v. Irvine*, 6 H. & N. 512.

¹⁶ *Lawrence v. Porter*, 63 Fed. 62, 11 C. C. A. 27, 26 L.R.A. 167, citing *Warren v. Stoddart*, 105 U. S. 224, 26 L. ed. 1117; *Deere v. Lewis*, 51 Ill. 254. See *Lande v. Hyde*, 66 N. Y. Misc. 250. As to the vendee's duty to accept from the vendor a substitute for the goods bought but not delivered.

¹⁷ *Borden v. Vinegar Bend L. Co.*, 2 Ala. App. 354; *Lawrence v. Porter*, *supra*; *Pittsburg I. & S. Eng. Co. v. National T. Works*, 184 Pa. 251. Compare *Cook Mfg. Co. v. Ran-*

may safely reject any proposition which would produce that result.¹⁸ The right to recover the difference between the price agreed upon and the market value on the day fixed for delivery cannot be affected by an offer of the defendant to sell to the vendee at a price below the value on that day.¹⁹ In the absence of special circumstances duly made known to the seller he is not liable for the loss of time by the purchaser, the loss of the salary paid his employee and other such expenses incurred in preparation for putting the goods on the market.²⁰ "Such damages are not implied by the contract, cannot be reasonably foreseen or anticipated as the result of a breach of it, do not ordinarily flow from such a breach, and cannot be permitted to form the basis of a judgment."²¹ But if the vendor sells the goods which he contracted the party to whom they were bargained may recover on the basis of the amount the vendor has sold for.²² Where the market price is less than the contract price at the date when the contract requires delivery the vendee can suffer no actual injury; he is, however, entitled to nominal damages.²³ If the vendor sells a part of the goods to another purchaser and thus puts it out of his power to perform his contract the vendee, if he has received none of the property, is entitled to the difference between the contract and the market price of all the goods purchased, and not merely of those which the vendor has sold to another.²⁴ Where by the terms of a con-

dall, 62 Iowa 244, which is disapproved of in *Lawrence v. Porter*.

¹⁸ *Campfield v. Sauer*, 189 Fed. 576, 38 L.R.A.(N.S.) 837, 111 C. O. A. 14; *Coulter v. Thompson L. Co.*, 142 Fed. 706, 74 C. C. A. 38; *Hirsch v. Georgia I. & C. Co.*, 169 Fed. 578, 95 C. C. A. 76.

¹⁹ *Havemeyer v. Cunningham*, 35 Barb. 515.

²⁰ *Galinski v. Thomas*, 178 Mich. 589.

²¹ *Moffitt-W. D. Co. v. Byrd*, 92 Fed. 290, 34 C. C. A. 351, reversing the court of appeals of the Indian Territory, 1 Ind. Ty. 612, and the United States court of appeals

thereof. See *Trigg v. Clay*, stated in § 662.

²² *Peterson v. Ayre*, 13 C. B. 353; *Gainsford v. Carroll*, 2 B. & C. 624.

²³ *Rose v. Bozeman*, 41 Ala. 678; *Bush v. Canfield*, 2 Conn. 485; *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1. E. & E. 680; *Maher v. Riley*, 17 Cal. 415; *Wire v. Foster*, 62 Iowa 114; *Harrison W. Co. v. Hall & W. H. Co.*, 97 Mo. 289; *McGrath v. Gagné*, 77 Md. 331, 39 Am. St. 415; *Weber v. Squier*, 51 Mo. App. 601; *Tedford Auto Co. v. Horn*, 113 Ark. 310; *Troendle v. Steger*, 159 Ky. 182.

²⁴ *Crist v. Armour*, 34 Barb. 378.

tract between the owner of property and another it is agreed that the latter is not a purchaser of the property, but is to sell it and account to the owner for the avails of the sales at a certain rate, the rule of damages as between vendor and vendee does not apply.²⁵ Neither does that rule apply to the breach of a contract to sell the sole right to go upon land and cut and remove a crop of flax thereon. The liability of the vendor is for the value of the raw material he would have sold if there had been a market for it, less the expense of marketing it. In the absence of a market price his liability is measured by the value of the raw material to the manufacturer, and not by the entire profit which would have been made by the sub-

In *Somers v. Wright*, 115 Mass. 292, A. agreed to sell by warranty deed a lot of land to B. for a certain sum, payable in lumber "at current retail prices." A. bound himself to discharge an existing mortgage on or before a certain day, and it was also agreed that B. should not pay the lumber agreed upon as the price above the amount of the mortgage, computed at the current retail prices, until the discharge of such mortgage. A. did not discharge the mortgage, and B. paid it to prevent a foreclosure. It was held that B., in an action on A.'s contract to discharge the mortgage, was entitled to recover the loss of profits which would have accrued by the delivery of the lumber, and that the measure of damages was the difference between the wholesale and the retail price of the lumber.

In *Harrison v. Charlton*, 37 Iowa 134, C. bought of H. a lumber yard, the stock to be invoiced and delivered at a future day; H. in the meantime to make no additions thereto. H. made additions, which were unknowingly included and paid for by C. Held, the measure

of damages was the difference between the price paid by him for the additional lumber and the market price at which he could have purchased the same.

Where the plaintiff and the defendant each had a claim against premises which were about to be sold on foreclosure, and the defendant, a prior lienor, agreed with the plaintiff, a subsequent lienor, that he would bid the amount of his claim upon the sale and convey his title and assign any judgment for a deficiency to the plaintiff, who was to pay the amount of the defendant's judgment, the costs, taxes, expenses of sale, etc., the contract was construed as a sale of the plaintiff's claim to the defendant, and not as a mere contract to convey to the plaintiff the premises in question in the event the defendant bought them. Upon the breach of such contract the defendant's liability was the amount of the purchase-money he had agreed to pay. *Schmaltz v. Weed*, 27 App. Div. (N. Y.) 309. The case is considered in another aspect in 57 App. Div. (N. Y.) 245.

²⁵ *Giles v. Morrison*, 50 Barb. 50.

sequent manufacture of the flax.²⁶ But where the vendor breaches his contract with a vendee, both expecting the goods would be manufactured by the latter, he is entitled to recover the profits he would have made.²⁷ Where the refusal was to deliver a quantity of sugar more or less and part of it was damaged before the time fixed for delivery, the vendee was entitled to recover damages based on all that arrived at the place of delivery in the absence of evidence showing the depreciation of the value of that damaged; the damage might have been less than the enhanced market value.²⁸

§ 654. Proof of value. The proof of the value of property is generally by the judgments or opinions of witnesses.²⁹ If the article in question has a market price that will usually control as the best evidence of its value.³⁰ If this test has been applied by an actual sale of it the fact may be proved as evidence of its value,³¹ if the sale was made in the ordinary course of business,³² though it was not made at the place stipulated for delivery, but in the nearest available market.³³ The parties who

²⁶ Richardson v. Reid, 8 New Zeal. 760 (1890).

²⁷ Holliday v. Highland I. & S. Co., 43 Ind. App. 342; Crystal Ice Co. v. Holliday, — Miss. —, 64 So. 658; Usrey Lumber Co. v. Huie-Hodge Lumber Co., 135 La. 511.

²⁸ Havemeyer v. Cunningham, 35 Barb. 515.

²⁹ § 445; Gulf, etc. R. Co. v. Dunman, 85 Tex. 176, citing the text; Cleveland v. Rowe, 99 Minn. 444; Carle v. Nelson, *infra*.

³⁰ Cahan v. Platt, 69 N. Y. 348, 25 Am. Rep. 203; Durst v. Burton, 47 N. Y. 167, 7 Amf. Rep. 428; Warren v. A. B. Mayer Mfg. Co., 161 Mo. 112. See Parks v. Morris A. & T. Co., 54 N. Y. 586.

If there was a market price for the goods in question at the time and place stipulated for their delivery, proof of the price in another market is only competent as an aid

in determining the true value in the place of delivery. Rau v. Trumbull, 68 Ill. App. 490.

³¹ Petrified B. M. Co. v. Rogers, 150 Fed. 445; Olson v. Rydl, 25 S. D. 268; Muller v. Eno, 14 N. Y. 597; Deck v. Feld, 38 Mo. App. 674; Stevens v. Springer, 23 id. 375; Mofat v. Davitt, 200 Mass. 452; Carle v. Nelson, 145 Wis. 593; Martin v. Bunker-C. L. Co., 167 Mo. App. 381.

Where the price to be paid for a boiler was 281l. 8s., and it was sold by one of the defendants to the other, and admittedly at a bargain, for 500l., it did not lie in the mouth of the defendants to say that the market price was less than 500l. Wills v. Marshall, 1 New Zeal. L. R. (Sup. Ct.) 28. See § 447.

³² Knudston v. Schjelderup, 98 Minn. 531.

³³ Olson v. Rydl, 25 S. D. 268.

Evidence of existing market value

have accepted property in part payment of other property at an agreed valuation are bound by it.³⁴ The price paid for an article is not conclusive, but tends to show the value thereof, and, in the absence of other evidence, would suffice.³⁵ Even the amount goods cost is admissible for the same purpose.³⁶ On the breach of a contract by the vendee of a note and mortgage to repurchase the same the measure of damages is conclusively established by the foreclosure sale of the mortgaged premises.³⁷ When the cost was the price at which a regular dealer in such articles had sold it when new, in the ordinary course of trade, it is evidence of the market value; and if afterwards deteriorated by use, its present value can be ascertained by reference to the former price and the extent of depreciation.³⁸ So proof of the amount it sold for at auction has been admitted.³⁹ The price obtained at a sale made soon after the contract to buy was broken may be shown if the property was not usually sold at the time of the breach.⁴⁰ But the price received on a sale remote from the time of the original purchase and when the article had been deteriorated by use is not a basis on which to find its value.⁴¹ Witnesses having the requisite knowledge may testify

in the vicinity of the place designated for the delivery of property must be received. *Tuttle-C. C. Co. v. Coaldale F. Co.*, 136 Iowa 382.

³⁴ *Vulcan I. Works v. Roquemore*, 175 Fed. 11, 99 C. C. A. 77; *Brooks v. Hubbard*, 3 Conn. 58, 8 Am. Dec. 154.

³⁵ *Muller v. Eno*, *Deck v. Feld*, *Stevens v. Springer*, *supra*; *Bach v. Levy*, 101 N. Y. 511; *Trustees of Howard College v. Turner*, 71 Ala. 429, 46 Am. Rep. 326 (college scholarship); *White A. Co. v. Dorsey*, 119 Md. 251.

³⁶ *Euston v. Erie R. Co.*, 147 Ill. App. 594, quoting the text; *Smith v. Griffith*, 3 Hill 333, 38 Am. Dec. 639; *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339.

When the sale is made by a manufacturer to a purchaser who has or-

dered the goods the price agreed upon is presumably the market value. *Geiss v. Wyeth H. & Mfg. Co.*, 37 Kan. 130.

³⁷ *Loeb v. Stern*, 198 Ill. 371, 99 Ill. App. 637.

³⁸ *Luse v. Jones*, 39 N. J. L. 707, *Jacksonville, etc. R. Co. v. Peninsular L., etc. Co.*, 27 Fla. 157, 17 L.R.A. 33.

³⁹ *Cronnse v. Fitch*, 14 Abb. Pr. 346. See *Bissell v. Starr*, 32 Mich. 297; *Willamet Falls C. & L. Co. v. Kelly*, 3 Ore. 99; *Wilson v. Holden*, 16 Abb. Pr. 133.

⁴⁰ *Redhead v. Wyoming C. Co.*, 126 Iowa 410; *Meyer v. McAllister*, 24 Cal. App. 16.

⁴¹ *Bedford v. Hol-Tan Co.*, 143 App. Div. (N. Y.) 372; *Meyer v. McAllister*, 24 Cal. App. 16.

as to market prices. In doing so they testify to facts rather than opinions. It is knowledge more or less special, though it is largely, and may be exclusively, hearsay.⁴² The statements of the buyer of property during the course of the negotiations for its purchase are competent to show what its value would have been if it had conformed to the warranty.⁴³

Market prices themselves are the estimate or opinion of those who influence the market; that opinion is expressed in actual transactions; and it is a knowledge of these, in such form as is usually relied on, which qualifies the witness to testify. Such a witness—that is, one who has thus informed himself in respect to market prices which are relevant, and not presumed to be within the actual knowledge of all jurors—may testify to them though he knows nothing of the property in question.⁴⁴ He may be examined by hypothetical questions, even if he has not seen the particular subject to which the trial relates and has not heard all the evidence given in the case.⁴⁵

Merchandise brokers in Boston and members of firms doing business and having houses established in Boston and New York, who are familiar with the value of a particular line of goods in New York, and whose information is derived from daily price-current lists and returns on sales daily furnished them in Boston from their New York houses, may testify to

⁴² *Rothrock v. Hunter*, 66 Wash. 543; *Harrison v. Glover*, 72 N. Y. 451; *Washington I. Co. v. Webster*, 68 Me. 463; *Whitney v. Thacher*, 117 Mass. 523; *Lush v. Druse*, 4 Wend. 313; *Savercool v. Farwell*, 17 Mich. 308; *Cliquot's Champagne*, 3 Wall. 114, 18 L. ed. 116; 1 Whart. Ev. §§ 446, 449; *Stone v. Covell*, 29 Mich. 359.

The statement of a third party to the effect that, for a special purpose, wholly unconnected with any commercial use, he would be willing to pay a sum stated for notes does not tend to prove their value. *Win-side State Bank v. Lound*, 52 Neb. 469.

⁴³ *Miller v. Aldrich*, 123 Ill. App. 464.

⁴⁴ *Miller v. Smith*, 112 Mass. 475; *Beecher v. Denniston*, 13 Gray 354; *Fitchburg R. Co. v. Freeman*, 12 id. 401, 74 Am. Dec. 600; *Brady v. Brady*, 8 Allen 101; *Lawton v. Chase*, 108 Mass. 238; *McCollum v. Seward*, 62 N. Y. 316; *Reynolds v. Robinson*, 64 id. 589.

⁴⁵ *Woodbury v. Obear*, 7 Gray 467; *Hunt v. Lowell G. L. Co.*, 8 Allen 169, 172, 85 Am. Dec. 697; *Cornell v. Dean*, 105 Mass. 435; *Browne v. Moore*, 32 Mich. 254. See § 446.

such value in the latter market at a given time.⁴⁶ The market price of a marketable commodity may be determined as well by offers to sell, made by dealers in the usual course of business, as by actual sales; and statements of dealers in answer to inquiries as to price are competent evidence.⁴⁷ A price-current published in a newspaper is not competent evidence of market value without proof as to the sources from which the information which formed its basis was obtained, or whether the quotations of prices were from actual sales or otherwise. The credit to be given to the paper must depend upon such extrinsic proof; it cannot be determined by the publication itself.⁴⁸ An unaccepted offer, as an isolated transaction, is not evidence upon the question of value. But in a market regularly attended by buyers and sellers an offer as well as a sale of an article of recognized uniform character, constantly bought and sold there, so as to have a place on the daily price-current list may serve to show that the market value of that article did not then exceed the price at which it was offered. It is admissible because of its publicity and the presumption of the presence of dealers ready to purchase, and who would have done so if the offer had been below the market value. That dealers are themselves guided in their transactions by such indications of the state of the market makes the fact one that may properly be considered in evidence.⁴⁹

Whether the very property to be valued corresponds with that to which the market prices apply is a matter of judgment. A witness who has knowledge of market values and knows the property in question may give his opinion of its value.⁵⁰ Every one is supposed to have some idea of the value

⁴⁶ *Whitney v. Thacher*, 117 Mass. 523.

⁴⁷ *Harrison v. Glover*, 72 N. Y. 451.

⁴⁸ *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202.

In *Lush v. Druse*, 4 Wend. 314, the witness who testified as to the market price had inquired of merchants dealing in the article and

examined their books, thus giving the sources of his knowledge. In *Cliquot's Champagne*, 3 Wall. 114, 18 L. ed. 116, the price-current was procured directly from dealers in the article, and was verified by testimony which tended to show its accuracy. See § 447.

⁴⁹ *Whitney v. Thacher*, *supra*.

⁵⁰ *Id.*; *Brill v. Flagler*, 23 Wend.

of such property as is in general use; it is not necessary to have a drover or a butcher to prove the value of cow;⁵¹ and an expert is not an indispensable witness.⁵² If the article in question has no market value its value may be shown by proof of such elements or facts affecting the question as exist. Recourse may be had to the items of cost, utility and use. And opinions of witnesses properly informed on the subject may also be given in respect to its value.⁵³ The purchaser of a store who has been defrauded thereof by his vendor may show the profits he had realized therefrom during the time he had carried on business there under his bargain.⁵⁴ In an action for the conversion of the bonds of a California corporation

354; *Parks v. Morris A. & T. Co.*, 54 N. Y. 593; *Kellogg v. Krauser*, 14 S. & R. 137, 16 Am. Dec. 480; *Haskell v. Mitchell*, 53 Me. 468, 89 Am. Dec. 711; *Whiteley v. China*, 61 Me. 199; *Snow v. Boston & M. R.*, 65 Me. 230; *Shattuck v. Stoneham*, etc. R., 6 Allen 115; *Swan v. Middlesex*, 101 Mass. 173; *Kronsnable v. Knoblauch*, 21 Minn. 56; *Thatcher v. Kaucher*, 2 Colo. 698; *Clarion Bank v. Jones*, 21 Wall. 325, 22 L. ed. 542; *Whelan v. Lynch*, *supra*; *Covey v. Campbell*, 52 Ind. 157; *Chamness v. Chamness*, 53 id. 301; *Williams v. Brown*, 28 Ohio St. 547; *Lush v. Druse*; *Cliquot's Champagne*, *supra*; *Lafayette, etc. R. Co. v. Winslow*, 66 Ill. 219; *Toledo, etc. R. Co. v. Kickler*, 51 Ill. 157; *White v. Hermann*, id. 243; *Eagle & P. Mfg. Co. v. Browne*, 58 Ga. 240; *Hanover W. Co. v. Ashland I. Co.*, 84 Pa. 279; *Holten v. Board, etc.*, 55 Ind. 194; *Carpenter v. Robinson*, 1 Holmes 67; *Barger v. Northern Pac. R. Co.*, 22 Minn. 343.

⁵¹ *Ohio & M. R. Co. v. Irvin*, 27 Ill. 178.

⁵² *Same v. Taylor*, 27 Ill. 207.

⁵³ *Vulcan I. Works v. Roquemore*, 175 Fed. 11, 99 C. C. A. 77 (proof *Suth. Dam. Vol. II.—67*

of the cost of procuring the article contracted for in the condition and at the place specified for its delivery may be made if no better evidence is obtainable); *Masterton v. Mayor*, 7 Hill 61; *Gulf, etc. R. Co. v. Dunman*, 85 Tex. 176, citing the text; *Murray v. Stanton*, 99 Mass. 345; *Lafayette, etc. R. Co. v. Winslow*, 66 Ill. 219; *White v. Hermann*, 51 Ill. 243; *Kellogg v. Krauser*, 14 S. & R. 137, 16 Am. Dec. 480; *Eaton v. Mellus*, 7 Gray 566; *Berry v. Dwinel*, 44 Me. 255; *Wemple v. Stewart*, 22 Barb. 154; *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71; *Trout v. Kennedy*, 47 Pa. 387; *Saunders v. Clark*, 106 Mass. 331; *Jemison v. Gray*, 29 Iowa 537; *Graham v. Maitland*, 1 Sweeney 149; *Jacksonville, etc. R. Co. v. Peninsular L. etc. Co.*, 27 Fla. 157, 17 L.R.A. 33, 61, quoting the text; *Warren v. Mayer Mfg. Co.*, 161 Mo. 112; *Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, quoting the text, and holding that the pedigree of an animal may be proven. See *Kirschmann v. Lediard*, 61 Barb. 573.

⁵⁴ *Collins v. Lavelle*, 19 R. I. 45, citing *Montgomery, etc. Agricultur-*

which had never been put on the market and had no market value, it was held that, though being payable in dollars, so that legally paper dollars would discharge them, yet it might be shown that in California they were treated as payable in coin and were practically payable in gold, with a view to their valuation by that standard.⁵⁵ In New Hampshire the former rule excluding opinions upon the subject of value⁵⁶ has been changed by statute. The goodwill of a corporation is an element of value in ascertaining the value of its stock.⁵⁷ The price paid others for like property may not be shown unless it tends to prove market value.⁵⁸ The difficulty in ascertaining the cost of manufacturing goods is not cause for refusing the recovery of damages based thereon. It will be assumed they were to be manufactured in the usual course of the party's business.⁵⁹ If the time agreed upon for delivery covers several months the evidence as to the market value of the article may cover each month of the period though prices may have been influenced by unusual circumstances.⁶⁰ Only nominal damages may be recovered for the refusal to accept goods in the absence of evidence of their value.⁶¹ If goods are such that the price they would probably bring at a resale would not be a fair test of their value, the price at which they were offered to the vendee may be a basis upon which to fix their value.⁶² The cost of repairing a machine after a reasonable test has been made of it may be shown as

al Soc. v. Harwood, 126 Ind. 440, 10 L.R.A. 532; Goebel v. Hough, 26 Minn. 252; Chapman v. Kirby, 49 Ill. 211, and cases cited in §§ 52, 54, 65, vol. 1, 2d ed. of this work.

⁵⁵ *Simpkins v. Low*, 54 N. Y. 183.

The difference in the value of a warranted article if it had conformed to the warranty and as it was cannot be shown by evidence of the difference between the value of the product made therefrom if manufactured from an article which met the warranty and one which fell short of doing so, the defects in the article being apparent before it was manufactured. *Powell v. New Eng-*

land C. Y. Co., 154 App. Div. (N. Y.) 875.

⁵⁶ *Rochester v. Chester*, 3 N. H. 349; *Peterborough v. Jeffrey*, 6 id. 462; *Whipple v. Walpole*, 10 id. 130; *Hoitt v. Moulton*, 21 id. 586.

⁵⁷ *Lindsay's Est.*, 210 Pa. 224.

⁵⁸ *Nugent v. Armour P. Co.*, 208 Mo. 480.

⁵⁹ *Holliday v. Highland I. & S. Co.*, 43 Ind. App. 342.

⁶⁰ *Consolidated C. Co. v. Jones*, 232 Ill. 326.

⁶¹ *Brown v. Trinidad A. Mfg. Co.*, 210 Mo. 260.

⁶² *Imperial R. S. Co. v. Steinfeld*, 232 Pa. 399.

bearing upon its value when it was delivered.⁶³ The evidence as to the value of property must cover such as was contracted for,⁶⁴ and must be confined to the value in the place of delivery, there being a market value there.⁶⁵

§ 655. **Rule of damages in favor of vendor when delivery impossible.** The vendor may be relieved from the payment of damages by delivery being rendered impossible by the act of God. Thus, where a contract is made for the sale and delivery of specific articles of personal property under such circumstances that the title does not pass if the property is destroyed by accident, without the fault of the vendor, he is not liable to the vendee in damages for non-delivery.⁶⁶ And it has been said in a comparatively recent case in England⁶⁷ that "where a contract has been made, amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day, there, if the chattels without the fault of the vendor perish in the interval, the purchaser must pay the price and the vendor is excused from performing his contract to deliver, which has thus become impossible."⁶⁸ In the case from which this quotation is made Blackburn, J., delivering the unanimous decision of the court, said: "The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance."⁶⁹ This prin-

⁶³ *Marbury L. Co. v. Stearns Mfg. Co.* (Ky.) 107 S. W. 200; *Showen v. J. L. Owens Co.*, 182 Mich. 264.

⁶⁴ *Crescent Mfg. Co. v. Slattery*, 132 La. 917.

⁶⁵ *Grays Harbor C. Co. v. Turnbull-J. L. Co.*, 163 Ill. App. 231.

⁶⁶ *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Thomas v. Knowles*, 128 Mass. 22; *Gould v. Murch*, 70 Me. 288; *McMillan v. Fox*, 90 Wis. 173. See *Chicago, etc. R. Co. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625.

⁶⁷ *Taylor v. Caldwell*, 3 B. & S. 826.

⁶⁸ *Rugg v. Minett*, 11 East 210.

⁶⁹ *Appleby v. Meyers*, L. R. 1 C. P. 615, 2 id. 651; *Robinson v. Davidson*, L. R. 6 Ex. 269; *Knight v. Bean*, 22 Me. 531; *Dickey v. Linscott*, 20 id. 453, 37 Am. Dec. 66; *Raisin F. Co. v. Barrow*, 97 Ala. 694.

Impossibility of performance because of an earthquake and strikes does not excuse. *Isaacson v. Starrett*, 56 Wash. 18.

ciple was applied where there was a contract to sell potatoes to be grown on the defendant's land in W., which was rendered impossible of full performance because a disease attacked them;⁷⁰ and where the defendant sold a cargo of goods to be shipped from A. in a designated month by a named steamer, the contract providing that in case of prohibition of export, blockade or hostilities preventing shipment it was to be canceled. Two months before the time stipulated for the shipment of the cargo the steamer stranded and was so damaged that repairs could not be made in time for her to load. A majority of the court was of opinion that it was an implied condition of the contract that it should not become operative if performance became impossible by reason of the steamer, without default of the defendant, ceasing to exist as a cargo-carrying vessel before the time for performance.⁷¹ The vendor may likewise be excused, as may all contracting parties, when the act stipulated to be done has become unlawful,—as would be the case if after making the agreement a statute is passed rendering performance of it illegal.⁷² If a condition arises which excuses the performance of the contract the vendee is bound to endeavor to mitigate the loss, and his damages will be measured by the difference between the contract price and the market price at the date of his receiving notice of the existence of the condition.⁷³

⁷⁰ *Howell v. Coupland*, 1 Q. B. Div. 258; *Russell v. Camp*, 9 Ga. App. 691; *Ontario F. Assn. v. Cutting P. Co.*, 134 Cal. 21, 53 L.R.A. 681, 86 Am. St. 231.

⁷¹ *Nickoll v. Ashton*, [1901] 2 K. B. 126, [1900] 2 Q. B. 298.

⁷² *Cordes v. Miller*, 39 Mich. 581, 33 Am. Rep. 430; *Jamieson v. Indiana G. Co.*, 128 Ind. 555, 12 L.R.A. 652; *Malcomson v. Wappoo Mills*, 88 Fed. 680; *Mississippi R. Co. v. Green*, 9 Heisk. 588; *Bailey v. De Crispigny*, L. R. 4 Q. B. 180; *Baylies v. Fettyplace*, 7 Mass. 325; *Clancy v. Overman*, 1 Dev. & Bat.

402; *Jones v. Judd*, 4 N. Y. 412; *Davis v. Cary*, 15 Q. B. 418.

"If the thing promised be possible in itself it is no excuse that the promisor became unable to perform it by causes beyond his own control, for it was his own fault to run the risk of undertaking unconditionally to fulfill a promise when he might have guarded himself by the terms of his contract." *Benj. on Sales*, § 571 and note g. See, also, § 572; and *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644; *Booth v. Spuyten Duyvil R. Mill*, 60 N. Y. 487.

⁷³ *Nickoll v. Ashton*, [1900] 2 Q. B. 298.

§ 656. **Damages if purchase price paid; highest intermediate value; vendee's duty to lessen damages.** The measure of damages is the same whether the purchase-money has been paid or not. The consideration of a contract does not measure the damages for the breach of it. If the property is worth less than the price and the contract has been rescinded the buyer may sue to recover the consideration, which will then measure his damages;⁷⁴ but so long as he stands on the contract, as by suing for its breach, he must be content if the law places him in the position he would have occupied if the contract had been performed.⁷⁵ This it does by permitting the recovery of the market value of the property at the time and place when and where it should have been delivered.⁷⁶ In some states the highest

⁷⁴ *Mobile Auto Co. v. R. W. Sturges & Co.*, — Miss. —, 66 So. 205; *Laumier v. Dolph*, 145 Mo. App. 78.

⁷⁵ *Winside State Bank v. Lound*, 52 Neb. 469; *Wells v. Abernethy*, 5 Conn. 222; *Smethurst v. Woolston*, 5 W. & S. 106; *Rose v. Bozeman*, 41 Ala. 678; *Humphreysville Co. v. Vermont C. M. Co.*, 33 Vt. 92; *Lydecker v. Valentine*, 71 Hun 194.

⁷⁶ *Belden v. Krom*, 34 Wash. 184, citing the text; *Tompkins v. Lamb*, 121 App. Div. (N. Y.) 366 (regardless of the price or value of the article delivered under the contract); *Vann v. Lunsford*, 91 Ala. 576 (the rule has no application to the sale of a house which the seller promises to remove to the purchaser's lot, but fails to do); *Winside State Bank v. Lound*, 52 Neb. 469; *Davis v. Fish*, 1 G. Greene 406, 48 Am. Dec. 387; *Wells v. Abernethy*, 5 Conn. 222; *Bozeman v. Rose*, 40 Ala. 212; *Rose v. Bozeman*, 41 id. 678; *McGehee v. Posey*, 42 id. 330; *Moore v. Fleming*, 34 id. 49; *Neil v. Clay*, 48 id. 252; *Rutan v. Hinchman*, 29 N. J. L. 112; *Fenton v. Perkins*, 3

Mo. 23; *Farwell v. Kennett*, 7 Mo. 595; *Alexander v. Macauley*, 6 Md. 359; *Dyer v. Rich*, 1 Metc. (Mass.) 180; *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. ed. 71; *Leach v. Smith*, 25 Ark. 246; *Kirschmann v. Lediard*, 61 Barb. 573; *Cleveland & P. R. Co. v. Kelley*, 5 Ohio St. 180; *Underhill v. Goff*, 48 Ill. 198; *Butler v. Baker*, 5 Ohio St. 484; *Bicknell v. Waterman*, 5 R. I. 43; *Marshall v. Ferguson*, 23 Cal. 65; *Enders v. Board of Public Works*, 1 Gratt. 372; *Baltimore City P. R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402; *McDonald v. Hodge*, 5 Hayw. 86; *Doak v. Snapp*, 1 Cold. 180; *Hamilton v. Ganyard*, 34 Barb. 204; *Haywood v. Haywood*, 42 Me. 229; *Whitsett v. Forehand*, 79 N. C. 230; *Kitzinger v. Sanborn*, 70 Ill. 146; *Kribbs v. Jones*, 44 Md. 396; *Parsons v. Sutton*, 66 N. Y. 92; *Sadler v. Bean*, 37 Iowa 439; *Moorehead v. Hyde*, 38 id. 382; *Smith v. Berry*, 18 Me. 122; *Warren v. Wheeler*, 21 id. 484; *Furlong v. Polleys*, 30 id. 491, 50 Am. Dec. 635; *Berry v. Dwinel*, 44 Me. 255; *Bush v. Holmes*, 53 id. 417; *Rider v. Kelley*, 32 Vt.

market price between the date of the breach and the commencement of the action or the trial is the measure of damages where the price has been paid if there has been no unreason-

268, 76 Am. Dec. 176; *Hill v. Smith*, 32 Vt. 433; *Copper Co. v. Copper M. Co.*, 33 id. 92; *Wyman v. American P. Co.*, 8 Cush. 168; *Pinkerton v. Manchester, etc. R.*, 42 N. H. 424; *Yoder v. Allen*, 2 Bibb 338.

In *Dey v. Dox*, 9 Wend. 129, 24 Am. Dec. 137, a vendor sued on a contract of sale by which he agreed to deliver property and for which only a nominal sum was paid down, was liable for the value of the property because he did not set up the fact of nonpayment, and was thereby precluded from bringing a subsequent action for the value of the goods. The measure of damages for the nondelivery of goods sold, but not paid for, is the difference between the contract price and the market value at the time when they should have been delivered.

On the rescission by the vendor of a conditional contract for the sale of furniture he is liable to the buyer in an action for money had and received for the amount of the partial payments made, less a reasonable sum for the hire of the furniture during the time of the buyer's possession of it, and less, also, any depreciation in its value by damage or injury over and above the ordinary wear and tear. The buyer cannot recover for money paid by a previous purchaser unless he accounts for the hire or damage such purchaser was liable for. *Snook v. Raglan*, 89 Ga. 251.

Where the consideration for the personal property on a farm was the care and support of the vendee's parents during the life-time of his father and the payment of the

father's existing debts, and the care and support were furnished and the greater part of the debts paid, some of the property being disposed of during the father's life-time, the vendee, on surrendering part of that which remained to the executors of the father without prejudice to his claim against the estate was entitled to the value of it, less the amount of unpaid debts. *Wamsley v. Wamsley*, 48 App. Div. (N. Y.) 330.

In England the question is an open one. It is said in *Mayne on Dam.*, 8th ed., p. 226, it is quite settled that the price of stock may be taken at the time of trial. The cases, may, however, be distinguished on the ground that stock may be supposed to be purchased rather as an investment than for resale, while goods are bought expressly to sell again. Consequently, it may be assumed that the former would have remained in the possession of the buyer till the time of trial, while no such presumption can be raised in the latter case. If this be so, damages might fairly be calculated in regard to stock at the price it bore at the time of the trial; in regard to goods, according to their price at the latest period when we could be sure they would have remained in the plaintiff's hands, viz., the time they ought to have been delivered. This rule could produce no practical injustice, for if ever the price proved less than that paid the plaintiff would have it in his power to treat the contract as rescinded, and sue for money had and received as on a failure of consideration.

able delay in commencing or prosecuting the suit.⁷⁷ This doctrine has been held in New York,⁷⁸ but the tendency of the later decisions is towards the standard of value at the time and place of the breach.⁷⁹ They establish the rule that the pledgee

⁷⁷ *Johnson v. Miller*, — Tex. Civ. App. —, 163 S. W. 592; *Gilman v. Andrews*, 66 Iowa 116; *Harrison v. Charlton*, 37 Iowa 134; *Fisher v. Dow*, 72 Tex. 432; *Masterson v. Goodlett*, 46 Tex. 402; *Randon v. Barton*, 4 id. 489; *Calvit v. McFadden*, 13 id. 324; *Brasher v. Davidson*, 31 id. 190, 85 Am. Dec. 525; *Gregg v. Fitzhugh*, 36 Tex. 127; *Cartwright v. McCook*, 33 id. 612; *West v. Pritchard*, 19 Conn. 212; *Davenport v. Wells*, 3 Iowa 242; *Cannon v. Folsom*, 2 id. 101; *Stapleton v. King*, 40 id. 278; *Kent v. Ginter*, 23 Ind. 1; *Maher v. Riley*, 17 Cal. 415.

⁷⁸ *West v. Wentworth*, 3 Cow. 82; *Clark v. Pinney*, 7 id. 681; *Commercial Bank v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317; *Wilson v. Little*, 2 N. Y. 443; *Lobdell v. Stowell*, 51 id. 70.

⁷⁹ *Ormsby v. Vermont C. M. Co.*, 56 N. Y. 623; *Tyng v. Commercial W. Co.*, 58 id. 308; *Mechanics' & T. Bank v. Farmers' & M. Nat. Bank*, 60 id. 40; *Whelan v. Lynch*, id. 469, 19 Am. Rep. 202; *Wintermute v. Cooke*, 73 N. Y. 107.

In *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, the previous decisions in cases of conversion were reviewed and the law held to be that there is not a fixed and unqualified rule giving the plaintiff, in all cases of conversion, the highest market price from the time of conversion to the trial and that such a rule cannot be unheld on any sound principle of reason or justice. Referring to *Kortright v. Buffalo Com. Bank*, 20 Wend. 91, affirmed, 22 id.

248; *West v. Wentworth*, 3 Cow. 82, and *Clark v. Pinney*, 7 id. 596, *Rapallo, J.*, said: "These were actions for the non-delivery of merchandise in pursuance of a contract of sale and the extreme rule was applied of allowing to the vendor as damages the highest value up to the time of trial. This rule was, however, strictly confined to cases where the purchase price had been paid in advance, it being conceded that in the ordinary case, where the price was to be paid on delivery, the only rule is the market value on the day appointed by the contract for the delivery. It cannot be disputed that this distinction, though questioned by high authority, has long been acted upon in this state in respect to contracts for the sale and delivery of goods. The reason upon which it is founded is that, where the purchaser has not paid for the goods, he may, on the refusal of his vendor to deliver, go into the market and buy goods of a similar quality, and that what it would cost him to do this is the just measure of his damages; but where he has paid the purchase-money it is unreasonable to require him to pay it a second time; and therefore all fluctuations in price should be at the risk of the vendor who refuses to deliver while retaining the purchase-money. The very reasoning upon which these decisions are founded demonstrates their inapplicability to a case like the present, where the purchase-money of the stocks [bought on a margin] has not been paid by the complaining

of stock who converts it in good faith by making an unauthorized sale of it and refuses to replace it on demand is liable for its

party, and the only additional payment which he would be required to make for the purpose of replacing the stocks would be such as was occasioned by the rise in the market price."

The general reasoning in this opinion is against the rule of the highest price after conversion or delivery due on contract, though the facts of the case were considered as not requiring the court to go the length of an unqualified reversal of the rule which had been so generally followed in that state. But subsequent cases, which have just been cited, and others referred to in the next note, show that *Baker v. Drake* has been accepted and followed as a case which has accomplished that departure.

The facts of the case and the law involved are thus stated and commented on in the opinion: "All that appears upon the subject (of the terms of the contract) in the evidence is that the plaintiff, through his friend Rogers, deposited various sums of money with the defendants, and from time to time directed them to purchase for his account shares of stock to an amount of cost from ten to twenty times greater than the sums deposited, which they did. No agreement as to margin or as to carrying of stock by the defendants is shown by the evidence, but the plaintiff alleges in his complaint that the agreement was that he should deposit with the defendants such collateral security or margin as they should, from time to time, require; and that they would purchase the stock and hold and carry the same subject to the plaintiff's direction as to the sale and disposi-

tion thereof as long as the plaintiff should desire, and would not sell or dispose of the same unless the plaintiff's margins should be exhausted or insufficient, and not then unless they should demand of the plaintiff increased security, or require him to take and pay for the stocks, and give him due notice of the time and place of sale and due opportunity to make good his margin. The answer denies only the agreement to give notice of the time and place of sale, admitting, by implication, that in other respects the agreement is correctly set forth. * * * It appears that the plaintiff had during the whole course of his transactions with the defendants advanced, in the aggregate, but \$4,240 towards the purchase of shares which at the time of the alleged wrongful sale, November 18, 1868, had cost the defendants upwards of \$66,300 over and above all the sums so advanced by the plaintiff. By the stock lists in evidence it appears that these shares were then of the market value of less than \$67,000, and the surplus arising from the sale after paying the amount due the defendants amounted to only \$558, which sum represents the value at that time of the plaintiff's interest in the property sold.

"It so happened, however, that within a few days after the sale the market price of the stock rose, and that at the time of the commencement of this action, November 24, 1863, the shares would have brought some \$5,500 more than the sum for which they had been sold. But after the commencement of the action and before the trial the stock underwent an alternate elevation and de-

highest market price between the time the owner receives notice of his act and such reasonable time thereafter as it may be neces-

pression, and reached its maximum point in August, 1869, at which time one sale of thirty shares at one hundred and seventy per cent. was proved. It afterwards declined, and on the day preceding the trial, October 20, 1879, the price was one hundred and forty-three, having for a month previous to the trial ranged between one hundred and thirty-seven and one hundred and forty-five. The jury in obedience to the rule laid down by the trial court found a verdict for plaintiff for \$18,000, being just the difference between one hundred and thirty-four, which was the average price at which the defendant sold, and one hundred and seventy, the highest price touched before the trial,—thirty-six per cent. on five hundred shares. More than two-thirds of this supposed damage arose after the bringing of the suit. This enormous amount of profit given under the name of damages could not have been arrived at except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff would not only have supported the necessary margin and caused the stock to be carried through all its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience.

"In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct the defendant for such a con-

jectural loss, its amount is a question of fact, and a finding in respect to it should be based upon some evidence. In respect to a dealing which, at the time of its termination, was as likely to result in a further loss as in profit, to lay down as an inflexible rule of law as damages for its wrongful interruption the largest amount of profit which subsequent development disclosed might, under the most favorable circumstances, have been possibly obtained from it, must be awarded to the fortunate individual who occupies the position of plaintiff, without regard to the probabilities of his realizing such profits, seems to me a wide departure from the elementary principles upon which damages have hitherto been awarded. * * * But the rule adopted in *Markham v. Jaudon* (41 N. Y. 235), passing far beyond the scope of reasonable indemnity to the customer whose stocks have been improperly sold, places him in a position incomparably superior to that of which he was deprived. It leaves him with his venture out, for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end. The more crowded the calendar, and the more new trials granted in the action, the better for him. He is freed from the trouble of keeping his margins good, and relieved of all apprehension of being sold out for want of margin. If the stock should fall or become worthless he can incur no loss; but if, at any period during the months or years occupied in the litigation, the market price of the stock happens to shoot up, though it be but for a moment, he can, at the trial, take a

sary for him to use in replacing such stock by purchasing it in the market.⁸⁰ This rule applies as well where the pledgee is a broker and carries the stock on a margin for a customer as where the owner has paid in full for it and was holding it for an investment.⁸¹ It will be at once perceived that these cases rest upon the principle that it is the legal duty of the person wronged to use reasonable means to lessen the damage which may result from the wrong. It is believed that the same principle applies to contracts for the sale of goods, and that the same result will be reached by the higher court of New York if the question shall arise.

A payment is not made within the rule by the transfer of earnest money, at least where that is repaid before a tender is made of the balance.⁸² In Texas interest is not recoverable from the time of the breach, but only from the date of the valuation.⁸³ In Iowa if property has been paid for the purchaser is not bound to go into the market to lessen the liability of the vendor.⁸⁴

§ 657. **Contracts for delivery of stocks.** Bellows, J., in a New Hampshire case, thus sums up the reasons for the prevailing rule respecting damages for the non-delivery of stocks to a vendee: "The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach; and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and elsewhere. It is true that in some cases the plaintiff may have been injured to the extent of the value of the property at the highest market

retrospect and seize upon that happy instance as the opportunity for profit of which he was deprived by his transgressing broker, and compel him to replace with solid funds this imaginary loss." The court reached the conclusion that the dissenting opinions of Grover and Woodruff, JJ., in the case referred to, embody the sounder law.

⁸⁰ Wright v. Bank, 110 N. Y. 237, 1 L.R.A. 289; Gruman v. Smith, 81 N. Y. 25; Colt v. Owens, 90 id. 368, 47 N. Y. Super. 430; Barnes v. Brown, 130 N. Y. 371, reversing Barnes v. Seligman, 55 Hun 339.

⁸¹ Wright v. Bank, *supra*.

⁸² Worthen v. Wilmot, 30 Vt. 555.

⁸³ Masterson v. Goodlett, 46 Tex. 402; Fisher v. Dow, 72 id. 432.

⁸⁴ Mann v. Taylor, 78 Iowa 355.

price between the breach and the time of trial. But it is equally true that in a large number of cases, and perhaps generally, it would not be so. In that large class of cases where the articles to be delivered entered into the common consumption of the country, in the shape of provisions, perishable or otherwise, to hold that the plaintiff might elect as the rule in all cases the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would in many cases be grossly unjust and give to the plaintiff an amount of damages disproportioned to the injury. For in most of these cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause by review, new trial or otherwise. Shall there be different measures of value at each trial? In the case of stocks, in regard to which the rule in England originated, there are doubtless cases, and a great many, where they are purchased as a permanent investment and to be held without regard to fluctuations; and to hold that the damages should be the highest price between the breach and trial, when there is no reason to suppose that a sale would have been made at that precise time, would also be unjust. But it may be fairly assumed that a very large portion of the stocks purchased are purchased to be sold soon; and to give the purchaser, in case of failure to deliver such stocks, the right to elect their value at any time before trial, which might often be several years, would be giving him, not indemnity merely, but a power, in many instances, of unjust extortion which no court could contemplate without pain.”⁸⁵ The rule in England is indicated by a quotation from *Mayne on Damages*, and notes from a few other cases.⁸⁶

⁸⁵ *Pinkerton v. Manchester, etc.* R. R., 42 N. H. 424; *Darrin v. Whittingham*, 107 Md. 46.

⁸⁶ In *Mayne on Damages* (8th Eng. ed.), p. 220, this subject is thus treated: “In the cases above discussed, no payment had been made for the goods, and on this

ground they were distinguished from actions for not replacing stock, because in that case the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. *Gainsford v. Carroll*, 2 B. & C. at p. 625. Accordingly, where there has been a

There are cases in this country which distinguish contracts for the delivery or replacing of stocks from other contracts of

loan of stock, and a breach of the agreement to replace it, the measure of damages is held to be the whole value of the stock lent, taken at such a rate as will indemnify the plaintiff. Therefore, where the stock has risen since the time appointed for the transfer, it will be taken at its price on or before the day of trial. *Downes v. Back*, 1 Stark. 318; *Harrison v. Harrison*, 1 C. & P. 412; *Shepherd v. Johnson*, 2 East 211; *Owen v. Routh*, 14 C. B. 327. In the last case the rule stated was laid down as the invariable one, without any reference to a rise or fall in the price. And it is no answer to say that the defendant may be prejudiced by the plaintiff's delaying to bring the action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards, so as to avail himself of a rising market. Per *Grose*, 2 East 212. In one case where it had fallen, it was estimated at its price on the day it ought to have been replaced (*Sanders v. Kentish*, 9 T. R. 162; see 2 East 212); and in another case, where no day was named for its replacement, and it had fallen in value, at its price on the day when it was transferred to the borrower. *Forrest v. Elwes*, 4 Ves. 492. But the plaintiff cannot recover the highest price which the stock had reached at any intermediate day (*McArthur v. Lord Seaforth*, 2 Taunt. 257; see *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. at p. 284, 60 J. L. (Ch.) 313); because such a measure involves the assumption that he would have sold out upon that day, which is purely speculative profit. Nor can he claim

damages for any profit which he might have made, had he possessed the stock, at all events unless his wish to have it back for that express purpose was distinctly communicated to the defendant. Therefore, when the defendant lent five per cent. stock which was to be replaced on a fixed day, and after that day government gave the holders an option to be paid off at par, or to commute their stock for three per cents.; the plaintiff expressed to the defendant a wish to have the stock replaced, that he might be paid at par, but no wish to take the new stock; held, that he was not entitled to recover the price of so much of three per cent. stock as he might have obtained in exchange for his five per cents. *McArthur v. Lord Seaforth*, *supra*.

"In the case cited the profits claimed were both contingent in their nature, and collateral to the breach of contract. But where a bond was given to secure the replacement of stock, and payment in the meantime of sums equal to the interest and dividends, and a bonus was afterwards declared upon the stock, it was held by Sir John Leach, M. R., that in equity, and perhaps even at law, the lender was entitled to be placed in the same situation as if the stock had remained in his name, and was therefore entitled to the replacement of the original stock, increased by the amount of the bonus, and to dividends, in the meantime, as well upon the bonus as upon the original stock. *Vaughan v. Wood*, 1 Myl. & K. 403.

"The rules established in the case of a loan of stock were held to be equally applicable where the loan

sale by allowing for the breach of the former the highest value up to the time of trial, while the damages for the breach of the

was of mining shares. *Owen v. Routh*, 14 C. B. 327. There appears to be great similarity between these cases and that of a contract for the purchase of goods, in which payment is made beforehand. The plaintiff is equally kept out of his money, and, therefore, equally unable to protect himself by going into the market to buy that which the defendant had agreed to sell him. The defendant has equally the use of the plaintiff's property and is therefore able to make all the profits by means of it which the plaintiff could have made. If the case is to be governed by exactly the same rules as that of stock, it will require no farther discussion. But upon this point there seems to be very little agreement. * * * The only two cases in England which touch the subject specifically do not tend to clear it up very much. * * * (*Dutch v. Warren*, 2 Burr. 1010; *Startup v. Cortazzi*, 2 Cr., M. & R. 165.) * * *

"Such is the unsettled state of the law upon the subject. Mr. Sedgwick is of the opinion that the period of breach is the true time, in all cases, in estimating the damages, unless it can be shown that the article was delivered for some specific object known to both parties at the time, and thus a loss within the contemplation of both parties has been sustained. Sedgw. on Dam. 310 (4th ed.). This doctrine cannot be maintained in England, if, as he also thinks, there is no valid reason for making any difference between stock and any other vendible commodity. It is quite settled that the price of stock may be taken at the time of trial. The case may, however, be distinguished on the

ground that stock may be supposed to be purchased rather as an investment than for resale, while goods are bought expressly to sell again. Consequently, it may be assumed that the former would have remained in the possession of the buyer till the time of trial, while no such presumption can be raised in the latter case. If this be so, damages might fairly be calculated, in regard to stock, at the price it bore at the time of trial; in regard to goods, according to their price at the latest period when we could be sure they would have remained in the plaintiff's hands, viz.: the time they ought to have been delivered."

The courts of England, in actions for nondelivery of railway shares, have given the value at the date of the breach, and not of the trial, and such cases are distinguished from those for failing to replace borrowed stock. *Shaw v. Holland*, 15 M. & W. 116; *Tempest v. Kilner*, 2 C. B. 300; *Barned v. Hamilton*, 2 Eng. Railw. Cas. 624. And in *Elliott v. Hughes*, 3 F. & F. 387, the measure of damages for nondelivery of goods was determined by the highest price up to the trial.

In *Anderson v. Beard*, [1900] 2 Q. B. 260, the defendant employed a broker to purchase for him certain shares on the stock exchange, and afterwards directed him to "carry over" the shares to the next account. The broker, following the regulations of the exchange, purchased the shares in his own name from the plaintiff, a jobber on the exchange, and afterwards carried over with them the same shares. The defendant's name was not disclosed until afterwards. Before the next settling

others have been measured by the value at the time when the goods should have been delivered.⁸⁷ But there appears to be no sound reason for this distinction. The market price of stocks fluctuates; so does the market price of other kinds of personal property; both are liable to factitious changes; but all stocks do not, nor do all other kinds of property, in fact, fluctuate to the same extent or from the same immediate causes. The same considerations which commend the rule of the value at the time of the breach in the case of a contract for the sale and delivery of merchandise apply with equal force to contracts for the sale and delivery of stocks. And it is believed the weight of American authority is in favor of assessing the damages for the breach of contracts of sale by the same rule, whether they relate to stocks or merchandise, and whether the price has been paid or not.⁸⁸ In Pennsylvania the rule allowing the highest intermediate market price in stock transactions has been restricted to

day the broker was declared a defaulter on the exchange, and, in accordance with the rules of that body, his contract with the plaintiff was closed, and the latter took back the shares at a price fixed by the official assignee of the exchange and known as the "hammer price." The defendant denied responsibility for the shares, and the plaintiff at once sold them for the best price obtainable. The defendant was liable for the difference between the price at which the shares had been carried over and that at which the plaintiff sold them, and not merely for the difference between the price at which they had been carried over and the "hammer price."

⁸⁷ Wells v. Abernethy, 5 Conn. 222; Bank v. Reese, 26 Pa. 143; Kent v. Ginter, 23 Ind. 1; McKenney v. Haines, 63 Me. 74; Musgrave v. Beckendorff, 53 Pa. 310.

⁸⁸ Enders v. Board of Public Works, etc., 1 Gratt. 372; Baltimore City P. R. Co. v. Sewell, 35 Md. 238,

6 Am. Rep. 402; White v. Salisbury, 33 Mo. 150; Alexander v. Macauley, 6 Md. 359; Eastern R. Co. v. Benedict, 10 Gray 212; Noonan v. Ilesley, 17 Wis. 314, 84 Am. Dec. 742; Doak v. Snapp, 1 Cold. 180; Smith v. Dunlap, 12 Ill. 184, 193; Sargent v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; Smethurst v. Woolston, 5 W. & S. 106; Coldren v. Miller, 1 Blackf. 296; Van Vleit v. Adair, id. 346; Columbia v. Amos, 5 Ind. 184; Coffin v. State, 144 Ind. 578, 55 Am. St. 188 (state bonds); Kuhn v. McKay, 7 Wyo. 42, 57; Brewster v. Van Liew, 119 Ill. 554, 59 Am. Rep. 823; Wildes v. Robinson, 50 App. Div. (N. Y.) 192; Sloan v. McKane, 131 App. Div. (N. Y.) 244. See Chapman v. Fowler, 132 App. Div. (N. Y.) 250; Redding v. Godwin, 44 Minn. 355. Peek v. Steinberg, 163 Cal. 127 (the total par value of stock measures the rights of a party entitled to paid up stock).

cases in which a trust relation exists between the parties.⁸⁹ In New York, after great discussion, the court of appeals has settled the law to be that the vendor or pledgee of stock is liable for the highest market price between the time of the sale or conversion and such reasonable time as the vendee or owner can, after knowledge of the other's act, supply himself with stock by going into the market.⁹⁰ This rule, as applied to stock transactions between a broker and his principal, is approved by the federal supreme court.⁹¹

In a Virginia case stock was borrowed to be returned at specified times; dividends to be paid in lieu of interest. It was not returned, but the borrower continued to pay the dividends for some time after the date fixed for returning the stock. It was held the general rule of damages against a vendor was the value of the property at the time it should

⁸⁹ *Huntingdon, etc. R. & C. Co. v. English*, 96 Pa. 247, 42 Am. Rep. 543.

In Michigan the buyer may recover the difference between the contract price and the highest market value between the time fixed for delivery and the expiration of a reasonable time for him to obtain the stock in the market; what is such a time may be either a question of law or of fact depending upon the existence or nonexistence of a dispute as to the facts or inference to be drawn from them. *Vos v. Child*, 171 Mich. 595, 43 L.R.A. (N.S.) 368. The opinion contains a quotation from *McKinley v. Williams*, 74 Fed. 94, 20 C. C. A. 312. The argument of Justice Sanborn in that case is probably as strong as any in the books in favor of this view.

⁹⁰ *Joseph v. Sulzberger*, 136 App Div. (N. Y.) 499. See last section.

In *Barnes v. Brown*, 130 N. Y. 371, there was a breach of a contract to assign full-paid stock of a certain corporation; stock not fully

paid was accepted and returned. The stock stipulated for had no actual or market value at the time the pretended delivery of it was made. It was held (reversing *Barnes v. Seligman*, 55 Hun 339) that the plaintiff was only entitled to nominal damages, although the defendant, in order to perform the contract, would have been obliged to pay par for the stock. The plaintiff's recovery could not exceed the sum which would indemnify him for his loss.

One who has bought and paid for stock which has never been issued cannot obtain redress in an action for damages, but may recover the money paid. *Rose v. Foord*, 96 Cal. 152.

In *Colton v. Kennedy*, 74 N. Y. Misc. 217, the damages for failure to deliver bonds were measured by the amount of the plaintiff's note given therefor.

⁹¹ *Galigher v. Jones*, 129 U. S. 193, 32 L. ed. 658.

have been delivered, and interest from that date until paid; that there is no distinction in this respect between contracts for the sale and delivery of stocks and other executory contracts of sale; that under the circumstances the lender might recover the value of the stocks at the time the borrower ceased to pay dividends, with interest from that date.⁹² But in a later case⁹³ stock was sold and paid for, but the company which issued it denied that the seller owned it and the buyer, without unreasonable delay, sued for damages. The sale was made at \$3.50 per share. The verdict was for damages on the basis of a value of \$20 per share, the value at the time of the trial, which was less than it had previously been after the breach of the contract. It was said that this, no matter what may be regarded as the proper rule, cannot be deemed excessive. The general rule, where there has been no unreasonable delay in the commencement and prosecution of a case, is to treat the refusal as amounting to a conversion and gives as the measure of damages the value or its highest price in market at any time after demand and refusal.

In an action at law against a corporation for refusing to issue or transfer stock the rule of damages is the same as upon a sale; the plaintiff may claim in the same suit the value of the stock and the dividends thereon, and the measure of damages is its value at the time of the demand, together with the dividends accrued thereon at that time with interest,⁹⁴ or at the time of the refusal to register, the officers being entitled to a reasonable time for the consideration of every transfer before they register it.⁹⁵ The denial of the opportunity due a stockholder to purchase shares at the price they were offered a third party is cause for the recovery by the former of the difference between the

⁹² *Enders v. Board of Public Works*, 1 Gratt. 372.

⁹³ *Carter v. Edwards*, 88 Va. 205 (1891).

⁹⁴ *Baltimore City P. R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402; *Wilson v. London & G. F. Co.*, 14 L. T. Rep. 15 (1897); *Saunders v. United States M. Co.*, 25 Wash. 475,

485; *German Union B. & S. F. Ass'n v. Sendmeyer*, 50 Pa. 67.

⁹⁵ *In re Ottos v. Kopje Diamond Mines*, [1893] 1 Ch. 618; *Bank v. Bank*, 120 Ga. 575, 102 Am. St. 115. It was said: Had the pledgee demanded a transfer before the sale the measure of damages for failure to comply would have been his debt

value of the stock he was entitled to buy at that price and its market value when delivery was made to such party.⁹⁶ The holder of a bond convertible into preferred stock may recover the market value of such stock at the date of his refused demand therefor; it is immaterial that no such stock had been issued, the right to issue it existing.⁹⁷ A stockholder wrongfully excluded from any share in the management of a corporation and whose interest therein has been declared forfeited may recover the value of his interest when it was attempted to be taken from him, including, besides technical profits, the increase in the value of the corporate assets and interest on the amount due him from the time of his exclusion.⁹⁸ In a New Brunswick case the plaintiff was obliged to raise the wages he had been paying his workmen because after the breach of the defendant's contract he paid higher wages than before the sale; the plaintiff's "help" was broken up by his workmen leaving his employ and going into the employ of the defendant. The court said: "It was one of the inducements held out by the defendant to the plaintiff to enter into the agreement, that the 'help' in his (defendant's) establishment was worth \$6,000 to a man commencing that kind of business. Then surely—where the defendant has broken his agreement by going into business again and the very workmen whose services he represented would be of such value to the plaintiff in his establishment all, or nearly all, returned to the defendant's employ almost immediately after he resumed business, and the plaintiff consequently lost the value of their services, and, as he stated, could not replace them by workmen of equal skill—the jury had the right to allow the plaintiff damages for the loss he had sustained in consequence of this, as well as for the additional wages he had to pay in consequence of the defendant's offering higher wages."⁹⁹

and interest. But at the sale it acquired the pledgor's title free from any equity of redemption and the measure of damages for the refusal to make the transfer was the value of the shares at the time of the refusal.

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⁹⁶ *Stokes v. Continental T. Co.*, 186 N. Y. 285, 12 L.R.A. (N.S.) 969

⁹⁷ *Bratten v. Catawissa R. Co.*, 211 Pa. 21.

⁹⁸ *Crosby Lumber Co. v. Smith*, 2 C. C. A. 97, 51 Fed. 63.

⁹⁹ *Whittaker v. Welch*, 2 Pugs. 436.

§ 658. Compensation for breach of contract of sale of good will; certainty of proof. The property known as goodwill is intangible and consists in "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity or reputation for skill or affluence or punctuality or from other accidental circumstances or necessities, or even from ancient partialities or prejudices."¹ Owing to the peculiarity of the property the degree of certainty as to the proof of damages which result from the breach of contracts for the sale of it is not as attainable as in the breach of contracts for the sale of tangible property. This uncertainty is not to work a denial of justice to a party who has been wronged; the damages must be ascertained from all the facts and circumstances as best they may.² They are to be measured by the injury done, not by ineffectual attempts to injure.³ The standard is the same whether relief is sought in an

¹ Story's Part., § 99. See Barber v. Connecticut, etc. Ins. Co., 15 Fed. 312; Wedderburn v. Wedderburn, 22 Beav. 84.

The distinction between good-will and profits of trade is obvious. "Profits are the gains realized from trade; good-will is that which brings trade. A favorable location of a mercantile establishment or the habit of customers to resort to a particular locality will bring trade. This advantage may be designated by the term 'good-will.' What the trader gains from the trade so acquired are profits. If by any means customers are driven from a particular locality to which they resort for trade it is plain that the trade loses that which we have described as good-will." Carey v. Gunnison (Iowa) 17 N. W. 881, 885; Nelson v. Hiatt, 38 Neb. 478.

² Moorman v. Parkerson, 131 La. 204, quoting the text.

³ Burekhardt v. Burekhardt, 36 Ohio St. 261; Nelson v. Hiatt, *supra*; Noble v. Wilder, 25 Tex. Civ. App. 311; Shaw v. Jones, 133 Ga. 446 (the sum paid is not decisive); Bradford v. Montgomery F. Co., 115 Tenn. 610, 9 L.R.A.(N.S.) 979 (the loss of profits, if there are data from which the amount may be ascertained with reasonable certainty, the diminution in the value of the property sold and the cost of the licenses for the unexpired term are elements of damage); Whorley v. Tennessee Cent. Exp. Co. (Tenn. Ch. App.) 62 S. W. 346 (affirmed by supreme court without opinion); Raymond v. Yarrington, 96 Tex. 443, 62 L.R.A. 962.

independent action or by counter-claim.⁴ Where the plaintiff purchased, not merely the good-will attached to the premises transferred, but the property and good-will of the business and the exclusive right to use a trade-mark, it was held that proof of the damages resulting from a breach need not be made by showing specific loss of business and profits as of a bill of particulars of his injuries.⁵ In such a case the wrong done by the vendor is a wilful one, and the case is such as he has chosen to make it; hence his is the loss which may arise from the uncertainty pertaining to the nature of it and the difficulty of accurately estimating the results of his own wrongful act.⁶

The following language indicates the trend of judicial thought respecting the certainty of proof in actions for the breach by vendors of contracts for the sale of good-will, though the doctrine declared is not everywhere acquiesced in:⁷ "With reference to the defendant's contention as to damages, we have no doubt that the judge who tried the case was warranted in finding substantial damages from the defendant's competition in a small place, without evidence specifically directed to what the damage would be, just as in the case of words affecting a trader in the way of his trade."⁸ It is said in another recent case in which the facts showed a wilful and malicious breach of contract that it was one where the law will not nicely attempt to limit the amount of reparation, but will extend the line of relief so as to embrace all the consequences of the wrong-doer's

⁴ *Burckhardt v. Burckhardt*, *supra*.

⁵ S. C., 42 Ohio St. 474, 497, 51 Am. Rep. 842.

⁶ *Id.*; *Mellersh v. Keen*, 28 Beav. 453; *Helphenstine v. Downey*, 7 D. C. App. Cas. 343; *Turner v. Burns*, 24 Ont. 28, citing *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; *Sessinghaus M. Co. v. Hanebrink*, 247 Mo. 212, citing the text; *Bowling v. Walls*, 72 W. Va. 638.

Where there was a breach of a contract not to supply water to the inhabitants of a locality the profits made by supplying it measured the

liability. *Bennett W. Co. v. Millvale*, 200 Pa. 613, 202 Pa. 616.

⁷ See *Taylor v. Howard*, 110 Ala. 468.

In ascertaining the loss suffered all the facts and circumstances showing the extent thereof may be regarded; but if the data furnished does not enable the jury to fix the damages with a reasonable degree of certainty and exactness only a nominal sum may be recovered. *Shaw v. Jones*, 133 Ga. 446.

⁸ *Smith v. Brown*, 164 Mass. 584; *Lashus v. Chamberlain*, 6 Utah 385, 5 Utah 140.

act although quite remote from the original transaction. "That it cannot be demonstrated to a mathematical certainty what profits have or have not come from a certain source of business is no objection to their recovery. In cases for personal injuries the loss of earning capacity, both past and prospective, is considered as an element of damage. The proof of such loss should be as certain as that of loss of profits in business; yet when there is evidence that the capacity is lessened, and that the accident was the probable cause thereof, the injured party is given compensation therefor. So in this case, so far as it was proved that the loss of profits during the term of the contract was caused by the defendant's illegal competition the plaintiffs were entitled to recover. The fact that the finding rested upon probability only or was made by drawing inferences from circumstantial evidence would not render it improper. If, upon the evidence as a whole, there was the slightest balance of probability in favor of the plaintiffs it would be as erroneous to find against them as it would if their claim had been demonstrated to be true."⁹

The Missouri supreme court has declared that the good-will of a business which consists of labels and wrappers bearing the name of the vendor, or other marks or brands, will be protected on principles analogous to those which govern the infringement of trade-marks; the plaintiff who has obtained the exclusive right to manufacture and sell articles so wrapped may recover all the profits made by the defendant therefrom, regardless of the effect upon his own business or profits.¹⁰ This view is not usually acquiesced in, and seems not to be maintainable on principle. It was observed by the writer of the opinion that in computing the extent of the plaintiff's injury the profits made by the defendant constitute an element; "but only such profits made by the defendant as the plaintiffs have lost by reason of the wrongful act of the defendant complained of. In ascertaining the profits lost to the plaintiffs, the profits made by the defendant may properly be given in evidence in

⁹ *Salinger v. Salinger*, 69 N. H. 589; *Long v. O'Bryan*, 28 Ky. Law Rep. 1062; *Whorley v. Tennessee*

Cent. Exp. Co., *supra*; *Gutzeit v. Strader*, 158 Ky. 131.

¹⁰ *Peltz v. Eichele*, 62 Mo. 171.

connection with the diversion of customers from plaintiffs to defendant, and the amount of their purchases, the product of the plaintiff's factory, and the amount of their sales, and the reduction in the price of the articles sold, if any, in consequence of the unlawful competition of defendant." These remarks were doubtless *obiter*, and are thus answered: If the profits made by a party who had violated his contract respecting the good-will of a business which he had sold constituted an element of damage it would necessarily seem to follow that, if he conducted a competing business in such a manner as to keep up the running expenses only, and no profit accrued, he would not be liable for a breach of his covenant, regardless of how much injury he could thus inflict upon his credulous victim. The bare statement of the consequences which would result from the converse of such a proposition establishes its absurdity, and shows that, upon principle, the statement thus made, in a matter to which the court's attention was not particularly attracted, cannot be the law.¹¹ On the breach of a contract not to resume the practice of a profession the damages are measured by the value of the practice lost by the plaintiff, regardless of the gains or losses of the defendant, less the sum due under the contract of purchase.¹² The damage sustained, not the consideration paid, measures the recovery.¹³ A contract for the sale of the good-will of a business, the vendor binding himself not to engage in the like business for a specified term, contemplates not only that the plaintiff should reap the profits of the business during the term, but also that at the end of the term he would own the good-will of the business. Its loss must be compensated for. If during the term the plaintiff's profits were reduced he is entitled to be recompensed therefor; and if, in addition to that, the good-will of the business at the end of the term was worth a certain amount less than it

¹¹ Dose v. Tooze, 37 Ore. 13; Noble v. Wilder, 25 Tex. Civ. App. 311.

¹² Gregory v. Spieker, 110 Cal. 150, 52 Am. St. 70, citing Peltz v. Eichele; Lashus v. Chamberlain, *supra*; Howard v. Taylor, 90 Ala.

241. To the same effect: Rigney v. Monette, 47 La. Ann. 648; Dose v. Tooze, *supra*; Warfield v. Booth, 33 Md. 63.

¹³ Stewart v. Challacombe, 11 Ill. App. 379,

would have been but for the defendant's illegal act there may be a recovery for that damage. "The damages are not remote or consequential, either in the sense that they are not the immediate and direct result of the wrongful act complained of, or that they would not have been reasonably anticipated by the parties. * * * But the loss of profits after the termination of the contract cannot be allowed as an element of damages in this case. It cannot be said that when the contract was made the parties had in mind that the plaintiff would continue in business indefinitely. Their contract did not involve rights that might exist after its termination, and so a breach of it cannot be said to infringe such rights. So far as the reasonable anticipation of such profits was an element in the value of the business at the termination of the contract it should be considered. Evidence of the loss of such profits, which had occurred before the trial and as the result of the defendant's illegal acts, was competent upon the question of the reduced value of the business (good-will) when the contract expired." ¹⁴ Where the contract for the sale of a livery-stable and outfit covered the good-will and bound the vendor not to compete with the vendee so long as he remained in business it was ruled that the measure of damages for its breach was not the difference in the value of the property with the good-will and without the competition of the defendant and such value without the good-will and with such competition. That rule would be practically impossible of application because of the difficulty of determining the difference in the value of the property or contract under the differing conditions; no witness could know how long the plaintiff would continue in business. It was suggested that the plaintiff's most effective remedy would be an injunction. ¹⁵

¹⁴ *Salinger v. Salinger*, 69 N. H. 589; *Moorehead v. Hyde*, 38 Iowa 382; *Galucha v. Naso*, *infra*.

If the injury complained of is to the value of the business of the plaintiff proof of reduction in the amount done and in the daily sales after the defendant re-entered busi-

ness is competent, and such proof may cover the time after suit was brought. *Galucha v. Naso*, 147 Iowa 309.

¹⁵ *Jackson v. Byrnes*, 103 Tenn. 698. See *Bradford v. Montgomery F. Co.*, 115 Tenn. 610, 9 L.R.A. (N.S.) 979.

The fact that the purchaser of the good-will of a business paid as part of the consideration therefor the value of an unexpired license to conduct the business, which license was issued to his vendor and was not assignable or transferable, does not affect the recovery.¹⁶ The damages resulting to a physician by the loss of the practice given up in reliance upon the contract of his vendor to sell his practice do not arise from the breach of such contract and are not recoverable because the law does not contemplate indemnity for profits the party supposes he would have made from the business he claims he would have pursued if he had not made the contract violated. The plaintiff would have lost his practice if the defendant had not broken his contract.¹⁷ The plaintiff's damages are not measurable by the difference between the aggregate price paid and the value of the property received, other than the good-will. Such a rule would make the value of the good-will the measure of damages.¹⁸ Neither are they to be based upon that rule and also, in addition thereto, such other damages as the plaintiff has sustained. To permit the latter rule would authorize "the jury to make a new contract for the parties by ascertaining the reasonable value of the property at the time of the purchase, when no agreement had been reached in that respect; and, having reached a conclusion thereon, it would have permitted the jury to treat the difference between such value and the consideration paid as liquidated damages, in the absence of any stipulation to that effect."¹⁹

In an Indiana case it was claimed that fraudulent representations were made to the purchasers of a stock of merchandise and the good-will of the business in this, that the annual sales were represented to be \$30,000, while they were in fact but one-half that sum. The purchasers obtained a lease of the building in which the vendor had carried on business. The following is substantially the instruction given on the

¹⁶ Howard v. Taylor, 99 Ala. 450;
Taylor v. Howard, 110 Ala. 468.

¹⁷ Rigney v. Monette, 47 La. Ann.
648; Williams v. Barton, 13 La.
404, 410.

¹⁸ Howard v. Taylor, 90 Ala. 241.

See Jackson v. Byrnes, *supra*.

¹⁹ Dose v. Tooze, 37 Ore. 13, 720.

question of damages, of which the supreme court said that it is as accurate, correct and fair a statement of the proper measure thereof as could well be given: The subject of good-will can be considered and its value determined only in connection with the leasehold or rental value of the building or rooms wherein the business was done; the question is confined to the difference between the rental value of the building if the business done there had amounted to the sums represented and the amount of business in fact done there by the vendor. "By the increased rental value on account of the good-will attached is meant, not how much more money would the occupant of the building have made if the good-will had been as represented; that could never be certainly determined; but how much was the rental value increased, or would it have been increased, if attended by such good-will; how much more rent for that place of business would men generally pay for the purpose of carrying on there the same business for the sake of getting such good-will. In short, what is the good-will worth, fixing the value beforehand, taking the chance of realizing on it."²⁰ The purchaser of property may show the effect upon its value of the violation by the vendor of his contract not to re-engage in the business conducted thereon.²¹

§ 659. Contracts to pay in or deliver specific articles; presumed value of notes, etc. Where the vendee has paid or furnished the consideration, whether directly as purchase-money or in an antecedent debt, and the vendor, for that consideration, undertakes to deliver a specific quantity of goods of a given description at a future day the contract is of the very nature of those considered, and the damages are calculated upon the value of the property in case of failure to deliver it.²² The word "dol-

²⁰ Rawson v. Pratt, 91 Ind. 9; Montgomery, etc. Soc. v. Harwood, 126 id. 440, 10 L.R.A. 532. See Musselman's App., 62 Pa. 81, 1 Am. Rep. 382; Mitchell v. Read, 84 N. Y. 556.

²¹ Evans v. Elliott, 20 Ind. 283, 83 Am. Dec. 319.

²² Munn & Co. v. American Co., 82

N. J. Eq. 443; Montelius v. Ather-ton, 6 Colo. 224; Cummings v. Dudley, 60 Cal. 383, 44 Am. Rep. 58; Barnes v. Brown, 130 N. Y. 371, stated in note to § 657; Butler v. Baker, 5 Ohio St. 484; Dyer v. Rich, 1 Metc. (Mass) 180; Neel v. Clay, 48 Ala. 252; Leach v. Smith, 25 Ark. 246; Doak v. Snapp, 1 Cold. 180; Mo-

lars" is sometimes used in such contracts, not to express the value in legal currency to be paid, but the quantity of the specific thing to be delivered. It is then a measure of quantity. Thus, on the breach of an agreement to pay a given sum in a particular species of paper, as bank or other notes, or stock, recovery can be had only of the value of such paper.²³ Where one party gave another an acknowledgment of indebtedness, thus: "due N. \$300 in W. R. R. stock," it was held to bind the party giving it to pay so many dollars in the stock of the company as, when counted at par, would amount to \$300. The court say: "If the stock is appreciated above par the payee is to be benefited by the increased value; and if depreciated he is then to be restricted to \$300, although worth less than that sum in money. The authorities abundantly show that where the instrument, like the one at bar, is to be paid in bank notes, or in stock or scrip in the similitude of bank notes, then the market value of the notes, stock or scrip is the measure of damages. And

Gehee v. Posey, 42 Ala. 330; Brasher v. Davidson, 31 Tex. 190, 98 Am. Dec. 525; Cartwright v. McCook, 33 Tex. 612; Edgar v. Boise, 11 S. & R. 445; Safely v. Gilmore, 21 Iowa 588, 89 Am. Dec. 592; Hixon v. Hixon, 7 Humph. 33; Williams v. Jones, 12 Ind. 561; Pierce v. Spader, 13 id. 458; Williams v. Sims, 22 Ala. 512; Moore v. Fleming, 34 id. 491; Marr v. Prather, 3 Metc. (Ky.) 196; Herbert v. Easton, 43 Ala. 547; Powe v. Powe, 42 Ala. 113; Mettler v. Moore, 1 Blackf. 342, 12 Am. Dec. 248; Hedges v. Gray, 1 Blackf. 216; Clay v. Huston, 1 Bibb 461; West v. Wentworth, 3 Cow. 82; Barrett v. Allen, 10 Ohio 426; Smith v. Berry, 18 Me. 122; Vance v. Bloomer, 20 Wend. 196; Rockwell v. Rockwell, 4 Hill 164; Baker v. Mair, 12 Mass. 121; Brooks v. Hubbard, 3 Conn. 58, 8 Am. Dec. 154; Gilbert v. Danforth, 6 N. Y. 585; Newman v. McGregor, 5 Ohio 349, 24 Am. Dec. 293; Starr v. Light, 22 Wis.

414; Jemison v. Gray, 29 Iowa 537.

²³ Hixon v. Hixon, 7 Humph. 33; Robinson v. Noble, 8 Pet. 181, 8 L. ed. 910; Hopson v. Fountain, 5 Humph. 140; Bush v. Hibbard, 24 Barb. 292; Gordon v. Parker, 2 Sm. & M. 485; Walker v. Meek, 12 id. 495; Arnold v. Suffolk Bank, 27 Barb. 424; Bank v. Reese, 26 Pa. 143; Eastern R. Co. v. Benedict, 10 Gray 212; Child v. Pierce, 37 Mich. 155; Coldren v. Miller, 1 Blackf. 296; Van Vleet v. Adair, id. 346; Cotton v. Reed, Sneed 24; Fosdick v. Greene, 27 Ohio St. 484; Green v. Sizer, 40 Miss. 530; Kirtland v. Molton, 41 Ala. 548; Williams v. Jones, 12 Ind. 561; Anderson v. Ewing, 3 Litt. 245; Pierce v. Spader, 13 Ind. 458; Memphis, etc. R. Co. v. Walker, 2 Head 467; Williams v. Sims, 22 Ala. 512; Hart v. Lanman, 29 Barb. 410; Marr v. Prather, Clay v. Huston, Deak v. Snapp, *supra*.

the reason given for this rule is that where a party engages to pay so many dollars in bank notes, stock or scrip the articles are described and numerically calculated by the number they express; so that \$300 in railroad stock or bank notes is understood to mean that amount as expressed upon the face of the stock or note, and not the amount which will be equivalent in value to \$300 in money; while an instrument drawn for the payment of so many dollars in chattels—wheat, salt, cloth, wool or other like articles—is construed to mean so much of those things as will amount to the sum in money, because the things themselves cannot be counted by dollars, as the name is never applied to them.”²⁴

It has been already stated that if the property to be delivered has no market value its real value is to be ascertained by such elements of value as are attainable.²⁵ Of this character are promissory notes, stocks or projected corporations which fail to organize or any stocks in which there has been no traffic. Where such subjects are contracted to be sold and there is no market value, how may their value be established? Where, for instance, a contract is made for the transfer of bonds or a third person's note of a certain amount in exchange for property, upon breach it has been held that the measure of damages is what the note purports to be worth.²⁶ But in Alabama it is

²⁴ Henry v. R. C. Co., *infra*; Noonan v. Ilsley, 17 Wis. 314, 84 Am. Dec. 742; Anderson v. Ewing, 3 Litt. 245; German Union, etc. Ass'n v. Sendmeyer, 50 Pa. 67; Dillard v. Evans, 4 Ark. 175; Phelps v. Riley, 3 Conn. 266; Robinson v. Noble, 8 Pet. 181, 8 L. ed. 910; Parks v. Marshall, 10 Ind. 20; Orange & A. R. Co. v. Fulvey, 17 Gratt. 366; Mettler v. Moore, 1 Blackf. 342, 12 Am. Dec. 248; Wyman v. American P. Co., 8 Cush. 168; Hedges v. Gray, 1 Blackf. 216; Humaston v. Telegraph Co., 20 Wall. 20, 22 L. ed. 279; Hussey v. Manufacturers' & M. Bank, 10 Pick. 415; Thrasher v. Pike County R. Co., 25 Ill. 393;

Rutan v. Hinchman, 29 N. J. L. 11; Sargent v. Franklin Ins. Co., 8 Pick. 90, 19 Am. Dec. 306; Eastern R. Co. v. Benedict, 10 Gray 212; Smith v. Dunlap, 12 Ill. 184; Sirlott v. Tandy, 3 Dana 142; Breckinridge v. Rolls, 2 T. B. Mon. 150; January v. Henry, 3 id. 8; White v. Green, id. 155; Alexander v. Macauley, 6 Md. 359. See Thorington v. Smith, 8 Wall. 1, 19 L. ed. 361; Shelton v. French, 33 Conn. 489.

²⁵ Critchfield v. Julia, 147 Fed. 65, 77 C. C. A. 297, quoting the text; §§ 653, 654.

²⁶ Henry v. North American R. C. Co., 158 Fed. 79, 85 C. C. A. 409, citing the text; Fenton v. Perkins,

held that such an undertaking is not one to pay the face of the notes;²⁷ that the *onus* of proving the value is on the plaintiff; and that, in the absence of affirmative proof of value, only nominal damages can be given.²⁸ It is believed that the weight of authority is in favor of the rule that notes are, *prima facie*, worth their face; and that, in the absence of disparaging evidence, damages may be assessed on that basis, both in actions for failure to transfer and for conversion.²⁹ Where the contract is to pay in the notes of a third person the insolvency of such person may be shown to lessen the damages.³⁰

3 Mo. 23; Shelton v. French, 33 Conn. 489; Farwell v. Kennett, 7 Mo. 595; Child v. Pierce, 37 Mich. 155; Bates v. Cherry Valley R. Co., 3 Thomp. & C. 16; Thomas v. Dickinson, 12 N. Y. 364, 23 Barb. 431; Kirschmann v. Lediard, 61 Barb. 573; Vance v. McBurnett, 94 Ga. 251.

²⁷ Williams v. Sims, 22 Ala. 512; Jolly v. Walker, 26 id. 690; Wilson v. Jones, 8 id. 536; Carter v. Penn, 4 id. 140; Moore v. Fleming, 34 id. 491.

²⁸ Id. See also McKiel v. Porter, 4 Ark. 534; Elliott v. Chilton, 5 id. 181.

²⁹ Neff v. Clute, 12 Barb. 466; Baker v. Jordan, 5 Humph. 485; Pledger v. Wade, 1 Bay 35; Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; Neiler v. Kelley, 69 Pa. 403; Work v. Bennett, 70 id. 484; Eastern R. Co. v. Benedict, 10 Gray 212; Arnold v. Suffolk Bank, 26 Barb. 424; Thomas v. Dickinson, 23 id. 431, 12 N. Y. 364; Child v. Pierce, 37 Mich. 155; Clay v. Huston, 1 Bibb. 461; Parks v. Marshall, 10 Ind. 20; Smith v. Dunlap, 12 Ill. 184; Rutan v. Hinchman, 29 N. J. L. 112. See §§ 654, 1132.

In Kicknall v. Waterman, 5 R. I. 43, there was an agreement for the exchange of a specified lot of cotton

for a specified note of a third person at an agreed price for the cotton. The agreement was made through a broker acting for the parties, and, it being agreed that the purchaser's note should be given for the difference, nothing remained to be done but to deliver the cotton and receive the notes. It was held to be no defense to an action upon the contract for not delivering the cotton upon tender of the notes that, before the contract was entered into the maker of the first named note had failed, both parties and the broker being at the time of contracting ignorant of the failure; the law implying, in such a contract of exchange, no warranty of the solvency of the maker. The rule of damages in such a case was held to be the value of the note in money at the time of the contract at the stipulated price of the cotton to be received in exchange, with interest upon the value from the day the cotton was demanded; the note which had been deposited in the registry of the court to be at the disposal of the defendant.

³⁰ Derleth v. Degraaf, 51 N. Y. Super. 369; Potter v. Merchants' Bank, 28 N. Y. 655; Thayer v. Manley, 73 id. 307; Hynes v. Patterson, 95 id. 6.

§ 660. **Same subject.** Stocks, like promissory notes, have a nominal value expressed in dollars or pounds sterling; and as we have seen, on the breach of a contract for the delivery or transfer thereof recovery is based on their market value if they have such. In the absence of that evidence of value other circumstances must be resorted to; and their nominal value will perhaps be accepted where there is no other proof. In one case the plaintiff agreed to sell a certain patent to the defendants who, it was recited in the agreement, were about to organize a company for the manufacture of the articles under the patent; the plaintiff agreed to make such conveyance as should be necessary to carry the agreement into effect immediately upon the organization of the company; and in consideration thereof the defendants agreed to transfer to the plaintiff, among other things, an amount equal to \$50,000 of the capital stock of the corporation. The court held that the plaintiff was entitled to damages for the breach of his contract; that the amount depended on the value of the stock after the corporation was formed, to be proven by showing what such value would have been if the company had been formed, taking into consideration the property that was to be transferred, and also that by the breach the plaintiff was released from the obligation to transfer it. In such a case it was held to be erroneous to give the plaintiff damages to the nominal amount of the stock. Referring to a previous case,³¹ Ingraham, J., said: "In that case the rule of damages was said to be the amount of the obligation to be delivered in payment. But there the plaintiff had transferred to the defendant the property he had agreed to sell, and the court held that the plaintiff could recover the price at which the same was agreed to be sold. Here there has been no conveyance of the property, but the same is retained by the plaintiff, and he is only entitled to damages, and not to the nominal value agreed to be paid. The rule of damages is to be fixed by proof of what the value of the stock would have been if the contract had been performed, over and above the property retained by the plaintiff. Had the property been transferred by the plaintiff then,

³¹ Thomas v. Dickinson, 23 Barb. 431, reversed, 12 N. Y. 364.

in the absence of any proof of value, the rule adopted on the trial would have been the correct one." The trial court had directed a verdict for the nominal amount of the stock.³² Contracts are not unfrequently made upon executed considerations to pay a stated sum in specific articles. Upon failure to deliver the articles at the time they are due the contract furnishes, in the designated sum, the measure of damages. It is the sum stated and agreed to be paid, with interest.³³

Where the agreement is to pay a certain specified sum in specific articles at a stated price there is much conflict as to the criterion of damages. Thus, a contract to pay \$250 at a future day in brown cotton shirting at thirty cents per yard, was held to be an agreement to pay \$250, with an option to the maker to pay at maturity in brown shirting at the stipulated price per yard. The court say that the promise to pay \$250 necessarily implies a recognition of indebtedness to that amount; that the

³² *Kirschmann v. Lediard*, 61 Barb. 573; *Bates v. Cherry Valley*, etc. R. Co., 3 Thomp. & C. 16, 59 N. Y. 641.

In *Dyer v. Rich*, 1 Metc. (Mass.) 180, it was held that a promise that one shall receive a certificate of ten shares of the corporate stock of a certain manufacturing company whose capital stock shall be \$100,000, divided into no more than two hundred shares, is not fulfilled by a tender of a certificate of ten shares of stock in that company of which only \$35,000 are paid in, divided into seventy shares. And it was also held that the rule of damages for breach of such promise is the value of ten shares in the full capital stock, if it had been made up at the time stipulated, and the company had been then ready in good faith to operate upon such capital according to the charter.

³³ *Haywood v. Haywood*, 42 Me. 229, 66 Am. Dec. 277; *Alexander v. Macauley*, 6 Md. 359; *Marshall v.*

Ferguson, 23 Cal. 65; *Burr v. Brown*, 5 W. Va. 241. See *Currie v. White*, 6 Abb. Pr. (N.S.) 352; *Moore v. Hudson River R. Co.*, 12 Barb. 156.

In *Jones v. Foster*, 67 Wis. 296, the purchaser of mill machinery was to pay a certain price with interest, by sawing logs which the vendor was to furnish, in yearly instalments until all the timber on certain lands was cut; this might be done in two years, and was required to be done in four. After the expiration of four years the purchaser brought an action based on the failure to furnish logs. It appeared that if the agreement had been complied with the machinery would probably have been paid for by the sawing which would have been done in two years. The plaintiff recovered as damages a sum equal to the profits he would have made if the logs had been supplied, less the price of the machinery and two years' interest thereon.

residue of the note has no bearing on this point and relates exclusively to the mode of payment; that the manner in which the debt is to be paid, whether in cash or in collateral articles, has no relevancy in ascertaining the sum due; it points to an object wholly separate and distinct. This is an early and leading case upon the rule of damages which it lays down. Hosmer, C. J., delivering the unanimous opinion of the court, further expounded the contract by saying: "If the defendant, when the note was given, did not owe the plaintiff \$250 and this sum is to be considered as a penalty to enforce the contract, what is the value of the stipulation? It is a promise to pay *blank* yards of cotton shirting, and void for uncertainty. Expunge the \$250, or what is virtually the same thing, decide that it is not the real amount of debt or liquidated damages, and the note contains no criterion by which the number of yards of shirting can be estimated. Now, as the quantity of shirting is not mentioned, it necessarily follows that unless the \$250 is the sum due to the plaintiff, and therefore a standard by which to establish the value of the contract, there is no certain engagement in words or by reference from which the debt can be ascertained. It is admitted by the defendant that if the note had been for \$250, payable in cotton shirting, and there had ceased, that the damages, in the event of nonpayment, must be the sum expressed. This surrenders the question in controversy. Why should the above sum be payable in the event expressed? For this convincing reason: because the damages are *liquidated*. But if the damages had been liquidated the subsequent agreement that the shirting should be received at thirty cents per yard can have no possible effect on the prior liquidation. It was not inserted for that purpose, but to obviate the necessity of recurring to parol proof for the ascertainment of the value of the shirting should it be delivered. For this end the parties agreed on a certain arbitrary valuation, which they anticipated would probably be the real value, but which in all events they, for their mutual convenience, agreed to consider as such. This is the whole scope and effect of this latter clause in the note: that the defendant might know how many yards of shirting to deliver, and the plaintiff how much he was entitled to demand if it

should be tendered. The case has been argued for the defendant as if there had been a promise to deliver a certain number of yards of shirting and an omission to deliver them. That would present a question of unliquidated damages, in which resort must be had to parol testimony to ascertain the value of the contract, but it has no imaginable bearing on the case before the court in which the debt is ascertained. It has been contended that in no case can the plaintiff recover a sum greater in amount than the value of the article which, had it been tendered, would have satisfied the contract. This principle is manifestly incorrect and is not always true, even when applied to a case where the damages have not been liquidated. In a contract for the transfer of stock on a certain day the party promising may be relieved by a strict performance of his engagement; but, if he omit to do it, the court will award in damages against him the price of the stock although it has risen at the moment when the judgment is rendered. The construction which I have given to the note in question is according to the obvious intention of the parties, and perfectly equitable in its result. The sum expressed is to ascertain the indebtedness, that is \$250; and the residue to give an option to the defendant to pay the debt in collateral articles at a stipulated price. If the payment were not made, what must be the expected consequence? That this part of the agreement should be as if it had never existed; and then the whole contract should be comprised in the expression, 'I promise to pay \$250.' Nothing can be more conformable to natural justice. The plaintiff will receive the precise sum admitted to be his due, and no more. And if the defendant is in a condition less eligible than he would have been if he had availed himself of the option allowed him it was his voluntary choice. After he had renounced the privilege accorded to him, to limit the recovery of the plaintiff by the value of the cotton shirting, would be to give the defendant the abnegated option in another shape, in defiance of equity, and in opposition to the agreement of the parties." ³⁴

In a case in which there was a contract for the sale and pur-

³⁴ Brooks v. Hubbard, 3 Conn. 58, 8 Am. Dec. 154.

chase of cattle at an agreed price, to be paid for in land, also at an agreed price, the vendor was entitled to recover that price in money. It may be, said the court, that he had the choice of several remedies, and that he doubtless could recover the value of the land; but he was not confined to that measure of damages. "We think the case presented by the pleadings and evidence is analogous to that of a note payable in property. If the maker of such a note fails to deliver the specific property on or before the maturity of the note it becomes a money demand."³⁵

§ 661. **Same subject; author's opinion.** The view of the law laid down in the Connecticut case, quoted from in the preceding section, was adopted afterwards in New York. There were earlier decisions there to the same effect, but they received less consideration. The clause of the contract providing for payment in specific articles and fixing the value was deemed to be inserted for the benefit of the debtor; it offers him a mode of payment which he can adopt or not at his pleasure. The contract thus construed is an alternative one, authorizing the debtor to pay the sum stated therein in specific articles when due or in money.³⁶ The chancellor remarked in the course of his opinion that "the language is certainly not the best which could be used to express such an intent, and probably if the contract was drawn by a lawyer he would put it in the alternative, giving the debtor the option in express terms to pay the debt in money or in wheat at the fixed rate per bushel. But certainly if the intention of the parties was that a certain number of bushels of wheat should be absolutely delivered in payment a lawyer would draw the note for so many bushels of wheat in direct terms."³⁷ In some other states such a contract is construed as an agree-

³⁵ *Corbett v. Sayers* 29 Tex. Civ. App. 68, citing *Baker v. Todd*, 6 Tex. 273, 55 Am. Dec. 775; *Short v. Abernathy*, 42 Tex. 94; *Bummel v. Houston*, 68 Tex. 10.

³⁶ The option does not survive the time fixed for performance; after that the contract is an absolute one for the payment of money. *New York News Pub. Co. v. National S.*

Co., 148 N. Y. 39; *Pinney v. Gleason*, 5 Wend. 393, 21 Am. Dec. 223; *Choice v. Moseley*, 1 Bailey 136, 19 Am. Dec. 661; *Perry v. Smith*, 22 Vt. 301; *Smith v. Coolidge*, 68 Vt. 516; *Deel v. Berry*, 21 Tex. 463, 73 Am. Dec. 236.

³⁷ *Pinney v. Gleason*, *supra*; *Harrington v. Wells*, 12 Vt. 505; *Perry v. Smith*, 22 Vt. 301; *West v. Went-*

ment for the delivery of the specific articles, and in case of breach by non-delivery the rule of damages is the value of the articles, and not the sum stated therein.³⁸

Uninfluenced by any traditional use or extraneous practical construction of such contracts in states or localities where they are common, giving them or tending to give them, by custom, a special meaning which the language does not suggest, they appear to the writer to be contracts, not simply to pay the sum mentioned, but mutually binding to make and receive payment as the instrument specifies, and that upon default of the debtor the general principle in respect to the *quantum* of damages which applies generally will govern; that is, that the creditor shall receive such sum in damages as will place him in as good condition, as though the goods or property had been paid according to the contract. The divergence of the decisions is wholly attributable to the singularity of holding the promise to pay in property at a specified price as not absolutely obligatory; that it imposes no absolute obligation on the debtor, nor confers any right on the creditor. A valid promise, for instance, to pay \$250 in shirting at thirty cents a yard is obviously an absolute promise, in terms, to pay eight hundred and thirty-three and one-third yards; read as the law construes contracts generally there is no room for interpretation. The creditor is not only entitled to be paid \$250, but he is entitled to receive it in shirting at that price, and the debtor binds himself to make payment accordingly. If there is a want of directness in the agreement and it would be more natural to express the intention and legal effect by a direct promise of the number of yards, it may be answered that it is not a legitimate deduction from this slight circuitry that the parties do not mean what they say; it is more

worth, 3 Cow. 82; Smith v. Smith, 2 Johns. 243. See Haywood v. Haywood, 42 Me. 229, 66 Am. Dec. 277; Trowbridge v. Holcomb, 4 Ohio St. 38.

³⁸ Meason v. Phillips, Addison 346; Edgar v. Boise, 11 S. & R. 445; McDonald v. Hodge, 5 Hayw. 86; Gregg v. Fitzhugh, 36 Tex. 127;

Price v. Justrobe, Harp. 111; Wilson v. George, 10 N. H. 445; Mattox v. Craig, 2 Bibb 584; Cole v. Ross, 9 B. Mon. 393, 50 Am. Dec. 517; Starr v. Light, 22 Wis. 414; Pierson v. Spaulding, 61 Mich. 90; Johnson v. Dooley, 65 Ark. 71, 40 L.R.A. 74.

objectionable to infer that they mean something which they have not said, either directly or by some circumlocution. The interpretation which allows the promisor an option to pay the \$250 in money in satisfaction of his promise ignores a part of the contract and treats it as expunged. The promise as made is not an absolute promise to pay \$250, either in money or in value. If the shirting should be worth just thirty cents a yard when the pay day comes the nominal would be the real value, not otherwise. If the shirting should be worth more than thirty cents per yard when due the promise to the extent of that excess would be for more than \$250. Hence by making this contract there is no precise liquidation of indebtedness. Nor is there any implication from the contract that the indebtedness ever existed in any other form. If it in fact did previously exist as an absolute debt for that amount the action for breach of this contract would not be affected by that circumstance. Doubtless, after a default an action might be sustained on the indebtedness in its prior form as though the promise to pay it in specific articles had never been made; because the making of the contract in such case, without performance, would not satisfy the debt; receiving it would be only a conditional payment, and after default no payment at all.

In a case in Ohio where a contract was entered into for work at a certain price, with a stipulation that the same was to be paid for in specific articles at an agreed rate and price, the debtor was held to have an election to deliver the articles or pay the money if such right is expressed or fairly to be implied. If not expressed, and the subject-matter or *res gestæ* indicates that no such right of election was contemplated by the parties, then the general rules of law relating to executory sales are applicable and the contract is a single and imperative promise to deliver the specific articles. If the right of election to pay money or the articles at the option of the debtor exists and the latter are not delivered the plaintiff should recover the amount of the debt and interest; but if no such election is expressed or implied the plaintiff is entitled to the market value of the articles with interest.³⁹

³⁹ Cleveland & P. R. Co. v. Kelley, 5 Ohio St. 180.

§ 662. **Consequential damages on contracts of sale.** The damages which a purchaser is generally entitled to for failure of the vendor to deliver the property contracted are measured by the rules which have been discussed in the preceding pages.⁴⁰ Under special circumstances, known to the parties at the time of contracting, the damages may be enhanced beyond the real or market value of the property. This is the case when it is sold for some special purpose of the purchaser and where, in consequence of the non-delivery, he, in respect to that intended purpose, sustains damages beyond its value, or the difference between the contract and market price of the property. If a person contracts with another for the sale of personal property and breaks his contract the proper damages are such as may fairly and reasonably be considered either as arising naturally from the breach of contract or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made it as the probable result of its breach.⁴¹ It is but the general rule of damages for breach of contract applied to contracts of sale. If the contract be simply one for mer-

⁴⁰ See, also §§ 45, 46.

⁴¹ *Globe Ref. Co. v. Landa C. O. Co.*, 190 U. S. 540, 47 L. ed. 1171; (the consequences must be contemplated at the time of making the contract); *Green v. Lineville D. Co.*, 150 Ala. 112; *Richner v. Plateau L. S. Co.*, 44 Colo. 302, quoting the text; *Cooper v. National F. Co.*, 132 Ga. 529; *Leek M. Co. v. Langford*, 81 Miss. 728; *Mark v. Williams C. Co.*, 204 Mo. 242; *Delafield v. Armsby*, 131 App. Div. (N. Y.) 572; *Hoskins v. Scott*, 52 Ore. 271; *Chisholm & M. Mfg. Co. v. United States C. Co.*, 111 Tenn. 202; *Sedro V. Co. v. Kwapil*, 62 Wash. 385; *Adams Mach. Co. v. South State L. Co.*, 2 Ala. App. 471; *O'Neal v. Seim*, 158 N. C. 588; *Emu v. Gravel & R. M. Co.*, 3 New South Wales St. Rep. 204, stated in note to sec. 52; *Hadley v. Baxendale*, 9 Ex. 341; *Griffin v. Colver*, 16 N. Y. 489;

Smeed v. Foord, 1 Ellis & E. 602; *Tirry v. Hogan*, 181 Mo. App. 48.

The holder of an insurance policy upon a house he has sold is not liable because of his failure to assign it as agreed for the loss resulting from the destruction of the house. The cost of insuring it for the remainder of the term measures his responsibility. *Dodd v. Jones*, 137 Mass. 322; *Elfenbein v. Abbonanza*, 64 N. Y. Misc. 176.

The damages recoverable on the breach of a vendor's contract not to sell goods like those purchased by the vendee to other parties in his locality cannot exceed the loss of profits on goods purchased by him at the time the contract was made. *Saddlery H. Mfg. Co. v. Hillsborough Mills*, 68 N. H. 216, 73 Am. St. 569.

chandise at a certain price, to be delivered at a designated time and place, the rule of the difference between the contract and market price and interest affords full compensation; for the vendee may go into the market and purchase like goods at the current price and thus save himself from loss. Where, however, particular goods or those of a designated description are bargained for for a special purpose, or for delivery at a particular time and place in view of ulterior contracts or preparations, a failure of the vendor to perform may cause injury which would not be compensated by that rule; but unless, according to the great preponderance of authority, that purpose or the special circumstances from which, in case of default, such consequential damages would proceed, were communicated to the seller when the bargain was made, such damages, though they may arise naturally and proximately from the breach of the contract, are yet exceptional and cannot be said to have entered into the contemplation of the parties.⁴²

⁴² *McManus v. American W. Co.*, 126 App. Div. (N. Y.) 68; *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288; *Perry Tie & L. Co. v. Reynolds*, 100 Va. 624 (demurrage and dead freight on deficiency of cargo for vessel sent to receive goods); *Smalls v. Brennan*, 14 Ga. App. 84; *Baker v. Shaw*, 78 Wash. 233; *Holloway v. White-D. S. Co.*, 151 Fed. 216, 10 L.R.A.(N.S.) 704, 80 C. C. A. 568, citing the text; *Bliss v. Buffalo T. C. Co.*, 131 Fed. 51, 65 C. C. A. 289; *Cassell's Mill v. Strater G. Co.*, 166 Ala. 274; *Nichols v. Rasch*, 138 Ala. 372; *Arizona P. Co. v. Racine-S. Co.*, 13 Ariz. 283; *Brownfield v. Jones*, 98 Ark. 495; *Marshall v. Clark*, 78 Conn. 9, 112 Am. St. 84; *Huggins v. Southeastern L. & C. Co.*, 121 Ga. 311; *Oxford K. Mills v. American W. Co.*, 6 Ga. App. 642; *Piedmont W. Co. v. Hudgens*, 4 Ga. App. 393; *National C. Co. v. Nichols*, 155 Ill. App. 44; *Ledgerwood v. Bushnell*, 128 id. 555; *Cobb C. Co. v. Crocker-*

W. Co., 125 id. 241; *Union F. Works v. Columbia I. & S. Co.*, 112 id. 183; *Bushnell v. King B. Co.*, 140 Iowa 405; *Creamery P. Mfg. Co. v. Benton County O. Co.*, 120 Iowa 584; *Robinson L. Co. v. Burton*, 128 La. 120; *Henry v. Hobbs*, 165 Mich. 183 (the vendor's knowledge is immaterial if he did not obtain it from the vendee when the contract was made); *Collins v. Luban* (N. Y. Misc.), 127 (N. Y.) Supp. 461; *Tillinghast v. Cotton Mills*, 143 N. C. 268; *Critcher v. Porter*, 135 N. C. 542; *David v. Whitmer*, 46 Pa. Super. 307; *Gadsden v. Home F. & C. Co.* (S. C.), 72 S. E. 15; *Foss v. Heinman*, 144 Wis. 146; *First Nat. Bank v. Snell*, 144 Wis. 433; *Fairbanks v. Hooper*, 147 Ky. 154; *Waynesville W. Mfg. Co. v. Berlin M. Works*, 144 N. C. 689; *Penn v. Smith*, 104 Ala. 445; *Sanderlin v. Willis*, 94 Ga. 171; *Orr v. Farmers' Alliance W. & C. Co.*, 97 Ga. 241 (the last two cases add the qualifi-

A view somewhat at variance with that stated and with the current of authority has recently been held in Virginia by a majority of the judges of the court of last resort. It is especially significant because of the influence exercised by it over some other courts and is indicative of judicial discontent with the established rule. In that case there was no market at or near the place appointed for the delivery of the property, which was paid for in advance, and which the vendor did not deliver. Subsequent to the making of the contract a resale of the property was made at an advance over the purchase price. The price upon the resale was held to afford the best and very

cation to the rule stated in the text—unless, notice of the contract of resale was brought home to the vendor before he breached his contract); *Rhea Thielens I. Co. v. Racine M. & W. I. Co.*, 89 Ill. App. 463; *Cockburn v. Ashland L. Co.*, 54 Wis. 619; *Gill v. Johnson-B. C. Co.*, 84 Mo. App. 456; *Denver, etc. R. Co. v. Hutchins*, 31 Neb. 572; *Moffitt-W. D. Co. v. Byrd*, 92 Fed. 290, 34 C. C. A. 351; *Watson v. Gray*, 16 L. T. Rep. 308; *Guetzkow v. Andrews*, 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. 909; *Coffin v. State*, 144 Ind. 578, 55 Am. St. 188; *Reed L. Co. v. Lewis*, 94 Ala. 626; *Wappoo Mills v. Commercial G. Co.*, 91 Ga. 396; *Detroit W. L. Works v. Knaszak*, 13 N. Y. Misc. 619; *Buffalo B. W. Co. v. Phillips*, 64 Wis. 338; *Goodkind v. Rogan*, 8 Ill. App. 413 (cost of reshipment of goods not according to warranty, not recoverable); *Jones v. National P. Co.*, 13 Daly 192; *Liljengren F. Co. v. Mead*, 42 Minn. 420; *Parks v. O'Connor*, 70 Tex. 377; *Cuddy v. Major*, 12 Mich. 368; *Young v. Cureton*, 87 Ala. 727; *Mann v. Taylor*, 78 Iowa 355; *Rahm v. Deig*, 121 Ind. 283; *Citizens' N. G. Co. v. Shenango N. G. Co.*, 138 Pa. 22; *English v. Spokane C. Co.*, 57 Fed. 451, 6 C. C. A. 416; *Loner-*

gan v. Waldo, 179 Mass. 135, 88 Am. St. 365; *Wilson v. Russler*, 91 Mo. App. 275; *South Gardiner L. Co. v. Bradstreet*, 97 Me. 165; *Crug v. Gorham*, 74 Conn. 541; *Pope v. Ferguson*, 82 N. J. L. 566 (the rule is not changed by the statute of 1907); *Wolfinger v. Mayo M. Co.*, 21 Pa. Dist. 189; *Weld & Co. v. Victory Mfg. Co.*, 205 Fed. 770.

"The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." *British Columbia S. M. Co. v. Nettleship*, L. R. 3 C. P. 499; *Horne v. Midland R. Co.*, 7 id. 583, 8 id. 131.

Regardless of the motive which led to the breach of the contract, mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account if he fails to deliver the goods; there must be consent to assume such liability. *Globe Ref. Co. v. Landa C. O. Co.*, 190 U. S. 540, 47 L. ed. 1171.

satisfactory evidence of its value. Referring to the distinction stated between a resale made at an advance subsequent to a contract of purchase and one made before that event and of which the vendor is informed, the court observe: "This is a rather fanciful distinction. It is not in accordance with the ordinary usages of trade that a dealer, a man buying to sell again, should disclose his dealings with the same goods at a profit to his vendor. But if there were any sound principle upon which this could rest, if the seller could be supposed to enter into his contract upon the basis of a resale in which he had no interest, still, in this case, it is reasonable to suppose that a lumber-getter selling seven hundred thousand feet of lumber to a dealer in lumber should know (1) that it was for a resale; (2) that this resale was to be on a profit; and (3) that he should know that his vendee would be damaged to the amount of his profit if the vendor should prove faithless."⁴³ But

⁴³ *Trigg v. Clay*, 88 Va. 330, approved in *White v. Leatherberry*, 82 Miss. 103. This case was heard on demurrer. The opinion contains this: It must be borne in mind that this was a contract made in the sawmill business for the purchase of logs to be manufactured and sold as lumber, and whatever would be the usual course of dealing by the purchaser with the logs purchased, in the usual and ordinary course of such business, must necessarily have been known to the defendant and within the contemplation of the parties at the time the contract was made; *Ober v. Katzenstein*, 160 N. C. 439. See *Sterling O. Co. v. House*, 25 W. Va. 64, 90, 93; *Neal v. Pender-H. H. Co.*, 122 N. C. 104, 65 Am. St. 697, stated in § 663; see § 666. In opposition to the Virginia case, *Lapp v. Illinois W. Co.*, 104 Ill. App. 255.

The view of the Virginia court has been approved in a late case in Washington in which the resales

were made after the contract of sale. It is said: Clearly, appellant then knew that a failure to furnish the shooks would probably result in loss of profits to respondent. The fact that there were then no actual sales made by respondent and no existing basis upon which the amount of his profit could be determined does not render any less certain the fact that the parties then had in mind the probability of future profits from the resale of the shooks. It is beyond controversy that appellant knew at the time that that was the sole inducement prompting respondent to contract for the shooks. The question of whether or not such prospective profits are too uncertain in amount to become a measure of damages in place of market value has more to do with the proof of the amount of such damages than with the contemplation of the parties as to the probable profits of the purchaser. *Sedro V. Co. v. Kwapil*, 62 Wash. 385.

according to the accepted rule if, at the time of contracting, sufficient notice be given of the intended use or of other and dependent plans the vendor, on failure to deliver or on delaying delivery, will be subject to proximately consequential damages. Thus, if the buyer has, in advance, made a contract for resale and discloses that fact to his vendor, who undertakes to furnish the commodity and deliver it at a specified time and place, arranged with reference to enabling the buyer to fulfill his contract for resale, and the vendor fails to deliver the property he will be liable to damages on the basis of the profits the vendee would realize upon his contract for such resale.⁴⁴ Those

- ⁴⁴ *Wilt v. Hammond Bros.*, 179 Mo. App. 406; *Johnson v. Miller*, — Tex. Civ. App. —, 163 S. W. 592; *Howard S. Co. v. Wells*, 176 Fed. 512, 100 C. O. A. 70; *Pacific S. M. Works v. California C. Co.*, 164 Fed. 980, 91 C. C. A. 108; *California C. Co. v. Pacific S. M. Works*, 144 Fed. 886; *Wilmoth v. Hamilton*, 127 Fed. 48, 61 C. C. A. 584; *Duvall v. Ferwerda*, 146 Mich. 13; *Chisholm & M. Mfg. Co. v. United States C. Co.*, 111 Tenn. 202; *Weatherford M. & F. Co. v. Tate*, 49 Tex. Civ. App. 392; *Hagan v. Rawle*, 143 Ill. App. 543. (The court said: It was not necessary that the terms of the contracts by which plaintiff agreed to furnish stone for use in the erection of buildings should be communicated to defendant. It was sufficient if he knew when he contracted with plaintiff the stone was intended to be so used); *Armeny v. Madson*, 111 Ill. App. 621; *Iowa B. Mfg. Co. v. Herrick*, 126 Iowa 721; *Goldston v. Wade* (N. Y. Misc.), 123 N. Y. Supp. 114; *Schutzman v. Lehman*, 61 N. Y. Misc. 648; *Kirby L. Co. v. Cummings* (Tex. Civ. App.), 122 S. W. 273; *Pittman v. Bloch Q. Co.*, 48 Tex. Civ. App. 320; *Wolf v. Galbraith*, 35 Tex. Civ. App. 505; *Raleigh L. Co. v. Wilson*, 69 W. Va. 598; *Robinson v. Hyer*, 35 Fla. 544, 577; *Fontaine v. Baxley*, 90 Ga. 416; *Bluegrass C. Co. v. Luthy*, 98 Ky. 583; *Wakeman v. Wheeler & W. Mfg. Co.*, 101 N. Y. 205, 54 Am. Rep. 676, stated in § 69; *Liggett A. Co. v. Michigan B. Co.*, 106 Mich. 445; *Shadbolt & B. I. Co. v. Topliff*, 85 Wis. 513; *Jordan v. Patterson*, 67 Conn. 473; *Hammer v. Schoenfelder*, 47 Wis. 455, stated in § 50; *Vickery v. McCormick*, 117 Ind. 594; *Jones v. National P. Co.*, 13 Daly 92; *Abbott v. Hapgood*, 150 Mass. 248, 15 Am. St. 193, 5 L.R.A. 586; *Van Winkle v. Wilkins*, 81 Ga. 93, 12 Am. St. 299; *Knowlson v. Piehl*, 130 Mich. 597; *South Gardiner L. Co. v. Bradstreet*, 97 Me. 165; *Currie F. Co. v. Krish*, 24 Ky. L. Rep. 2471; *Eagle T. Co. v. Barr*, 32 N. Y. St. Rep. 299; *Richardson v. Chynoweth*, 26 Wis. 656; *Hamilton v. Magill*, 12 L. R. Ire. 186; *Carpenter v. First Nat. Bank*, 119 Ill. 352; *Ramsey v. Tully*, 12 Ill. App. 463; *Stewart v. Power*, 12 Kan. 596; *Watson v. Bates*, 5 Up. Can. C. P. 366; *Johnson v. Matthews*, 5 Kan. 122; *Morrison v. Lovejoy*, 6 Minn. 319; *Messmore v. New York S. & L. Co.*, 40 N. Y. 422; *Imperial C. Co. v. Port Royal C. Co.*, 138 Pa. 45; *Border City I. & C. Co. v.*

profits may justly be said to have entered into the contemplation of the parties in making the contract. This rule is based upon reason and good sense, and is in strict accordance with the plainest principles of justice. It affirms nothing more than that where a party sustains a loss by reason of a breach of contract he shall, so far as money can do it, be placed in as good a situation by the recovery of damages as if the contract had been performed.⁴⁵ A vendor who knows that goods have been ordered for the purpose of being resold at a profit on an existing contract is chargeable with knowledge of such profits as the market price at the time delivery was due would have brought the vendee.⁴⁶ In some cases the rule is very properly less strict, and a vendor who knows that his vendee has bought goods to

Adams, 69 Ark. 219; *Pape v. Ferguson*, 28 Ind. App. 298, 305, citing the text; *Gunther v. Taylor*, 23 Ky. L. Rep. 536; *Tradewater C. Co. v. Lee*, 24 Ky. L. Rep. 215; *Lapp v. Illinois W. Co.*, 104 Ill. App. 255; *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44; *Perry T. & L. Co. v. Reynolds*, 100 Va. 264; *Irwin v. Kelly*, 176 Ill. App. 178; *Finkelstein v. Selwitz*, 79 N. Y. Misc. 28; *Cocke v. Big Muddy C. & I. Co.* (Tex. Civ. App.), 155 S. W. 1019; *Whitman v. Namquit W. Co.*, 206 Fed. 549.

It has been suggested that such damages may not be recovered if the vendor was to furnish only part of the goods required for the special purpose, of which he had knowledge, especially if they were claimed between a contractor and a selling firm of which he is a member. *Atlas P. C. Co. v. Hopper*, 116 App. Div. (N. Y.) 445.

⁴⁵ *Gagnon v. Sperry*, 206 Mass. 547; *Shouse v. Neiswanger*, 18 Mo. App. 236, 244, quoting the text: *Messmore v. New York S. & L. Co.*, 40 N. Y. 422. It was also held in this case that where the article furnished by the seller was not such

as the purchaser was entitled to, and the seller was notified to that effect the purchaser had a right to sell it at the place of delivery for the best price he could obtain, without giving notice to the defendant of the time and place of such sale; that after the sale he could recover from the vendor the difference between the sum paid and the sum realized on the resale.

⁴⁶ *Jordan v. Patterson*, 67 Conn. 473; *National C. Co. v. Nichols*, 155 Ill. App. 44; *Carpenter v. First Nat. Bank*, 119 Ill. 352; *Lapp v. Illinois W. Co.*, 104 Ill. App. 255; *Hill v. Parsons*, 110 Ill. 107; *Graham v. Bigelow*, 46 Nova Scotia 116, quoting the text.

There cannot be a recovery of the profits on contracts the vendee might have made, but had not, when the breach occurred. *Iowa B. Mfg. Co. v. Herrick*, 126 Iowa 721.

Where the seller controls the supply of the goods and is told at the time their sale was agreed upon that the buyer was negotiating their sale abroad, and that the sale would be confirmed upon the execution of the contract, it is immaterial that the

fill an order given by a third person is liable to such vendee for the price he was to receive although no notice of it was given the vendor if such price is not such as to yield an extraordinary and unusual profit, one which could not reasonably be presumed to have been in contemplation by the vendor at the time of contracting. The price at which the first vendee sold is not to be presumed to be unreasonable; but if it is the vendor will not be liable unless it is shown that he had knowledge of it.⁴⁷ Expenses incurred in making sales in anticipation of delivery may be recovered as well as the profits which would have been made;⁴⁸ and also the damages which a vendee has been obliged to pay his sub-vendee for failure to deliver the goods bargained for. In order that there may be a recovery of the loss of profits to the vendee's business because of the vendor's breach of contract, it must be shown that the business had been in successful operation for such length of time as to give it permanency and recognition, and that it was producing a profit which is approximately ascertainable.⁴⁹

In a Kentucky case there was neglect to supply a sawmill and fixtures. The vendee undertook to show that it had cer-

subcontract had not been made at that time or that the price to be paid thereunder was not disclosed. *Delafield v. Armsby*, 131 App. Div. (N. Y.) 572.

"Special damages for a failure to deliver goods may be considered within the contemplation of the parties only where the goods cannot be obtained from other sources and the purpose for which the goods were intended was known to both parties." *Collins v. Luban* (N. Y. Misc.), 127 N. Y. Supp. 461, citing *Delafield v. Armsby*, 131 App. Div. (N. Y.) 572, affirmed on opinion below, 199 N. Y. 518.

⁴⁷ *Guetzkow v. Andrews*, 92 Wis. 214, 224, 52 L.R.A. 209, 53 Am. St. 909.

⁴⁸ *Wilkes v. Stacy*, 113 Ark. 556; *Cleveland P. & S. W. Co. v. Con-*

sumers C. Co., 75 Ohio 153; *Mirandona v. Burg*, 51 La. Ann. 1190; *Harrow Spring Co. v. Whipple H. Co.*, 90 Mich. 147.

The code of Georgia declares that any necessary expense which one of two contracting parties incurs in complying with the contract may be recovered as damages. This has no application where the party who seeks to recover such expense was to perform the contract at his own cost if he also seeks to recover lost profits. *Fontaine v. Baxley*, 90 Ga. 416.

It seems that the rule in Alabama is otherwise if like goods can be obtained in the market. *Alabama C. Co. v. Geiss*, 143 Ala. 591.

⁴⁹ *States v. Durkin*, 65 Kan. 101; *Brown v. Hadley*, 43 Kan. 267; *Creamery P. Mfg. Co. v. Benton*

tain contracts with parties to saw timber for them; it did not appear that the vendor knew of these; the vendee also proved that a tramroad on his land was out of repair, and that he was damaged because he could not repair it. As to the first, the supreme court ruled that it could not be shown what profits would have been realized on the contracts; but there might be a recovery of the reasonable profits the vendee would have made during the time intervening between the making of the contract and its termination by him. He was also entitled to recover the reasonable expense of trips made for the purpose of ascertaining why the mill had not been shipped. The damages sustained because of inability to repair the tramroad were too remote and speculative.⁵⁰ In restoring an injured party to the same position he would have been in if the contract had not been broken account must be taken of losses suffered as well as of profits prevented.⁵¹ If the vendor was told at what

County C. Co., 120 Iowa 584. See *Connersville W. Co. v. McFarlan C. Co.*, 166 Ind. 123, 3 L.R.A.(N.S.) 709; sec. 59. Compare *Martin v. Bunker-C. L. Co.*, 167 Mo. App. 381.

In *Doane v. Preston*, 183 Mass. 569, a bill in equity was filed against the officers of a corporation based on their neglect to enter into a contract for the exclusive right to manufacture, sell or lease patented machines, patents for which the corporation owned. It did not appear that the machines were ever used, or that a demand for them existed. The proof of damages was too indefinite to warrant a recovery.

⁵⁰ *Enterprise Mfg. Co. v. Campbell* (Ky.), 121 S. W. 1040; *Tirry v. Hogan*, 181 Mo. App. 48.

⁵¹ *Kentucky D. & W. Co. v. Lillard*, 160 Fed. 34, 87 C. C. A. 190; *California C. Co. v. Pacific S. M. Works*, 144 Fed. 886; *Lillard v. Kentucky D. & W. Co.*, 134 Fed. 168, 67 C. C. A. 74; *Campfield v. Sauer*, 189 Fed. 576, 38 L.R.A.(N.S.) 837,

111 C. C. A. 14; *Baer v. Mobile C. & B. Mfg. Co.*, 159 Ala. 491; *Monad Engineering Co. v. Stewart*, 2 Boyce (Del.) 35; *Garfield & P. C. Co. v. Pennsylvania C. & C. Co.*, 199 Mass. 22 (demurrage on vessels sent to receive undelivered coal); *Czarnikow v. Baxter*, 146 App. Div. (N. Y.) 81; *Raymore R. Co. v. Pfotenhauser-N. Co.*, 145 App. Div. (N. Y.) 163; *Shurter v. Butler*, 43 Tex. Civ. App. 353; *Wallace v. Knoxville W. Mills*, 117 Ky. 450, citing the text; *Sutton v. Wannamaker* (N. Y. Misc.), 95 N. Y. Supp. 525; *Interstate E. Co. v. Archer*, 64 Wash. 629; *Jordan v. Patterson*, *supra*; *Australian S. Co. v. British Broken Hill P. Co.*, 2 The Argus, L. R. 173; *Whittaker v. Welch*, 2 Pugs. (New Bruns.) 436; *Enterprise Mfg. Co. v. Campbell* (Ky.), 121 S. W. 1040; *Ober v. Katzenstein*, 160 N. C. 439; *New Iberia S. Co. v. Lagarde*, 130 La. 387; *Graham v. Bigelow*, *supra*, quoting the text; *Martin v. Bunker-C. L. Co.*, 167 Mo. App. 381;

time the vendee desired to put his salesmen on the road he is liable for the loss of their time, although it was not said to the vendor that the salesmen would be idle if the goods were not furnished at the time agreed upon. "In determining the question of damages in such a case the seller ought to be held to have in contemplation the ordinary and usual methods of the business of the purchasers, or of the trade with which he transacts business."⁵² Where there was a failure to deliver drain pipe to a contractor for use in a ditch already dug the vendor, being notified that delay in delivery might result in the washing in of the ditch in case of rain, must answer for the expense incurred by the contractor in redigging the ditch, that result having been caused by reason of his delay.⁵³ The vendor's liability does not extend to the reimbursement of the vendee for assuming liability to his contractor for loss because of being prevented from doing work on other contracts.⁵⁴ In some states

Thomas I. Co. v. Jackson I. Co., 131 Mich. 130 (increased expense of using a substitute for the article bought, which could not be obtained in the market); *Cole v. Swanston*, 1 Cal. 51, 52 Am. Dec. 288 (efforts to obtain property bought); *Warren v. Mayer Mfg. Co.*, 161 Mo. 112.

The rental value of a manufacturing plant and interest on the capital invested in it may be recovered where it remains idle in consequence of the nondelivery of material necessary for its operation. *Nicholls v. American S. & W. Co.*, 117 App. Div. (N. Y.) 21.

A vendor who violates his obligation to maintain the wholesale price of an article at a specified figure must answer to a retail customer who has the article in stock, and which could not be obtained elsewhere, for its lessened value. *Lozier v. Hannan*, 12 Colo. App. 59.

In *Richner v. Plateau L. S. Co.*, 44 Colo. 302, the defendant failed to deliver hay, which could not be obtained elsewhere, knowing the

purpose for which it was to be used. The plaintiff was compelled to drive his animals where food could be obtained; some of them died, and others lost in weight. These losses were recovered for.

The cost of storing goods shipped after notice of the termination of the contract, the freight paid on them and the expense of necessary repairs may be recovered. *Owensboro W. Co. v. Riggan*, 151 N. C. 303.

⁵² *Blumenthal v. Stahle*, 98 Iowa 722. Compare *Moffitt-W. D. Co. v. Byrd*, 92 Fed. 290, 34 C. C. A. 351. See *Farrer v. Caster*, 17 Colo. App. 41; *Cleveland P. & S. W. Co. v. Carbon Co.*, *supra*; *Pickering Lfg. Co. v. Gordon*, — Tex. Civ. App. —, 168 S. W. 14.

⁵³ *Shurter v. Butler*, *supra*; *Loneragan v. Waldo*, 179 Mass. 135, 88 Am. St. 365; *Interstate E. Co. v. Archer*, 64 Wash. 629.

⁵⁴ *Raymore R. Co. v. Pfotenhauser-N. Co.*, *supra*.

the vendee cannot recover damages sustained on contracts of resale unless he was unable to procure goods of the specified quality elsewhere.⁵⁵ Damages based on the cost of operating a mill the defendant was not bound to operate are too speculative;⁵⁶ and so of damages caused by interrupting the business of the vendee by retaking the goods.⁵⁷ The vendee must exercise a reasonable degree of prudence to avoid consequential damages.⁵⁸ These may be materially increased by the conduct of the vendor in giving assurances that the property will be delivered within a short time; these justify the vendee in holding in readiness a vessel engaged to transport the property and enable him to recover to the extent of his liability for demurrage and dead freight on the deficiency in her cargo.⁵⁹ A buyer who fails to exercise his right to specify the various grades and quantities of goods he may order and refuses to accept any of them may not object that they were not tendered, the seller being ready and willing to deliver them. The recovery will be based on the profits which goods of the lowest quality the buyer could have selected would have realized.⁶⁰ A vendor of blooded animals sold for use in a foreign country by breaching his contract to furnish certificates of their registration becomes liable for the difference between their value there as registered and unregistered.⁶¹ Any expense saved by the purchaser because his contract with his vendee is not executed is to be deducted from the recovery.⁶²

§ 663. **Same subject; illustrations.** If a vendor in guano knows that the buyer has ordered it for use as a fertilizer and fails to deliver a portion of the quantity ordered and the latter

⁵⁵ *National C. Co. v. Cincinnati, G. & C., C. & M. Co.*, 168 Mich. 198; *Collins v. Luban* (N. Y. Misc.), 127 N. Y. Supp. 461.

⁵⁶ *Byrne M. Co. v. Robertson*, 149 Ala. 273. In such cases the damages may not be computed to the end of the contract period. *Id.*

⁵⁷ *Krausse v. Greenfield*, 61 Ore. 502,

⁵⁸ *Washington H. P. B. Co. v. Sinnott* (N. Y. Misc.), 92 N. Y. Supp. 504.

⁵⁹ *Perry T. & L. Co. v. Reynolds*, 100 Va. 264.

⁶⁰ *Whitman v. Namquit W. Co.*, 206 Fed. 549.

⁶¹ *Yamaoka v. Kloeber*, 71 Wash. 598.

⁶² *Finkelstein v. Selwitz*, 79 N. Y. Misc. 28.

is unable to procure it elsewhere the seller is liable for damages equal to the difference in value between the crop raised on the land on which the guano delivered was used and that raised on the same quantity of land of like quality and subjected to the same method of cultivation on which none was used in consequence of his breach.⁶³ A vendor had notice that the vendee was buying the article, caustic soda—not ordinarily procurable in the market—for the purpose of a resale at a distance. It was to be delivered, twenty-five tons in June, twenty-five tons in July, and twenty-five tons in August. None was delivered until September, and then only twenty-six tons. If the vendee could have delivered on his contract the soda which the vendor failed to deliver the profit thereon would have been 52*l.* 5*s.* 4*d.* That sum was paid into the court in an action upon the contract. But the vendee had to pay additional cost of transportation on account of the lateness of the season on the part delivered, and a certain sum to his sub-vendee for damages on the subcontract for loss of profits on a resale by him. The court held the vendee was entitled to recover as damages for the defendant's breach the loss of the profit the plaintiff would have derived from the transaction if the defendant had delivered the soda pursuant to his contract.⁶⁴ He was liable for the increased cost of transportation, but not for the damages paid to the sub-vendee. The latter were too remote. On this point Erle, C. J., said: "The defendant had notice at the time of entering into the contract with the plaintiffs that they had contracted with one purchaser on the continent. For the damages resulting from that it is agreed that he is responsible. But he had no notice of the subsequent resale; and it is not to be presumed that the parties contemplated that he was to be held responsible for the failure of any number of sub-sales. These could not in any sense be considered as the direct, natural or necessary consequences of a breach of the contract he was entering into."⁶⁵

⁶³ Bell v. Reynolds, 78 Ala. 511,
56 Am. Rep. 52; Ober v. Katzen-
stein, 159 N. C. 439, citing the text;
Herring v. Armwood, 130 N. C. 177,

57 L.R.A. 958; Spencer v. Hamil-
ton, 113 N. C. 49, 37 Am. St. 611.

⁶⁴ Baker v. Shaw, 78 Wash. 233.

⁶⁵ Borries v. Hutchinson, 18 C. B.

Where a coal dealer who had contracted to supply coal to steamers entered into a contract with the defendant for the coal he needed, which was expressly stated to be for shipment in such steamers, and in consequence of the defendant's default in supplying the coal one of the steamers was delayed and a claim of 150*l.* was made against the plaintiff on account thereof, which claim it was subsequently sought to enforce by action, which action the plaintiff defended so successfully as to reduce the claim to 20*l.*, he was entitled to recover from the defendant as damages the costs reasonably incurred by him in making such defense, less the amount recovered from the plaintiff in that action, which the defendant herein declined to defend. Such damages are within the rule laid down in *Hadley v. Baxendale*. The Earl of Halsbury, L. C., said: Both parties carried on business at C. The defendant knew what the plaintiff's business was, and that the coals were required for the purpose of supplying coals to steamers lying at C. Under the circumstances it is idle to suggest that it was not in the contemplation of the parties that a breach of the contract to supply coals would probably lead to such a claim against the plaintiff as was set up by the shipowners in this case. It would, under the circumstances, almost necessarily follow from a breach of the contract that such a claim would be made. It is also obvious that, if such a claim were made, it would be reasonable for the plaintiff, if, as was the case, he could not show that he was not liable, to take such steps as might be necessary to ensure that, at all events, the damages recovered should not be extravagant. It would be contrary to the principles of ordinary conduct in business that he should not endeavor to do this. * * * I really cannot see any distinction in substance between these costs and the charges of a surgeon in attendance upon a plaintiff who has sustained personal injuries through a tort.⁶⁶

(N.S.) 445; *Elbinger Actien-Gesellschaft von Eisenbahn v. Armstrong*, L. R. 9 Q. B. 473; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Sawdon v. Andrew*, 30 L. T. 23; *Masterton v. Mayor*, 7 Hill 61; *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85.

⁶⁶ *Agius v. Great Western C. Co.*, [1899] 1 Q. B. 413, approving *Hammond v. Bussey*, 20 Q. B. Div. 79, and doubting observations in *Baxendale v. London, etc. R. Co.*, L. R. 10 Ex. 35.

Knowledge of the use to be made

On failing to deliver machinery to be used in propelling a boat the vendor is liable for the rental value of the boat while it cannot be used in consequence of the breach,⁶⁷ and for interest on the money invested therein.⁶⁸ But under such circumstances, as almost all others, the vendee must be reasonably diligent in preventing damages. If he was able to procure the needed machinery elsewhere his damages would be measured by the difference between the rental value he was to pay and what he was to pay the vendor and the expense incident to his effort to lessen the loss.⁶⁹ A vendor who contracted to supply the furniture required for rooms in a hotel on failing to do so was liable for the loss resulting from the vendee's inability to use the rooms.⁷⁰ A vendor must respond for the damages suffered by his vendee in consequence of being delayed in commencing the ginning of cotton because of the failure to deliver machinery contracted for for that purpose, the vendee having been engaged in that business and the vendor knowing that fact.⁷¹ On the failure to furnish a stipulated quantity of distillery slop, with knowledge that it was to be used for fattening cattle, the vendor is liable for the profits the vendee would have made if the contract had been performed, he being unable to get other slop or to profitably fatten the cattle on other food.⁷² In such a

of the article to be supplied may be inferred from the situation of the parties and their previous dealings in relation thereto; if no other source of supply is open to the vendee he may recover for the profits he would have made by manufacturing the article in accordance with what must have been the understanding of the parties, and also expense incurred for unemployed help and unused plant. *Martin v. Bunker-C. L. Co.*, 167 Mo. App. 381.

⁶⁷ *Connersville W. Co. v. McFarlan C. Co.*, 166 Ind. 123, 3 L.R.A. (N.S.) 709; *Brownell v. Chapman*, 84 Iowa 504, 35 Am. St. 326; *Standard Oil Co. v. Weeks*, 6 Ala. App. 161.

⁶⁸ *Nicholls v. American S. & W. Co.*, 117 App. Div. (N. Y.) 21.

⁶⁹ *Hoskins v. Scott*, 52 Ore. 271.

⁷⁰ *Berkey & G. F. Co. v. Hascall*, 123 Ind. 502, 8 L.R.A. 65.

⁷¹ *Gore v. Mallsby*, 110 Ga. 893; *Rhodes v. Holladay-K. L. & L. Co.*, 105 Mo. App. 279; *Reagan R. B. Co. v. Dickson C. W. Co.*, 55 Tex. Civ. App. 509.

It seems it would be otherwise if the business was not an established one: *Consumers' P. I. Co. v. Jenkins*, 58 Ill. App. 519. Or if the plaintiff had not conducted it. *Mirandona v. Burg*, 51 La. Ann. 1190.

⁷² *New Market Co. v. Embry*, 20 Ky. L. Rep. 1130. But it is otherwise if proper feed could be obtained

case there may be a recovery for the loss of animals that died from starvation and the depreciation of others in value because of insufficient food, as well as for the extra time, labor and feed their condition demanded to save their lives.⁷³ Where there was a breach of a contract to furnish lumber for the construction of a building and the vendee was unable to procure other lumber, compelled to keep workmen idle, delayed in the construction of the building and put to additional expense by the vendor's default, compensation for these losses was just. The vendee was not bound to discharge the men and incur the risk of getting others.⁷⁴ The refusal to furnish lumber to a mill and to buy the products thereof is attended with liability for the profits the owner would have made.⁷⁵ It is declared in North Carolina that if the vendor's agent knew or could by ordinary care have known the purpose for which an article sold by him was intended, his knowledge is the knowledge of his principal, and that it must be common knowledge in localities where tobacco is cultivated that, if it is not cut and cured in apt time, serious loss is the necessary consequence; that such knowledge extends to the proper season for cutting and curing, and is presumed to have been present with the agent and defendant, a manufacturer of flues used in curing tobacco. The failure to furnish such flues made the vendor liable for the damages to plaintiff's crop which resulted from waiting for them and from the use of flues which were unfit for use.⁷⁶ A manufacturer who fails to deliver goods not elsewhere obtainable is liable for the profits his customer would have made, as well as for the increased market price up to the time fixed for delivery.⁷⁷

elsewhere. *Kopzcynski v. Bolcom-V. L. Co.*, 71 Wash. 93.

⁷³ *Kentucky D. & W. Co. v. Lillard*, 160 Fed. 34, 87 C. C. A. 190.

⁷⁴ *Clark v. Bailey*, 22 Ky. L. Rep. 1668; *Standard Oil Co. v. Weeks*, 6 Ala. App. 161, it seems.

Where the defendants, in order to induce the plaintiffs to move their sawmill from one locality to another, agreed to furnish logs to cut

a specified quantity of lumber, they were held liable for the loss of profits resulting from breach of their contract. *Tirry v. Hogan*, 181 Mo. App. 48.

⁷⁵ *Anderson v. Hilton & D. L. Co.*, 121 Ga. 688.

⁷⁶ *Neal v. Pender-H. H. Co.*, 122 N. C. 104, 65 Am. St. 697.

⁷⁷ *Roberts v. Lee*, 125 Ky. 709, 128 Am. St. 265.

In assessing damages against a vendor for the breach of a contract to deliver certain bridge timber to be manufactured by him, where the purchaser had procured it otherwise at an increased cost, the court held that if the course pursued in obtaining the timber was the only way in which it could be obtained or was the ordinary and usual or a reasonable and prudent way of obtaining it the difference between the contract price and the higher cost of the timber thus obtained might be recovered as damages naturally arising from the breach itself. If the course pursued by the purchaser was not the ordinary and usual way and not a reasonable or prudent one, were it not for an engagement into which he had entered with a third party for the completion, within a limited time, of the bridges for which the timber was contracted to be furnished, the purchaser cannot recover the increased cost he has been obliged to incur in order to fulfill such engagement unless its nature was known to the vendor at the time the contract was made. But if so made known, the purchaser may recover the difference between the contract price and the higher cost at which, acting in good faith and with reasonable diligence and prudence, he has been obliged to obtain the kind and quantity of timber contracted for in order to fulfill his engagement; for these damages may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of its breach.⁷⁸ The vendor of an engine, which he knew was to be used in grinding corn to feed cattle which were being fattened for the market, because of his failure to deliver it became liable to the vendees for the necessarily increased expense of having the feed ground for the cattle; the cost of other feed than that which the vendees would have used if the engine had been delivered, the purchase of which feed was made necessary by their inability to grind with the power they had sufficient feed of the kind they would have used but for the default. In respect to this head of damage the court said "If the plaintiffs were unable to grind the quantity of corn necessary for the feed of their cattle, in order to keep them in a thriving condi-

⁷⁸ *Paine v. Sherwood*, 21 Minn. 225; *Feehan v. Hallinan*, 13 Up. Can Q. B. 440.

tion, they would, of course, substitute the next best and most economical feed accessible to them for the purpose. If the cost of supplying the deficiency in corn meal with cottonseed meal was greater than the cost of the equivalence thereof in corn meal ground on the plaintiffs' own mill, had the defendant furnished the engine, then no reason is seen why the difference in the cost of the two meals was not an item of damage fairly and reasonably within the contemplation of the defendant when he entered into the contract and for which he was liable. In order to render the defendant liable it was not required that the plaintiffs should have notified the former at the time he entered into the contract that in case he made default they would be compelled to substitute cotton-seed meal for so much of the needed corn meal as they should be unable to procure, for this must be held to have then been reasonably contemplated by him." The vendor was not liable for delay in getting the cattle ready for the market; his default was not the direct and proximate cause thereof.⁷⁹ The expense and labor of obtaining other food for animals, injury thereto and loss of profits shown with reasonable certainty are elements of damages against a vendor who fails to deliver feed for them.⁸⁰ In a recent English case a husband was the plaintiff in an action for the breach of a warranty of food to recover the expenses incurred in procuring such services as his wife performed during her lifetime in caring for his home and family. The vendor was liable therefor, death having been caused by eating the food. The objection to recovery was based on the principle that a civil action does not lie for the recovery of damages sustained by the death of a human being. It was ruled that the death of the wife was not an essential feature of the case, but only an element in ascertaining the damages indicated, though it was otherwise as to the expenses of her funeral.⁸¹ On the breach of a contract to furnish paint suitable for painting a house the damages resulting from a change in the color of the paint after it began to dry and from the fact that the blinds to which the paint

⁷⁹ *Chalice v. Witte*, 81 Mo. App. Co., 134 Fed. 168, 67 C. C. A. 74.

^{84.} ⁸¹ *Jackson v. Watson*, [1902] 2

⁸⁰ *Lillard v. Kentucky D. & W.* K. B. 193.

had been applied became so gummy as to be immovable, are not too remote.⁸² But it is not the natural result of the breach of a contract to sell a business that the buyer, who gave up his employment to take possession of it, should remain unemployed for six months after the breach; ⁸³ or that he should sell out his interest in a business in order to obtain money to pay for the property for which he had contracted.⁸⁴ The vendor of a machine who fails to deliver it is not liable for the loss of profits in the business of the vendee, nor for his expenses in obtaining a machine in lieu of it; these are too remote and speculative.⁸⁵ The vendor of iron columns in a building which was being torn down is not liable, after default in performing his contract, for the expense incurred by the purchaser in grading for the purpose of erecting a building he did not erect, nor for the value the columns would have had for him in the building if he had erected it.⁸⁶ Inability to secure material of the kind bought may be cause for holding the vendor liable for damage to the appearance of the building by the use of inferior material; but the vendee must show such inability.⁸⁷

If the element of wilfulness enters into the conduct of a vendor of dangerous articles liability for consequential damages may be more far-reaching than under ordinary circumstances. In a North Carolina case the defendant sold the plaintiff's wife large quantities of laudanum for use as a beverage, with knowledge that she was, by its use, injuring both mind and body and causing loss to the plaintiff. Such sales were continued, notwithstanding repeated warnings and protests on the part of the plaintiff. This conduct placed liability on the defendant for the loss of the wife's services and companionship.⁸⁸ It may be

⁸² *McCaa v. Elam D. Co.*, 114 Ala. 74, 62 Am. St. 88.

⁸³ *O'Connor v. Nolan*, 64 Ill. App. 357.

⁸⁴ *Webster v. Woolford*, 81 Md. 329.

⁸⁵ *Connersville W. Co. v. McFarlan C. Co.*, 166 Ind. 123, 3 L.R.A. (N.S.) 709; *California P. B. & L. Co. v. Wasatch O. Co.*, 39 Utah 325;

Goodell v. Bluff City L. Co., 57 Ark. 203.

⁸⁶ *Warren v. Mayer Mfg. Co.*, 161 Mo. 112.

⁸⁷ *Sweeney v. Jamieson*, 2 Wash. Ty. 254.

⁸⁸ *Holleman v. Harward*, 119 N. C. 150, 56 Am. St. 672, 34 L.R.A. 803, citing *Hoard v. Peck*, 56 Barb. 202.

shown that the vendor of lumber necessary to the performance of a building contract knew that the vendee was liable for stipulated damages if the building was not finished within the time agreed upon.⁸⁹ But, it seems, that the right of a vendee to abandon his sub-contract and recover the indemnity in respect to any damages incurred thereby is dependent upon his inability to find like goods or a satisfactory substitute for them in the market;⁹⁰ and that the amount of his liability on such contract should be known to the vendor in order that it may be recovered as a matter of right; if that liability is reasonable in amount the jury may award a sum equal to it.⁹¹ The failure to supply an amount of water ample to extinguish fires brings about the loss resulting from a fire. Such damage is not too vague and indeterminate to be recovered for. The value of the property destroyed, and not the value of the water which should have been supplied, measures the recovery.⁹² Where the contract reserves to the vendor the right to terminate it the recovery of damages must be limited to such as were sustained before notice of the exercise of the option was given.⁹³ Where the contract to repurchase stock amounts to an option to rescind on the part of the vendee and, upon its exercise, the title at once vests in the party who agreed to repurchase, the vendee may protect the stock from sale to meet an assessment levied upon it and recover from the other party the amount of the assessment as special damages.⁹⁴

§ 664. Damages for delay in delivering property. Damages for delay in the delivery of property sold or contracted for may be recovered according to circumstances.⁹⁵ Where it has been

⁸⁹ *Campfield v. Sauer*, 189 Fed. 576, 38 L.R.A. (N.S.) 838, 111 C. C. A. 14; *Iowa Mfg. Co. v. Sturtevant*, 162 Fed. 460, 89 C. C. A. 346, 18 L.R.A. (N.S.) 575 (though the formal contract is silent on the subject); *Czarnikow v. Baxter*, 146 App. Div. (N. Y.) 81.

⁹⁰ *Czarnikow v. Baxter*, *supra*.

⁹¹ *Perry T. & L. Co. v. Reynolds*, 100 Va. 264, referring to Benj. on

Sales (7th ed. by Bennett), pp. 933-934, and 2 Mechem on *Sales*, §§ 1763-1776.

⁹² *Harris v. Columbia W. & L. Co.*, 114 Tenn. 328.

⁹³ *Ober v. Katzenstein*, 160 N. C. 439.

⁹⁴ *Hudson v. Seeley S. Co.*, 19 Cal. App. 213.

⁹⁵ *Robinson L. Co. v. Burton*, 128 La. 120, quoting the text.

paid for the jury may allow, if there is no proof of special damage, interest on the price from the time it should have been, until it actually is, delivered.⁹⁶ If there has been a decline in the market value at the time of the delayed delivery damages for the delay may be assessed at the amount of the depreciation.⁹⁷ In *Merrimack Mfg. Co. v. Quintard*⁹⁸ it was held that, inferior coal having been delivered after the contract time, the vendee was entitled to the difference between the value at the place of delivery of the coal called for by the contract and the value of the coal delivered as damages for the inferior quality; and that the measure of damages for failure to deliver in time was not the difference in market value, but the difference between the actual charge for freight and insurance which had to be paid by the purchaser and the average rate during the time covered by the contract for monthly deliveries. It was also held that evidence was admissible to show that freight on coal was usually higher in the autumn than in the summer, to prove what was in the contemplation of the parties, and that the loss occasioned by the increase in freight might be recovered as damages. But it has been held in a comparatively recent case that compensation for delay in delivering plank intended for a road does not include the increased expense of laying the plank by reason of such delay; such damages are too indefinite.⁹⁹ Sharswood, J., said: "To say that the increased expense of labor in putting down the planks in consequence of such delay would be such an immediate and proximate effect as ought to be charged to the common carrier seems to be entirely too indefinite. It would include a rise in wages, stormy weather, bad roads in consequence, which would be entirely beyond what

⁹⁶ *Edwards v. Sanborn*, 6 Mich. 348.

Interest should only be allowed from the time the contract was broken. *Loomis v. Norman P. S. Co.*, 81 Conn. 343.

⁹⁷ *Ramish v. Kirschbraun*, 98 Cal. 676, 107 Cal. 659; *Tyler C. & L. Co. v. Wettermark*, 12 Tex. Civ. App. 399; *Belcher v. Sellards*, 19 Ky. L.

Rep. 1571; *Spiers v. Halsted*, 74 N. C. 620; *Startup v. Cortazzi*, 2 Cr., M. & R. 165; *Clements v. Hawkes Mfg. Co.*, 107 Mass. 362; *A. G. Breitweiser Lumber Co. v. Crick*, 55 Pa. Super. Ct. 72.

⁹⁸ 107 Mass. 127, 9 Am. Rep. 13.

⁹⁹ *Pennsylvania R. Co. v. Titusville, etc. Co.*, 71 Pa. 350.

would naturally have been within the view of the parties and might well have happened even had the railroad company punctually performed their duty. The natural consequences of delay and stoppage of work, payment of wages and expenses arising therefrom, and the loss from not having the work finished at the time it otherwise would have been form the rule."¹ A more liberal rule has been applied in Maryland. Expenses resulting from delay in securing other property to be used in lieu of that ordered and properly rejected, the increased cost of doing the work for which the material was ordered because of the change of season, and the expense of procuring and handling the rejected material were recognized as elements of damage.² The sum paid as damages for delay in executing a contract in which the material contracted for was to have been used, and which could be obtained only from the vendor, is an element of damages, as are the wages paid workmen while idle; it was otherwise as to the loss sustained on other contracts entered into by the vendee.³

It seems but reasonable that the purchaser should so far rely upon the vendor's punctual performance of his contract as to be justified in making necessary preparations to receive the property he has agreed to deliver and that these should be compensated for by the vendor if he does not perform;⁴ but this is not the rule in Pennsylvania if he has no notice of the circumstances;⁵ and the same rule has been applied in Washington where the recovery of the rental value of property has been sought.⁶ Where the defendant agreed to construct a ship which he knew was intended to carry passengers to Australia, and

¹ Id. See *Fairbanks, Morse & Co. v. Carson-Muse Lumber Co.*, 160 Ky. 346.

² *Canton L. Co. v. Liller*, 112 Md. 258.

³ *Raymore R. Co. v. Pfotenhauer-N. Co.*, 145 App. Div. (N. Y.) 163; *J. H. McKenzie's Sons & Co. v. Consolidated Lumber Co.*, 142 Ga. 375.

⁴ *Wolf v. Galbraith*, 39 Tex. Civ. App. 351; *Chatham v. Jones*, 69 Tex.

744. But compare *Gorham v. Dallas*, etc. R. Co., 41 Tex. Civ. App. 615.

⁵ *Billmeyer v. Wagner*, 91 Pa. 92.

There cannot be a recovery of a bonus paid for expediting the construction of an appliance to be used in connection with the article ordered. *Brown v. Hope*, 17 Brit. Col. 220.

⁶ *Eichbaum v. Caldwell*, 58 Wash. 163.

special damages were claimed for delay in completing it, in this, that if the ship had been delivered according to the contract the plaintiffs would have made a profit of £7,000 on the voyage, but, in consequence of a fall in freight, they made only £4,280 after the vessel was delivered the jury gave a verdict for the plaintiff for £2,750 damages, which the court refused to set aside.⁷

Where there was a delay of three weeks in delivering beans and a sub-vendee canceled his contract and the original vendor afterwards admitted its responsibility for the delay, but declined to take the beans, take charge of their sale or advise what should be done with them, and the vendee sold them at a loss the vendor was liable for the resulting damage, but that did not include the vendee's traveling expenses, lawyer's fees, or money paid for photographs, telegrams, exchange, etc.⁸ Loss of business prestige, loss of agents, traveling expenses, the cost of advertising, loss of profits on goods the orders for which were canceled or on those returned as a matter of favor have been disallowed.⁹ As is elsewhere pointed out, the general rule is that a vendor is not liable for the loss of his vendee's profits on a resale unless he had notice thereof at the time his contract was made.¹⁰ A vendee cannot claim loss of profits on a resale if he could have obtained a substitute for the goods in time to have fulfilled his contracts at a price which would not have reduced his profits.¹¹ Neither can he recover special damages on other grounds if he could supply himself with an article like that ordered,¹² nor reimbursement for his liability to a third party if the vendor had no notice of it.¹³

⁷ *Fletcher v. Tayleur*, 17 C. B. 21. See *Blanchard v. Ely*, 21 Wend. 342; *Connell Bros. Co. v. H. Diederichsen & Co.*, 130 C. C. A. 251, 213 Fed. 737.

⁸ *Lippert v. Saginaw M. Co.*, 108 Wis. 512; *Albion L. Co. v. Lowell*, 20 Cal. App. 782.

⁹ *Centaur C. Co. v. Hill*, 7 Ont. L. R. 110.

¹⁰ *Bunch v. Potts*, 57 Ark. 257, See § 662.

And of course there cannot be a recovery for the loss of contract that might have been secured. *Brown v. Hope*, 17 Brit. Col. 220.

¹¹ *Bunch v. Potts*, 57 Ark. 257; *Watson v. Kirby*, 112 Ala. 436.

¹² *Robinson L. Co. v. Burton*, 128 La. 120; *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Super. 184.

¹³ *Wendell v. Walker* (N. Y. Misc.), 87 N. Y. Supp. 142.

§ 665. **Same subject; rental value, how proved.** A vendor agreed to deliver by a stipulated day a steam-engine, intended, as he knew, to drive machinery for the sawing and planing of lumber. It was not delivered until a week after the day fixed. In the assessment of damages for the breach of contract the vendee proved that the net average value of the engine at the time and place, and for the purpose intended, was \$50 a day beyond the wear and tear of the machinery and the cost of running it. This result was obtained by a calculation of such a wear and tear and cost, and the amount of lumber it would saw and plane in a day, together with the prices which the vendee received for the sawing and planing. This mode of arriving at the damages was rejected. It was held that the proper rule for estimating them was to ascertain what would have been a fair price to pay for the use of the engine and machinery in view of all the hazards and chances of business.¹⁴ Some general principles were laid down in the opinion in *Griffin v. Colver* which have been extensively quoted with approval. It was held that the rule which precludes the allowance of profits by way of damages is not a primary rule, but a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown by clear and satisfactory evidence to have been actually sustained; that it is a well established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; that it is under this rule that profits are excluded from the estimate in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not. It was remarked that nearly every element entering into the vendee's computation of damages

¹⁴ *Griffin v. Colver*, 16 N. Y. 489; *Creamery P. Mfg. Co. v. Benton C. Co.*, 120 Iowa 584; *Dustin v. St. Petersburg I. Co.*, 126 Fed. 816; *Fairbanks v. Hooper*, 147 Ky. 154. In *Brown v. Hooper*, 17 Brit. Col.

220, the loss per day for delay in delivering a dredge was held to be its net earning power per day based on the average price paid for such dredging as the dredge could be used for.

would have been of that uncertain character which has uniformly prevented a recovery for speculative profits. Selden, J., said: "The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. The familiar rules on the subject are all subordinate to these. For instance: That the damages must flow directly and naturally from the breach of contract is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last. These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural and even necessary result of the breach, and yet, if in their nature uncertain, they must be rejected. * * * So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach but for some special circumstances, collateral to the contract itself or foreign to its apparent object, they cannot be recovered."¹⁵ The value of the use of a plant includes the services necessary to its management; hence these cannot also be recovered.¹⁶

In a suit to recover damages for the non-delivery of a planing machine it appeared that the plaintiff, a resident of Iowa, went to the defendant's warehouse in Chicago and bought the machine, which he selected with reference to its weight and finish. He paid \$100 in hand and was to pay \$450 more on its delivery at his residence. The contract was that he was to

¹⁵ Wolf v. Galbraith, 39 Tex. Civ. App. 351; Freeman v. Clute, 3 Barb. 424; §§ 53, 58, 59; Fraser v. Echo M. & S. Co., 9 Tex. Civ. App.

210; Usrey Lumber Co. v. Huie-Hodge Lumber Co., 135 La. 511.

¹⁶ Dustin v. St. Petersburg I. Co., 126 Fed. 816.

have the identical machine he had selected, which was to be shipped when ordered. The plaintiff returned home to put up his shafting and pulleys, with the understanding that he was to send for the machine as soon as he should be ready to put it up. He ordered it on the 13th or 14th of March; and after a delay of fifteen or sixteen days received a letter saying a machine had been shipped to him. He declined to receive any machine except the one bought, which he demanded, and it was refused on the 13th of April, and on the same day he bought another machine. On the trial the plaintiff offered to prove that he had erected a building and put in a steam-engine and shafting at an expense of \$5,000, with a view to the use of this machine; that the defendant had notice of this when the contract was made; that it all lay idle for thirty-five days in consequence of the defendant's breach of contract. It was held that such evidence was admissible; that in arriving at the damages which the plaintiff was entitled to recover he should be allowed to show what would have been a fair rent for the use of the building and machinery, if in running order, during the time they lay idle in consequence of the defendant's refusal to deliver the machine, though such rent should not be allowed for any longer time than was reasonably necessary for supplying himself with another machine of similar character after being advised of the defendant's refusal to send the one purchased, and should not be allowed anything for probable profits.¹⁷ The lessened rental value of a building because of failure to furnish power to operate the elevators therein may be recovered for such time as the defendant undertook to supply it and for a reasonable time after the abandonment of efforts to do so; and there may also be a recovery of the reasonable expense of making a change of the power used. But liability does not extend beyond such time if other means for operating the elevators were available.¹⁸ Where there was delay in delivering logs to a saw-mill, the operations of which

¹⁷ *Benton v. Fay*, 64 Ill. 417. See *Creamery P. Mfg. Co. v. Benton C Co.* 120 Iowa 584; in which a recovery for the lost profits of a

business it was sought to establish was denied.

¹⁸ *Kimball v. Citizens' G. & E. Co.*, 141 Iowa 632.

were thereby interrupted, these rules were announced: It was the vendee's duty to obtain logs elsewhere as expeditiously and cheaply as he reasonably could, if that was practicable; the vendor would be responsible for the excess of the cost of the logs so obtained over the price at which he contracted to furnish them, and also for such reasonable expenses as were incurred in so doing. The vendee might have kept his teams and men unemployed for a short time at the vendor's expense if there was a loss by the suspension of the operations of the mill; but this could not be done if there was no reason to expect the delivery of the logs nor if they could be obtained elsewhere. It was further said that interest on the value of the mill for the time it remained idle would not be objectionable as a measure of damages, but that there could not be a recovery of general profits for so short a time as ten days, because of the uncertainty as to what they would be.¹⁹ In a case in which there was delay in delivering machinery for a cotton mill the court refused a recovery of the estimated monthly rental value of the machinery, that value being based on an estimate of the profits which might have been made on the raw material purchased and the manufactured goods sold; but suggested that the measure of damages is a fair rental value of the mill for the loss of time caused by the vendor, as to such part of the mill as his machinery would have equipped. "If this cannot be otherwise accurately determined by certain and determinate *data*, which were contemplated by the parties on entering into their contract, then the law will allow the legal rate of interest upon the capital invested to be the measure,²⁰ not because it is an accurate criterion, but for the reason that it is approximately just." If the vendee incurred losses and expenses incidental to the delay, such as insurance, idle labor, deterioration in machinery, etc., these were elements of damage.²¹ Profits are recoverable if the vendor was informed of a contract

¹⁹ *Watson v. Kirby*, 112 Ala. 436.

²⁰ Citing *Rocky Mount Mills v. Wilmington & W. R. Co.*, 119 N. C. 693, 5 Am. St. 682.

²¹ *Tompkins v. Dallas C. Mill*,

130 N. C. 347. See *Alpha Mills v. Watertown S. E. Co.*, 116 N. C. 797, in which the cost of insurance was ruled not to be a ground for recovery in an action for the breach of a warranty.

entered into by the vendee at the time the agreement for the delivery of the property sold was made, provided they are reasonably certain.²² In a Texas case a vendor who failed to deliver machinery for a cotton gin, he knowing the purpose for which it was ordered and the period covered by the season, was adjudged to be liable for the value of the use of the gin while it was idle, such value being ascertained by the net profits which would have been made if the gin had been in operation.²³ Courts are quite agreed in favor of the rental value of a plant as a measure of damages, instead of the profits which might have been made, where the interruption of operations is for a short time only. That value is to be ascertained by showing the profits made in the business. If that is prosecuted for a short time only and the seasons for carrying it on are variable in the results obtained the proof may cover a wide scope; it must not, however, include the profits it was hoped to make in collateral ventures; nor can the probable results of the particular season be accepted as the basis of the calculation.²⁴ In the absence of anything peculiar about the business the value of the use of an establishment may be arrived at by a comparison of its ordinary output and its output during the period of the vendor's default. In addition to the recovery of the value of its use the vendee may recover the expenses incurred after the default in reasonable efforts to secure the property bought under the contract and the expenses incurred in attempts to secure it elsewhere.²⁵ The additional expense incurred in manufacturing an article has been held to measure the recovery where the vendor knew the purpose for which the goods ordered was needed and the vendee was unable to obtain them elsewhere.²⁶

§ 666. **Same subject; mitigation of vendor's liability.** An English case illustrates the extent of the vendor's liability for consequential losses in a striking manner. The defendant had

²² *Pender L. Co. v. Wilmington I. Works*, 130 N. C. 584; *Centaur C. Co. v. Hill*, 7 Ont. L. R. 110; *Thorn v. Morgan*, 135 Mich. 51.

²³ *Dilley v. Ratcliff* (Tex. Civ. App.), 69 S. W. 237.

²⁴ *Standard S. Co. v. Carter*, 81 S. C. 181, 19 L.R.A. (N.S.) 155.

²⁵ *Kelley v. La Crosse C. Co.*, 120 Wis. 84, 102 Am. St. 971.

²⁶ *Wall v. St. Joseph Artesian I. & C. S. Co.*, 112 Mo. App. 659.

contracted to furnish a steam threshing-machine on a fixed day, which was wanted, as he knew, for the purpose of threshing the plaintiff's wheat in the field, so that it could be sent at once to market. He failed to deliver the machine in time, and the plaintiff was obliged to carry the wheat home and stack it. The wheat was injured by a thunder-storm, and it was necessary to kiln-dry a part of it; its market value was thereby diminished, and before it could be sold the market price had fallen. It was held that plaintiff was entitled to recover damages for the expense of carting and stacking the wheat, for the loss by reason of the exposure to the weather, including the expense of kiln-drying. In respect to these items Lord Campbell, C. J., said: "The plaintiff, who was a large farmer, was known by the defendant to be accustomed to thresh out his wheat in the field; he gave the order for the threshing-machine, which, it was agreed, should be delivered on the 14th of August, at which time the wheat might reasonably be expected to be ripe for threshing; the defendant knew that it was wanted for that purpose. Then, was it not in the contemplation of the parties that, if it was not delivered at that time, damage by rain might ensue to the plaintiff? The thunder-storm occurred, and the plaintiff's wheat was damaged. If the engine had been delivered at the time agreed upon the corn would have been threshed out and would have been carried to market in good condition, instead of which it was damaged. Is not this injury a natural consequence of the breach of contract? And may it not reasonably be supposed to have been foreseen by the parties? * * * Therefore, as respects those items for which the plaintiff claims damages as resulting from the falling of the rain I am of opinion that he is entitled to recover. But, as respects the fall of the market price of wheat in respect of which he claims damages, my opinion is quite different; because it could not have been foreseen by the parties that the market would fall; it was not in the contemplation of the parties at the time they made the contract and was not the natural consequence of the breach of contract." ²⁷

²⁷ *Smeed v. Foord*, 1 E. & E. 602. Cal. 464 (holding that damages caused by delay may be recovered, See *Friend & T. L. Co. v. Miller*, 67

The discrimination between a loss from exposure to rain and loss from fall in the market price does not appear to have caused any criticism, although the case has been frequently referred to.²⁸ The latter, however, arose as proximately from the delay in furnishing the machine as the other loss did; neither could have been foreseen; both did occur; and the parties must have known when the bargain was made that, if the vendor delayed performance, a loss from rain or from fall in the market was equally possible. The machine was relied upon to do the threshing, and the circumstances were such that the court held that the plaintiff was entitled to rely upon it. Had the storm destroyed the entire crop, notwithstanding such exertions of the plaintiff to prevent it as the law required him to make, the defendant, on the principle of the decision, would have been liable for its value, and that value would be the market value at the time of the loss, or at the date when, by reason of the breach of contract, the plaintiff was prevented from realizing the value by sale. On the principle that the injured party is to be placed in as good a situation by damages as he would have been in if the contract had been performed the value should be assessed, in the case supposed, at the time when, but for the defendant's breach of contract, the wheat would have been taken to market. In the

but not those which result from a failure to perform); *Van Winkle v. Wilkins*, 81 Ga. 93, 12 Am. St. 299 (depreciation of seed while the owner was awaiting the arrival of machinery, recovered for).

²⁸ In *Mayne on Damages* (8th Eng. ed., p. 30) the following is said in respect to *Smeed v. Foord*, *supra*: "The concluding part of the above ruling was put upon a finding of fact, viz.: that the parties could not have contemplated a fall in the market as one of the natural consequences of a breach of contract. Upon this point, however, it is difficult to see the distinction between this case and the other cases quoted below: *Collard v. South Eastern R.*

Co., 7 H. & N. 79; *Ward v. New York Cent. R. Co.*, 47 N. Y. 29, 7 Am. Rep. 405. If the defendant had undertaken to thresh the plaintiff's wheat and hand it over to him, and, in consequence of his delay, the market had fallen, these cases decide that the loss so incurred would have been part of the natural loss arising from breach of contract. Here the defendant only undertook to supply him with a threshing-machine. But every consequence which legally followed from the breach of the contract to thresh followed as an equally natural consequence from a breach of contract to supply the means of threshing."

actual case the plaintiff was entitled to that measure of damages, less the value of what he was able to save from destruction by the precautions he took and was required to take. As the plaintiff's exertions, for this purpose, were rendered necessary by the defendant's breach of contract, he was bound to make compensation for them; he was relieved thereby from paying the value of a totally lost crop.²⁹ The net amount saved was its value, then, after satisfying the charges for the saving; and this, taken from the total value which would otherwise have been lost, would leave, according to familiar analogies, the amount of the plaintiff's actual loss. By this method of computation the loss from a decline in the market would fall on the defendant.³⁰ The failure to deliver a harvester in time to harvest grain is the cause of the loss of it by ripening and shelling.³¹ The Louisiana court is one of those who are disposed to extend the rule concerning the necessity of formal notice to vendors as to the use to be made of an article purchased and the probable results of their failure to meet their obligations respecting delivery. It takes the reasonable view that a vendor must take notice of the danger to which the change of seasons exposes crops, and by failing to deliver articles ordered for the purpose of securing them he is liable for their loss by frost, and will not be heard to say that he should be absolved therefrom because the frost came a few days earlier, and was more severe, than usual.³²

The agreement of a carrier to deliver is like a vendor's agreement to deliver, and the same rule of damages is applied. A loss from a fall in the market at the time of a delayed delivery arises directly from the breach of contract.³³ Here the liability

²⁹ § 88.

³⁰ See *Ward v. New York Cent. R. Co.*; *Collard v. South Eastern R. Co.*, *supra*; *The Parana*, 1 Prob. Div. 452.

³¹ *Sutter v. International H. Co.*, 81 Kan. 452.

³² *Chattanooga C. & F. Co. v. Lefebvre*, 113 La. 487. See § 662.

³³ *Ward v. New York Cent. R. Co.*, *supra*; *Sturgess v. Bissell*, 46

N. Y. 462; *Weston v. Grand Trunk R. Co.*, 54 Me. 376, 92 Am. Dec. 552; *Peet v. Chicago, etc. R. Co.*, 20 Wis. 594, 91 Am. Dec. 446; *Medbury v. New York & C. R. Co.*, 26 Barb. 564; *Sisson v. Cleveland, etc. R. Co.*, 14 Mich. 489; *Briggs v. New York R. Co.*, 28 Barb. 515; *Colvin v. Jones*, 3 Dana 576; *Cowley v. Davidson*, 13 Minn. 92; *Collins v. Baumgardner*, 52 Pa. 461; *Atkisson*

would end if the whole property were finally delivered without diminution or deterioration, unless there are special circumstances which enter into the contract and give it more scope. A contract to deliver a threshing-machine at a given time to enable a farmer to thresh his wheat, with a view to its being taken at once to market, is not simply a contract to deliver a machine; it is a contract to do, at a specified time, one of a known series of acts for the purpose of getting the wheat immediately to market. Where there was delay in delivering machinery for a cotton-mill the vendor was liable for damages sustained by cotton seed bought by the vendee for manufacturing and for expense incurred in saving such seed from further damage. Under the facts the vendee's recovery was not restricted to such damage and expenses prior to his knowledge of the breach.³⁴ In a case in which the vendor knew that property was to be delivered on board a boat, he was liable for demurrage charges paid by the vendee while the boat was held for the purpose of receiving it, in consequence of delay in delivering the property.³⁵

The general damages arising from delay in delivering property or the failure to deliver it in proper condition may be mitigated by proof of subsequent delivery or of repairs made by the vendor.³⁶ The vendee's recovery is affected to the extent that he may profit by a resale made of the goods at a price in excess of that which prevailed when they were actually delivered.³⁷ In the absence of other circumstances than the acceptance of property after the time specified for its delivery

v. Steamboat C. G., 28 Mo. 124; Smith v. New Haven & N. R. Co., 12 Allen 531, 90 Am. Dec. 166; Wilson v. Lancashire R. Co., 9 C. B. (N. S.) 632; Ingledew v. Northern R., 7 Gray 88; Spring v. Haskell, 4 Allen 112; Cutting v. Grand Trunk R. Co., 13 id. 381.

³⁴ Colvin v. McCormick Cotton Oil Co., 66 S. C. 61.

³⁵ Miner v. Blume, 64 App. Div. (N. Y.) 511, ruled in reliance on Booth v. Spuyten Duyvil R. M. Co., 60 N. Y. 487 (one judge dissenting);

Connell Bros. Co. v. H. Diederichsen & Co., 130 C. C. A. 251, 213 Fed. 737. The expenses of travel and the payment for the extension of an option are not the proximate results of the failure to deliver property. Albion L. Co. v. Lowell, 20 Cal. App. 782.

³⁶ Marsh v. McPherson, 105 U. S. 709, 26 L. ed. 1139.

³⁷ Wertheim v. Chicoutimi P. Co., [1911] App. Cas. 301. See also Hibernian Banking Ass'n v. Bell & Zoller Coal Co., 181 Ill. App. 581.

there is no waiver of the right to recover damages because of the delay.³⁸ The impossibility of proving with mathematical exactness the amount of the damage sustained in cases of this kind does not prevent the recovery of such as were certain in their nature and in respect of the cause from which they proceeded.³⁹

§ 667. **Warranties of quality.** To determine whether a warranty exists is often a difficult question. On an executory contract for the sale and delivery of goods of a particular description the vendee is not obliged to receive and pay for those offered unless they correspond therewith. The contract to furnish such goods is strictly a precedent condition. When the vendor offers goods the maxim *caveat emptor* warns the vendee to make due examination, and reject them if they do not conform to the requirements of the contract. If they are apparently goods of the kind so required, are tendered on the contract and unconditionally received without objection the right to object is waived in respect to any want of conformity which could have been ascertained by a careful examination. The tender and acceptance make the contract an executed one for the sale and purchase of specific articles,⁴⁰ unless the vendor fraudulently prevents inspection of the goods.⁴¹

It is not always practicable or possible by inspection at the time of delivery to determine whether property offered upon an existing contract or for sale possesses certain qualities which the purchaser is charged for in the price. To some extent the

³⁸ *Belcher v. Sellards*, 19 Ky. L. Rep. 1571, citing *Digman v. Spurr*, 3 Wash. 309; *Gaylord v. Karst*, 17 N. Y. 720; *Halsted L. Co. v. Sutton*, 46 Kan. 192; *Strain v. Pauley*, 80 Ky. 622. *Contra*, *Fraser v. Ross*, 1 Penn. 348; *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Super. 184.

³⁹ *Raymore R. Co. v. Pfothenhauer-N. Co.*, 145 App. Div. (N. Y.), 163.

⁴⁰ *Lestershire v. Ritter*, 153 Fed. 573, 82 C. C. A. 527 (New York); *Telluride P. T. Co. v. Crane*, 208 Ill. 218; *Williamson v. Holt*, 147 N. O. 515, 17 L.R.A.(N.S.) 240;

Brooke v. Laurens M. Co., 78 S. C. 200, 125 Am. St. 780; *Wiedeman v. Keller*, 171 Ill. 93; *Rayner v. Rees*, 58 Ill. App. 292; *Martin v. Roehm*, 92 id. 87; *Diebold S. & L. Co. v. Huston*, 55 Kan. 104, 28 L.R.A. 53; *McCaa v. Elam D. Co.*, 114 Ala. 74, 62 Am. St. 88; *Parks v. O'Connor*, 70 Tex. 377; *Woods v. Cramer*, 34 S. C. 508; *Smith v. Coe*, 170 N. Y. 162; *Bell v. Mills*, 68 App. Div. (N. Y.) 531.

⁴¹ *Fay F. Co. v. Talerico* (Tex. Civ. App.), 69 S. W. 196.

law implies a warranty; but beyond this the purchaser must assure himself against loss from defects or want of fitness for his purpose by inspection or by obtaining a warranty. The vendee is entitled to an opportunity to make such examination of the goods offered on an existing contract as will enable him to ascertain whether they fulfill its requirements; and if they are of such a nature that qualities or fitness stipulated for can only be ascertained by the use or consumption of the property, or for any reason are intended to be ascertained before the title passes, the contract in respect to them is a warranty. Such a case is precisely like any bargain and sale with a representation or warranty of qualities or fitness.⁴² If the article warranted is not as it should be the retention of it does not preclude

⁴² *The Nimrod*, 141 Fed. 215, affirmed, no opinion, id. 834; *Bunch v. Weil*, 72 Ark. 343, 65 L.R.A. 80; *Wallace v. Knoxville W. Mills*, 117 Ky. 450; *Atkins v. Southern G. Co.*, 119 Mo. App. 119; *Lissberger v. Kellogg*, 78 N. J. L. 85; *Rhind v. Freedly*, 74 N. J. L. 138; *Depew v. Peck H. Co.*, 121 App. Div. (N. Y.) 28; *Egbert v. Hanford P. Co.*, 92 App. Div. (N. Y.) 252; *Haynor Mfg. Co. v. Davis*, 147 N. C. 267, 17 L.R.A.(N.S.) 193; *Mine S. Co. v. Columbia M. Co.*, 48 Ore. 391; *Northern S. Co. v. Wangard*, 123 Wis. 1, 107 Am. St. 984; *Snowden v. Waterman*, 105 Ga. 384; *Zimmerman v. Druecker*, 15 Ind. App. 512; *St. Louis B. Ass'n v. McEnroe*, 80 Mo. App. 429; *Omaha C. C. & L. Co. v. Fay*, 37 Neb. 68; *Meagley v. Hoyt*, 88 Hun 328; *Huyett & S. Mfg. Co. v. Gray*, 124 N. C. 322; *Coyle v. Baum*, 3 Okla. 695; *Thomas v. Marks*, 10 Vict. L. R. (law) 217; *English v. Spokane C. Co.*, 57 Fed. 451, 6 C. O. A. 416; *Merchants' & Mechanics' Sav. Bank v. Frazee*, 9 Ind. App. 161; *Philadelphia Whiting Co. v. Detroit W. L. Works*, 58 Mich. 29; *Lee v. Sickles*

S. Co., 38 Mo. App. 201; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652; *Howie v. Rea*, 70 N. C. 559; *Polhemus v. Heiman*, 45 Cal. 573; *Thomas v. Francis*, 12 Ind. 282; *Esty v. Read*, 29 Vt. 278; *Dounce v. Dow*, 57 N. Y. 16; *Hoe v. Sanborn*, 21 id. 532; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Parks v. Morris A. & T. Co.*, 54 N. Y. 586; *Baird v. Mathews*, 6 Dana, 130; *Lewis v. Rountree*, 78 N. C. 323; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Boothby v. Scales*, 27 Wis. 626; *Howard v. Hoey*, 23 Wend. 350; *Murray v. Smith*, 4 Daly 277; *Seigworth v. Leffel*, 76 Pa. 476; *Brown v. Burhans*, 4 Hun 227; *Kimball & A. Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558; *Dill v. O'Ferrell*, 45 Ind. 268; *Cox v. Long*, 69 N. C. 7; *Ash v. Beck* (Tex. Civ. App.), 68 S. W. 53.

"Whatever form a warranty assumes, if there is in fact a warranty, the mere acceptance of the property will not, as a matter of law, bar a recovery for breach of warranty, al-

a recovery for the breach.⁴³ But in case of a sale of specific goods, there being no undertaking to furnish those of particular quality or fitness, and when goods are delivered on an existing contract requiring a particular quality the absence or presence of which can be seen on mere view, the purchase is without warranty; or their acceptance, without objection, leaves the seller relieved of all responsibility for the goodness, quality or fitness of the property.⁴⁴ But if the goods delivered differ from

though an inspection of the property would have led to a discovery of the breach. Nor will actual knowledge of the defective condition of the thing delivered necessarily preclude a reliance upon the warranty. All the facts are to be laid before the jury, to the end that they may determine whether the purchaser relied on the warranty, and whether he has waived his right to take advantage of its breach." *Northwestern C. Co. v. Rice*, 5 N. D. 432, 57 Am. St. 563, citing *Morse v. Moore*, 83 Me. 473, 13 L.R.A. 224; *Gould v. Stein*, 149 Mass. 570, 14 Am. St. 455, 5 L.R.A. 213; *Lewis v. Rountree*, 78 N. O. 323; *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570; *Polhemus v. Heiman*, 45 Cal. 573; *Tacoma C. Co. v. Bradley*, 2 Wash. 600; *Hege v. Newsom*, 96 Ind. 431; *English v. Spokane C. Co.*, 6 C. C. A. 416, 57 Fed. 451, 48 Fed. 196; *Benj. on Sales* (6th Am. ed.), p. 856, note 29; *Dayton v. Hooglund*, 39 Ohio St. 671; *Holloway v. Jacoby*, 120 Pa. 583, 6 Am. St. 737; *Parks v. Morris A. & T. Co.*, 54 N. Y. 586; *Zabrisckie v. Central Vermont R. Co.*, 131 N. Y. 72; *Fairbank C. Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. 753. To the same effect is *North Alaska S. Co. v. Hobbs*, 159 Cal. 380, 35 L.R.A. (N.S.) 501, and local cases cited.

⁴³ *Steele v. Andrews*, 144 Iowa

360; *Ash v. Beck* (Tex. Civ. App.), 68 S. W. 53; *Becker v. Baker*, 146 Ky. 233; *Powell v. New England C. Y. Co.*, 154 App. Div. (N. Y.) 875; *Jacot v. Grossmann S. & S. Co.*, 115 Va. 90.

⁴⁴ *Scott v. Geiser*, 70 Kan. 500; *National O. Co. v. Rankin*, 68 Kan. 679; *Peoria G. S. Co. v. Turney*, 175 Ill. 631; *Gage v. Carpenter*, 107 Fed. 886, 47 C. C. A. 39; *Titley v. Enterprise S. Co.* 127 Ill. 457; *Howard v. Hoey*, 23 Wend. 350; *Hart v. Wright*, 17 id. 267; *Locke v. Williamson*, 40 Wis. 377; *Delafield v. De Grauw*, 3 Keyes 467; *Muller v. Eno*, 3 Duer 421, 14 N. Y. 597; *Wilkins v. Stevens*, 8 Vt. 214; *Houghton v. Carpenter*, 40 Vt. 588; *Reed v. Randall*, 29 N. Y. 358; *Fitch v. Carpenter*, 43 Barb. 40; *Cole v. Champlain T. Co.*, 26 Vt. 87; *Barnard v. Kellogg*, 10 Wall. 388, 19 L. ed. 989; *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276; *Hargous v. Stone*, 5 N. Y. 73; *Merriam v. Field*, 39 Wis. 578; *McClung v. Kelley*, 21 Iowa 507; *Hamilton v. Ganyard*, 34 Barb. 204; *Cleu v. McPherson*, 1 Bosw. 480; *Morehouse v. Comstock*, 42 Wis. 626; *Jones v. Murray*, 3 T. B. Mon. 83; *Emerson v. Bingham*, 10 Mass. 197; *Moses v. Mead*, 1 Denio 378, 5 id. 617; *Hyland v. Sherman*, 2 E. D. Smith 234; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Ranger v. Hearne*, 37 Tex. 30.

those contracted for in kind or generic description and there is no other acceptance than receipt and use of those furnished the intention to deliver or accept them on the contract will not be inferred, and the vendor will not be entitled to recover for them on a *quantum meruit*.⁴⁵

The English cases passing on the question of the existence of an implied warranty have been summed up by Mellor, J., in a way which has met the general approval of the courts of England. The law as declared by him has not in all particulars been approved by the courts in the United States; in the main, however, it has been accepted as correct. He said:⁴⁶ "First. Where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent and not discoverable on examination, at least where the seller is neither the grower nor manufacturer.⁴⁷ The buyer in such case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable.⁴⁸ So in the case of a sale in the market

⁴⁵ *Morse v. Moore*, 83 Me. 473, 23 Am. St. 783, 13 L.R.A. 224; *Atkins v. Southern G. Co.*, 119 Mo. App. 119; *Ellis v. Riddick*, 34 Tex. Civ. App. 256. See *Campion v. Marston*, 99 Me. 410; *Joseph v. Richardson*, 2 Pa. Super. 208; *Hoffman v. Dixon*, 105 Wis. 315, 76 Am. St. 914; *Murray v. Farthing*, 6 Mo. 251; *Andrews v. Eastman*, 41 Vt. 134; *June v. Falkinburg*, 89 Mo. App. 563; *Punteney-M. Mfg. Co. v. Northwall Co. (Neb.)*, 91 N. W. 863.

⁴⁶ *Jones v. Just*, L. R. 3 Q. B. 197, 202.

⁴⁷ *Farren v. Dameron*, 99 Md. 323, 105 Am. St. 297; *Remy v. Healy*, 161 Mich. 266, 29 L.R.A. (N.S.) 139; *Colchord Mach. Co. v. Loy-W. F. &*

Mach. Co., 131 Mo. App. 540; *Ketchum v. Stetson & P. M. Co.*, 33 Wash. 92; *Watkins v. Angotti*, 65 W. Va. 193; *Parkinson v. Lee*, 2 East 314.

Where goods of a specific denomination are sold, and not shown to be *in esse* or capable of inspection, there is an implied warranty that they are of a merchantable quality. *Thomas v. Marks*, 10 Viet. L. R. (law) 217.

⁴⁸ *Browning v. McNear*, 145 Cal. 272; *Commercial R. & C. Co. v. Dorsey*, 114 Md. 172; *Clement v. Rommeck*, 149 Mich. 595, 119 Am. St. 695; *Thompson v. Miser*, 82 Ohio 289; *Thielman v. Reinsch*, 103 Ark. 307.

of meat, which the buyer had inspected, but which was in fact diseased and unfit for food, the maxim *caveat emptor* applies.⁴⁹ Secondly. Where there is a sale of a definite existing chattel, specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty.⁵⁰ Thirdly. Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined and described thing be actually supplied, there is no warranty; there is no warranty that it shall answer the particular purpose intended by the buyer.⁵¹ Fourthly. Where

In *Hinckley v. Kersting*, 21 Ill. 247, 74 Am. Dec. 102, it was held that the rule of *caveat emptor* applies to a banker or broker who deals in depreciated bills as an article of commerce; and if a bank bill purchased by him proves to be of less value than the price given for it the vendor is not bound to make it good, where the transaction is *bona fide*.

⁴⁹ *Doyle v. Parish*, 110 Mo. App. 470; *Emerton v. Mathews*, 7 H. & N. 586.

⁵⁰ *Hege v. Newsom*, 96 Ind. 426; *Ivans v. Laury*, 67 N. J. L. 153; *Burr v. Gibson*, 3 M. & W. 390; *Ehrsam v. Brown*, 76 Kan. 206, 15 L.R.A.(N.S.) 877; *Neff v. McNeeley*, 1 Neb. (Unof.) 416. See *ante*, p. 1950; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Humphreys v. Comline*, 8 Blackf. 516; *McGuire v. Kearney*, 17 La. Ann. 295; *Deming v. Foster*, 42 N. H. 165; *Moses v. Mead*, 1 Denio 378; *Mixer v. Coburn*, 11 Metc. (Mass.) 559, 45 Am. Dec. 230; *Joslin v. Coughlin*, 26 Miss. 134; *Holden v. Dakin*, 4 Johns. 421; *Bartlett v. Hoppock*, 34 N. Y. 118, 88 Am. Dec. 427; *Bowman v. Clemmer*, 50 Ind. 10; *Fountleroy v. Wilcox*, 80 Ill. 477; *McCrea v. Longstreet*, 17 Pa. 316; *Edwards*

v. Wooldridge, 52 Tex. Civ. App. 512.

⁵¹ *Seitz v. Brewers' R. Co.*, 141 U. S. 510, 35 L. ed. 837; *Frederick Mfg. Co. v. Devlin*, 127 Fed. 71, 62 C. C. A. 53; *Savery H. Co. v. Under-Feed S. Co.*, 178 Fed. 806, 102 C. C. A. 254; *Davis C. D. Co. v. Mallory*, 137 Fed. 332, 69 L.R.A. 973, 69 O. C. A. 662; *Fay v. Dudley*, 129 Ga. 314; *Fuchs & L. Mfg. Co. v. Kittredge*, 242 Ill. 88; *Elevator Safety D. Co. v. Brown-K. I. Works*, 153 Ill. App. 313; *Gardner v. Winter*, 117 Ky. 382, 63 L.R.A. 647; *Lombard W.-W. G. Co. v. Great Northern P. Co.*, 101 Me. 114, 6 L.R.A.(N.S.) 180; *Leavitt v. Fibroid Co.*, *infra*; *Gilcrest L. Co. v. Wilson*, 84 Neb. 583; *Obenchain v. Roff*, 29 Okla. 211; *Mine S. Co. v. Columbia M. Co.*, 48 Ore. 391; *Roebeling Sons Co. v. American A. & C. Co.*, 231 Pa. 261; *American Home Sav. Bank Co. v. Guardian T. Co.*, 210 Pa. 320; *La Crosse P. Co. v. Brooks*, 142 Wis. 640; *Pullman's P. C. Co. v. Metropolitan St. R. Co.*, 157 U. S. 94, 39 L. ed. 632; *Stroock P. Co. v. Talcott*, 150 App. Div. (N. Y.) 343; *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Smith v. Coe*, 170 N. Y. 162; *Dounce v. Dow*,

a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied.⁵² In such a case the buyer trusts to the manufacturer or dealer

64 N. Y. 411; *Deming v. Foster*, 42 N. H. 165; *McGraw v. Fletcher*, 35 Mich. 104; *Bragg v. Morrill*, 49 Vt. 45.

⁵² *Lidgerwood Mfg. Co. v. S. R. H. Robinson & Son Contracting Co.*, 183 Ill. App. 431; *Western U. Tel. Co. v. Jackson Lumber Co.*, 187 Ala. 629; *Gascoigne v. Cary Brick Co.*, 217 Mass. 302; *The Nimrod*, 141 Fed. 215, affirmed, no opinion, *id.* 834; *Davis C. D. Co. v. Mallory*, *supra*; *Southern P. Co. v. Oteri*, 94 Ark. 318; *Bobrick C. Co. v. Prest-O-Lite Co.*, 160 Cal. 209; *Americus G. Co. v. Brackett*, 119 Ga. 489; *Fuchs & L. Mfg. Co. v. Kittredge*, 242 Ill. 88; *Oil-well S. Co. v. Priddy*, 41 Ind. App. 200; *Glucose S. R. Co. v. Climax & C. & P. B. Co.*, 40 Ind. App. 182; *Loxtercamp v. Lininger I. Co.*, 147 Iowa 29, 33 L.R.A. (N.S.) 501; *Conkling v. Standard O. Co.*, 138 Iowa 596; *Ideal H. Co. v. Kramer*, 127 Iowa 137; *Parsons B. C. & S. F. Co. v. Mallinger*, 122 Iowa 703; *Queen City G. Co. v. Pittsburg C. P. Co.*, 97 Md. 429; *Hanna-B. Co. v. Holley-M. Mfg. Co.*, 160 Mo. App. 437; *Cline v. Mock*, 150 Mo. App. 431; *Moore v. Koger*, 113 Mo. App. 423; *Skinner v. Kerwin O. G. Co.*, 103 Mo. App. 650; *Rhind v. Freedley*, 74 N. J. L. 138; *Heath D. G. Co. v. Hurd*, 193 N. Y. 255, 25 L.R.A. (N.S.) 160; *Shoe v. Maerky*, 35 Pa. Super. 270; *West End Mfg. Co. v. Warren Co.*, 198 Mass. 320; *Leavitt v. Fiberloid*

Co., 196 Mass. 440, 15 L.R.A. (N.S.) 855; *Randall v. Fay*, 158 Mich. 630; *Mark v. Williams C. Co.*, 204 Mo. 242; *El Paso, etc. R. Co. v. Eichel* (Tex. Civ. App.), 130 S. W. 922; *Canadian G. P. & L. v. Orr*, 23 Ont. L. R. 616; *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533; *Frith v. Hollan*, 133 Ala. 583; *Cram v. Gas E. & P. Co.*, 75 Hun 316; *Coyle v. Baum*, 3 Okla. 695; *Morse v. Union S. Y. Co.*, 21 Ore. 289, 14 L.R.A. 157; *Haines v. Young*, 13 Pa. Super. 303; *J. I. Case Plow Works v. Niles & S. Co.*, 90 Wis. 590, 603; *Nashua I. & S. Co. v. Brush*, 91 Fed. 213, 33 O. C. A. 456; *Chippewa L. & B. Co. v. Howard*, 18 Pa. Super. 423; *Alpha C. Co. v. Bradley*, 105 Iowa 537, 546; *Van Wyck v. Allen*, 69 N. Y. 65, 25 Am. Rep. 136; *Landreth v. Wyckoff*, 67 App. Div. (N. Y.) 145; *Acme H. Mach. Co. v. Gasperson*, 168 Mo. App. 558.

In *Drummond v. Van Ingen*, L. R. 12 App. Cas. 284, cloth merchants ordered of cloth manufacturers goods which were to correspond to samples previously furnished by the latter to the former; the manufacturers knew that the goods were to be sold to clothiers. The goods supplied were equal to the samples, but owing to a certain defect were unmerchantable for purposes for which goods of the same general class had been used in the trade. The same defect existed in the sam-

and relies upon his judgment and not upon his own.⁵³ Fifthly. Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee

ples, but it was not discoverable by due diligence upon such inspection as was ordinary and usual upon sales of such cloth. There was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily would be used.

In *Wisconsin R. P. B. Co. v. Hood*, 67 Minn. 329, 64 Am. St. 418, this view is criticised. It is said that the cases cited in support of it do not sustain the proposition that the mere dealer is liable on such an implied warranty. "The case then before the court did not call for any decision on this point, as it was merely a case of a sale of goods to arrive in port, and, when they arrived they were found not to be merchantable. In *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163, the cases were reviewed at length by Selden, J., and it is held that, even where a manufacturer furnishes an article for a specific purpose, an implied warranty against latent defects can only be held to exist on the ground that it is presumed that he or his servants, for whom he is responsible, knew of the defect. In *White v. Miller*, 71 N. Y. 118, 131, 27 Am. Rep. 13, it is said: 'It was decided in *Hoe v. Sanborn* that upon a sale of a chattel by a manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture. The rule is based on the presumed superior knowledge of the vendor, and there seems to be the same reason for implying a war-

ranty on a sale of seeds by the grower.' In *Randall v. Newson*, 2 Q. B. Div. 102, the court held the manufacturer to be an absolute insurer against all latent defects and liable for all damages caused by such defects; and this seems to be the holding of the court in *Rodgers v. Niles*, 11 Ohio St. 48. We are of the opinion that such an extraordinary responsibility is not, by the principles of the law, imposed on the manufacturer. The correct rule was applied in *Bragg v. Morrill*, 49 Vt. 45, and *Archdale v. Moore*, 19 Ill. 565 (approved in *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294) where it is held, that the manufacturer is only liable for failing to exercise the proper degree of care and skill in the selection of material and in the manufacture of the same, and that he impliedly warrants that he has done this."

⁵³ *Missouri, K. & T. Ry. Co. of Texas v. Interstate Chemical Co.*, — Tex. Civ. App. —, 169 S. W. 1120; *Wilson v. Wiggin*, 73 W. Va. 560; *Dayton v. Hoogland*, 39 Ohio St. 671; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Fox v. Stockton C. H. etc. Works*, 83 Cal. 333; *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *Kellogg B. Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86; *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150; *Brown v. Sayles*, 27 Vt. 227; *Sims v. Howell*, 49 Ga. 620; *Parks v. Morris A. & T. Co.*, 54 N. Y. 586; *Gammell v. Granby*, 49 Vt. 22; *Richardson v. Gundy*, 52 Ga. 504; *Whit-*

has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article.”⁵⁴

The fifth rule is limited to cases where a thing is ordered for a special purpose, and cannot be applied to those where a special thing is ordered, although this be intended for a special purpose. If the thing is itself specified selected and ordered the purchaser takes upon himself the risk of its effecting its purpose.⁵⁵ In some courts a manufacturer who sells a completed specific article is regarded as a dealer and his liability is limited accordingly.⁵⁶ The principle upon which a manufacturer is held to an implied warranty of quality is based upon the fact that he must know the “make-up” of the article sold by him. The law does not presume that a mere dealer is possessed

more v. South Boston I. Co., 2 Allen 58; Dutton v. Gerrish, 9 Cush. 89, 55 Am. Dec. 45; French v. Vining, 102 Mass. 135; Mallan v. Radloff, 17 C. B. (N. S.) 588; Gossler v. Eagle S. R., 103 Mass. 331; Leopold v. Van Kirk, 27 Wis. 152; Brown v. Murphee, 31 Miss. 91; Robinson Mach. Works v. Chandler, 56 Ind. 575; Brenton v. Davis, 8 Blackf. 317, 44 Am. Dec. 769; Orton v. Phelan, 2 Head 445; Beers v. Williams, 16 Ill. 69; Boyd v. Crawford, Addison 150; Cunningham v. Hall, 1 Sprague 404; Walton v. Cody, 1 Wis. 420; Marbury L. Co. v. Stearns Mfg. Co. (Ky.), 107 S. W. 200, citing local cases.

⁵⁴ Wilson v. Wiggin, 73 W. Va. 560; Main v. El Dorado D. G. Co., 83 Ark. 15; Truschel v. Dean, 77 Ark. 546; Main v. Dearing, 73 Ark. 470; Oil-well S. Co. v. Watson, 168 Ind. 603, 15 L.R.A. (N.S.) 868; Tinkem C. Co. v. Smith, 123 Iowa 554; Leavitt v. Fiberloid Co., 196 Mass. 440, 15 L.R.A. (N.S.) 855; Cooper v. Payne, 103 App. Div. (N. Y.) 118; Hooven v. Wirtz, 15 N. D. 477; Barnes v. Sisson, 44 Ill. App. 327; White v. Gresham, 52 id. 399;

Bierman v. City Mills Co., 151 N. Y. 482, 56 Am. St. 636, 37 L.R.A. 799; Laing v. Fidgeon, 4 Camp. 169, 6 Taunt. 108; Mann v. Everston, 32 Ind. 355; Leopold v. Van Kirk, 27 Wis. 152; Walton v. Cody, 1 id. 420; Gaylord Mfg. Co. v. Allen, 53 N. Y. 515; Howard v. Hoey, 23 Wend. 350; Hamilton v. Ganyard, 34 Barb. 204; Morehouse v. Comstock, 42 Wis. 626; Ketchum v. Wells, 19 id. 25; Cleu v. McPherson, 1 Bosw. 480; McClung v. Kelley, 21 Iowa 508; Merriam v. Field, 39 Wis. 578; Houston C. O. Co. v. Trammell, citing the text (Tex. Civ. App.), 72 S. W. 244. See Holden v. Clancy, 41 How. Pr. 1.

⁵⁵ American Home Sav. Bank Co. v. Guardian T. Co., 210 Pa. 320; Port Carbon I. Co. v. Groves, 68 Pa. 149; J. I. Case Plow Works v. Niles & S. Co., 90 Wis. 590, 602. See Goulds v. Brophy, 42 Minn. 109, 6 L.R.A. 392; Seitz v. Brewers' R. M. Co., 141 U. S. 510, 35 L. ed. 837.

⁵⁶ Lukens v. Freund, 27 Kan. 664, 41 Am. Rep. 429; Diebold S. & L. Co. v. Huston, 55 Kan. 104, 28 L.R.A. 53.

of that knowledge and the same reason for the rule does not exist as to him.⁵⁷ The American courts do not agree with Mellor, J., that no distinction is observed between articles purchased for food and other merchandise; that if a purchaser has an opportunity for inspection there is no implied warranty that the provisions are sound and wholesome. But it is believed that in all sales of provisions for consumption there is an implied warranty in this country.⁵⁸ If the seller of food for animals knows the purpose for which it is to be used it has been held that he impliedly warrants that it is wholesome and fit for that purpose;⁵⁹ but as to this there is disagreement.⁶⁰ "There

⁵⁷ *McCaa v. Elam D. Co.*, 114 Ala. 74, 85, 62 Am. St. 88; *Remy v. Healy*, 161 Mich. 266, 29 L.R.A. (N.S.) 139.

⁵⁸ *Nelson v. Armour P. Co.*, 76 Ark. 352; *Weideman v. Keller*, 171 Ill. 93; *Rothmiller v. Stein*, 143 N. Y. 581, 592, 26 L.R.A. 148; *Winsor v. Lombard*, 18 Pick. 57; *Hoover v. Peters*, 18 Mich. 51; *Divine v. McCormick*, 50 Barb. 116; *Davis v. Murphy*, 14 Ind. 158; *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 317; *Emerson v. Brigham*, 10 Mass. 197; *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339; *Marshall v. Peck*, 1 Dana 612; *Humphreys v. Comline*, 8 Blackf. 516; *Ryder v. Neitge*, 21 Minn. 70; *Moses v. Mead*, 1 Denio 378, 5 id. 617; *Hart v. Wright*, 17 Wend. 267; *Hyland v. Sherman*, 2 E. D. Smith 234; *Goldrich v. Ryan*, 3 id. 324; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440. See *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608.

In *Benj. on Sales*, § 672, it is said that the responsibility of a victualer, vintner, brewer, butcher or cook for selling unwholesome food does not arise out of any contract or implied warranty, but is a responsibility imposed by statute that

they shall make good any damage caused by their sale of unwholesome food. *Burnby v. Bollett*, 16 M. & W. 644. See *Chitty on Cont.* 420; 3 Black. Com. 166. But see *Sinclair v. Hathaway*, 57 Mich. 60, 58 Am. Rep. 327. In South Carolina fraud or deceit in the sale of unsound food for a sound price will not be inferred unless the seller knew it was unsound. *Poag v. Charlotte O. & F. Co.*, 61 S. C. 190. On a sale of food sealed in cans to a consumer by one who did not prepare it there is no implied warranty that it is wholesome or fit for food. *Julian v. Laubenberger*, 16 N. Y. Misc. 646.

Reliance of the purchaser on the judgment of the seller and the good faith of the latter have been declared to be the tests to determine whether there is an implied condition of the wholesomeness of the article sold. *Farrell v. Manhattan M. Co.*, 198 Mass. 271, 15 L.R.A. (N.S.) 884, 126 Am. St. 436. The question and the authorities are discussed in the opinion.

⁵⁹ *Houston C. O. Co. v. Trammell* (Tex. Civ. App.), 72 S. W. 244.

⁶⁰ *National C. O. Co. v. Young*, 74 Ark. 144, 109 Am. St. 71, ap-

is, however, no implied warranty of soundness or wholesomeness arising from the sale of meats or provisions to a dealer or middleman who buys on the market, not for consumption, but for sale to others, nor would there be any liability in a sale for immediate domestic use where the vendor was not a regular dealer.”⁶¹ Neither is there an implied warranty in the sale of second hand goods.⁶² Under the Federal Pure Food Act of 1906 the sale of goods guaranteed by the canner, if without discoverable defect by the person who sells them, is not attended with liability for the consequences of their use though they are unfit therefor.⁶³ One who sells a domestic animal to a retail butcher engaged in slaughtering such animals and selling their flesh for food does not impliedly warrant that it is fit for food although he knows the purpose for which it was bought.⁶⁴ Under the English Sale of Goods Act, 1893, “where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of a merchantable quality; provided, that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed.” The defendant dealt in beer for consumption on his premises, made by a particular firm only. The plaintiff was aware of that fact and frequented the defendant’s house for the purpose of obtaining such beer. There was a sale of beer by description within the meaning of the act and an implied warranty that it was of a merchantable quality.⁶⁵ One who produces and sells young fruit trees for fruit raising impliedly warrants that they are sound, healthy and vigorous.⁶⁶

In case of a sale by sample, there is an implied warranty

proving *Lukens v. Freind*, 27 Kan. 664, 41 Am. Rep. 429.

⁶¹ *Weideman v. Keller*, 171 Ill. 93, 98; *Nelson v. Armour P. Co.*, 76 Ark. 352. *Contra*, *Grocers’ W. Co. v. Bostock*, 22 Ont. L. R. 130.

⁶² *Fairbanks Steam Shovel Co. v. Holt & Jeffery*, 79 Wash. 361, L.R.A. 1915B 477.

⁶³ *Bigelow v. Maine Cent. R. Co.*, 110 Me. 105, 43 L.R.A.(N.S.) 627; *Trafton v. Davis*, 110 Me. 318.

⁶⁴ *Hanson v. Hartse*, 70 Minn. 282; *Cotton v. Reed*, 25 N. Y. Misc. 380.

⁶⁵ *Wren v. Holt*, [1903] 1 K. B. 610 (court of appeal).

⁶⁶ *Kitchin v. Oregon N. Co.*, 65 Ore. 20.

that the bulk of the goods sold is equal in quality to the sample,⁶⁷ except in Pennsylvania, where a sale by sample is a guaranty only that the article delivered shall follow its kind and be simply merchantable.⁶⁸ The description or name by which goods are sold is a warranty that they are such as are known or pass by that description or name.⁶⁹ If goods are sold by sample and by description as well and are expressly warranted

⁶⁷ *Meyer v. Everett P. & P. Co.*, 184 Fed. 945, 193 id. 857, 113 C. A. 643; *Giffen v. Selma F. Co.*, 5 Cal. App. 50; *Nixa C. Co. v. Lehmann-H. G. Co.*, 70 Kan. 664, 70 L.R.A. 653 (sale by canner of apples, who is a manufacturer within the rule limiting a sale by sample to a warranty when made by the manufacturer); *Deland M. & M. Co. v. Hanna*, 112 Md. 528, 136 Am. St. 404; *Stewart v. Voll*, 81 N. J. L. 323; *Lissberger v. Kellogg*, 78 N. J. L. 85; *Staiger v. Soht*, 116 App. Div. (N. Y.) 874; *Keeler v. Paulus Mfg. Co.*, 43 Tex. Civ. App. 555; *Smith v. Foote*, 81 Hun 128; *Meagley v. Hoyt*, 88 Hun 328; *Leggett v. Young*, 29 New Bruns. 675; *Drummond v. Van Ingen*, L. R. 12 App. Cas. 284; *Myer v. Wheeler*, 65 Iowa 390; *Bach v. Levy*, 101 N. Y. 511; *Oneida Mfg. Co. v. Lawrence*, 4 Cow. 440; *Andrews v. Kneeland*, 6 id. 354; *Sands v. Taylor*, 5 Johns. 395, 4 Am. Dec. 374; *Gallagher v. Waring*, 9 Wend. 20; *Beebee v. Robert*, 12 id. 413; *Boorman v. Johnston*, id. 566; *Moses v. Mead*, 1 Denio 386; *Brower v. Lewis*, 19 Barb. 574; *Beirne v. Dord*, 5 N. Y. 95; *Hargous v. Stone*, id. 73; *Messenger v. Pratt*, 3 Lans. 234; *Robinson v. Ruffstetler*, 165 N. C. 459; *Leonard v. Fowler*, 44 N. Y. 289; *Gurney v. Atlantic, etc. R. Co.*, 58 id. 358; *Williams v. Spafford*, 8 Pick. 250; *Hastings v. Lovering*, 2 id. 219; *Lothrop v. Otis*, 7 Allen

435; *Rose v. Beattie*, 2 N. & McC. 538; *Bradford v. Manly*, 13 Mass. 139; *Henshaw v. Robins*, 9 Metc. (Mass.) 86; *Whittaker v. Hueske*, 29 Tex. 355; *Brantley v. Thomas*, 22 id. 270, 73 Am. Dec. 264; *Powell v. New England C. Y. Co.*, 154 App. Div. (N. Y.) 875; *Borden v. Fine*, 212 Mass. 425; *Jacot v. Grossmann S. & S. Co.*, 115 Va. 90.

"The mere fact that a sample was exhibited does not necessarily make the transaction a sale by sample. The contract must evince an intention to contract by sample." *American C. Co. v. Flat Top G. Co.*, 68 W. Va. 698.

The assurance by an officer of the government authorized to sell buildings that the purchaser might remove them within a given time is equivalent to a warranty of title. *Houser v. United States*, 39 Ct. of Cls. 508.

⁶⁸ *Boyd v. Wilson*, 83 Pa. 319; *West Republic M. Co. v. Jones*, 108 id. 55, 65.

⁶⁹ *Mine S. Co. v. Columbia M. Co.*, 48 Ore. 391; *Puritan Mfg. Co. v. Westermire*, 47 Ore. 557; *Springfield S. Co. v. Edgecomb M. Co.*, 52 Wash. 620; *Johnston v. Lanter*, 87 Kan. 32; *Miller v. Moore*, 83 Ga. 684, 20 Am. St. 389, 6 L.R.A. 374; *Bach v. Levy*, 101 N. Y. 511; *Bridge v. Wain*, 1 Stark. 504; *Bannerman v. White*, 10 C. B. (N. S.) 844; *Behn v. Burness*, 3 B. & S. 755; *Chanter v. Hopkins*, 4 M. & W. 404; *Allan*

to correspond with both it is not enough that the bulk of them correspond with the sample if they do not also correspond with the description. The vendee may rely upon his warranty by description.⁷⁰

§ 668. Warranties of title; remedies on breach of warranty as to quality. There is an implied warranty of title, but only when the vendor has possession⁷¹ of the property sold.⁷² The

v. Lake, 18 Q. B. 560; Josling v. Kingsford, 13 C. B. (N. S.) 447; Hawkins v. Pemberton, 51 N. Y. 204; Osgood v. Lewis, 2 Harr. & G. 495, 18 Am. Dec. 317; Henshaw v. Robins, 9 Mete. (Mass.) 83, 43 Am. Dec. 387; Borrekens v. Bevan, 3 Rawle 23, 23 Am. Dec. 85; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Moore v. King, 57 Hun 224; Northwestern O. Co. v. Rice, 5 N. D. 432, 57 Am. St. 563; Forcheimer v. Stewart, 65 Iowa 593, 54 Am. Rep. 30; Grafton-Stamps Drug Co. v. Williams, 105 Miss. 296; American W. Co. v. Ray (Tex. Civ. App.), 150 S. W. 763.

⁷⁰ *Miamisburg T. & C. Co. v. Wohlhuter*, 71 Minn. 484.

⁷¹ It is said in *Shattuck v. Green*, 104 Mass. 42, 45: "If the vendor has either actual or constructive possession, and sells the chattels and not merely his interest in them, such sale is equivalent to an affirmation of title, and a warranty is implied. In *Whitney v. Heywood*, 6 Cush. 82, 86, Dewey, J., says, 'Possession here must be taken in its broadest sense,' and 'the excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive, and in such cases no warranty of title is implied.' The possession of an agent or of a tenant in common, holding the goods for the vendor and as his property, and not adversely, is the constructive possession of the vendor; and if he sells

goods thus held as his, a warranty of title is implied." *Hubbard v. Bliss*, 12 Allen 590; *Cushing v. Breed*, 14 Allen 376, 92 Am. Dec. 77.

Constructive possession as bailor is sufficient. *St. Anthony & D. E. Co. v. Dawson*, 20 N. D. 18.

⁷² *Burpee v. Holmes*, 132 Ga. 464; *Pierce v. Banton*, 98 Me. 553 (unless there is an assertion of title in the contract); *Shultis v. Rice*, 114 Mo. App. 274; *Jarrett v. Goodnow*, 39 W. Va. 602, 32 L.R.A. 321; *Jeffers v. Easton*, 113 Cal. 345; *Hodges v. Wilkinson*, 111 N. C. 56, 17 L.R.A. 545; *Close v. Crossland*, 47 Minn. 500; *Hendrickson v. Back*, 74 Minn. 90; *Scranton v. Clark*, 39 Barb. 273, 39 N. Y. 220, 100 Am. Dec. 430; *Brown v. Smith*, 5 How. (Miss.) 387; *McCoy v. Artcher*, 3 Barb. 323; *Gross v. Kierski*, 41 Cal. 111; *Thurston v. Spratt*, 52 Me. 202; *Boyd v. Whitfield*, 19 Ark. 447; *Scott v. Hix*, 2 Sneed 192; *Miller v. Van Tassel*, 24 Cal. 458; *Bennett v. Bartlett*, 6 Cush. 225; *Case v. Hall*, 24 Wend. 101; *Vibbard v. Johnson*, 19 Johns. 77; *Dorr v. Fisher*, 1 Cush. 271; *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *Williamson v. Summers*, 34 Ala. 691; *Linton v. Porter*, 31 Ill. 107; *Chancellor v. Wiggins*, 4 B. Mon. 201, 39 Am. Dec. 499; *Trigg v. Faris*, 5 Humph. 343; *Charlton v. Lay*, id. 496; *Hale v. Smith*, 6 Me. 416; *Butler v. Tufts*, 13 id. 302; *Bucknam v. Goddard*, 21 Pick.

warranty covers the right to use the property sold as against a patent held by another.⁷³ If the parties to the sale are joint owners and in joint possession, each having equal knowledge of the condition of the title, there is no implied warranty of title.⁷⁴ The general rule does not apply to sales by executors, administrators and other trustees; there is no warranty of title in sales by them, unless there be fraud or express warranty and eviction, in which case they would undoubtedly be personally responsible.⁷⁵ In case of a failure of title while the purchase-money

70; *Huntington v. Hall*, 36 Me. 501, 58 Am. Dec. 765; *Davis v. Smith*, 7 Minn. 414; *Chism v. Woods*, Hardin 531, 3 Am. Dec. 740; *Robinson v. Rice*, 20 Mo. 229; *Payne v. Rodden*, 4 Bibb. 304, 7 Am. Dec. 739; *Gookin v. Graham*, 5 Humph. 480; *Word v. Cavin*, 1 Head 506; *Whitney v. Heywood*, 6 Cush. 82; *Sargent v. Currier*, 49 N. H. 310, 6 Am. Rep. 524; *Emerson v. Brigham*, 10 Mass. 197; *Pratt v. Philbrook*, 41 Me. 132; *Darst v. Brockway*, 11 Ohio 462; *Lines v. Smith*, 4 Fla. 47; *McCabe v. Morehead*, 1 W. & S. 513; *Scott v. Scott*, 1 A. K. Marsh. 217; *Inge v. Bond*, 3 Hawks 101; *Colcock v. Goode*, 3 McCord 513; *Storm v. Smith*, 43 Miss. 497; *Shattuck v. Green*, 104 Mass. 42; *Long v. Hickingbottom*, 28 Miss. 772, 64 Am. Dec. 118; *Mockbee v. Gardner*, 2 Harr. & G. 176; *Coolidge v. Brigham*, 1 Metc. (Mass.) 551.

In a contract for the sale of a certain number of shares of fruit growing on the trees of an orchard, owned in shares, where the vendor guarantied to the vendee that the shares of fruit should be at his disposal on the trees, free from trouble and annoyance from other parties, on breach of the contract, where no special damage is alleged, the measure of damages is the highest market price of the fruit on the trees

at the orchard, if there is any market value for it there; if not, then, if the vendee is prepared to gather it and carry it to market, the market value there, less the cost of gathering and carriage. If other persons were in possession of the orchard when the vendee went there to gather the fruit, and if those persons forbade him or his agents or servants from going in and gathering the fruit purchased, and if the vendee could not have done so without risk of personal collision or violence, then the guaranty was broken, and though the vendee might have been permitted to gather a portion of the fruit bought, but not all, he had a right to come away and hold defendant responsible on the guaranty, as he was not bound to take the benefit of a portion of the contract. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich v. Emeric*, 12 Cal. 171.

⁷³ *National M. E. B. Co. v. Gotham*, 125 App. Div. (N. Y.) 101; *Macon K. Co. v. Leicester M. Co.*, 65 N. J. Eq. 138.

⁷⁴ *Gurley v. Dickason*, 19 Tex. Civ. App. 203. But compare *Shattuck v. Green*, *supra*.

⁷⁵ *Mockbee v. Gardner*, 2 Harr. & G. 176; *Sexton v. Sikking*, 90 Ill.

remains in their hands, undistributed or unadministered, it is suggested that there would exist no well-founded reason why they should not refund to the purchaser.⁷⁶ *Caveat emptor* applies in all its rigor to judicial sales;⁷⁷ to sales in open market,⁷⁸ and, it seems, to a note and mortgage formally transferred by an order of court for the purpose of transmitting the title, the nominal vendor having no connection therewith either as owner or investor.⁷⁹ It is said by a learned author that the present rule in England may be stated in the following terms: A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold.⁸⁰

On the sale of a promissory note, bill of exchange, shares or other securities or choses in action there is an implied warranty of the assignor's title, of the genuineness of the evidence of debt or other instrument assigned, the capacity of the makers to contract, and that the same are unpaid.⁸¹ The principle is

App. 667; *Tilley v. Bridges*, 105 Ill. 339.

The last two cases cited hold that an administrator has no authority to warrant the title to real estate sold by him. Some courts apply the same rule to sales of chattels. *Ramsey v. Blalock*, 32 Ga. 376. But the weight of authority is the other way. *Baltwood v. Miller*, 112 Mich. 657 (private sale); *Buckels v. Cunningham*, 6 Sm. & M. 358, 365; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Craddock v. Stewart*, 6 Ala. 77.

⁷⁶ *Mockbee v. Gardner*, *supra*.

⁷⁷ *Kimball v. Salisbury*, 19 Utah 161; *Ramney v. Meisenheimer*, 61 Mo. App. 434; *Balte v. Bedemiller*, 37 Ore. 27; *Corwin v. Benham*, 2 Ohio St. 36; *Parker v. Rodman*, 84 Ind. 256. See *The Monte Alegro*, 9 Wheat. 616, 6 L. ed. 174.

⁷⁸ *Schmidt v. Rankin*, 193 Mo. 254.

⁷⁹ *Oldfield v. Vassar College*, 68 App. Div. (N. Y.) 372.

⁸⁰ *Benj. on Sales*, § 639; *Hall v. Conder*, 2 C. B. (N. S.) 22; *Smith v. Neale*, *id.* 67; *Chapman v. Speller*, 14 Q. B. 621; *Sims v. Marryat*, 17 *id.* 281; *Eichholz v. Bannister*, 17 C. B. (N. S.) 708; *Bagueley v. Hawley*, L. R. 2 C. P. 625.

⁸¹ *Marshall v. Keach*, 227 Ill. 35; *Trustees v. Siers*, 68 W. Va. 125; *Rogan v. Illinois T. & S. Bank*, 93 Ill. App. 39; *Palmer v. Courtney*, 32 Neb. 773 (indorsement "without recourse"); *Higgins v. Illinois T. & S. Bank*, 193 Ill. 394; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Ledwich v. McKim*, 53 *id.* 307; *Erwin v. Downs*, 15 *id.* 575; *Bell v. Dagg*, 60 *id.* 528; *Sherman v. Johnson*, 56 Barb. 59; *Thrall v. Newell*, 19 Vt.

that one who sells commercial paper payable to bearer, and which he does not indorse, warrants that he has no knowledge of any facts which prove the paper to be worthless on account of the insolvency of the maker, or because it has been paid.⁸² The party accepting the transfer is at liberty to act upon the implied assertion of the validity of the paper and to bring an action for its collection,⁸³ and if defeated may recover the costs

202, 47 Am. Dec. 682; *Smith v. McNair*, 19 Kan. 330, 27 Am. Rep. 117; *National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358, 3 Metc. (Mass.) 469; *Terry v. Bissell*, 26 Conn. 23; *Wilder v. Cowles*, 100 Mass. 487; *Cabot Bank v. Morton*, 4 Gray 156; *Merriam v. Wolcott*, 3 Allen 258, 80 Am. Dec. 69; *Shaver v. Ehle*, 16 Johns. 201; *Markle v. Hatfield*, 2 id. 455, 3 Am. Dec. 446; *Herrick v. Whitney*, 15 Johns. 240; *Murray v. Judah*, 6 Cow. 484; *Flynn v. Allen*, 57 Pa. 482; *Canal Bank v. Bank*, 1 Hill 287; *Aldrich v. Jackson*, 5 R. I. 218; *Ellis v. Grooms*, 1 Stew. 47; *Bennett v. Buchan*, 61 N. Y. 222; *Furniss v. Ferguson*, 34 id. 485; *Andrews v. Kramer*, 77 Miss. 151; *Shaw B. B. Co. v. Maybell*, 86 Minn. 241; *Robinson v. McNeill*, 51 Ill. 225; *Carroll v. Nodine*, 41 Ore. 412.

In *Harloe v. Foster*, 53 N. Y. 385, it was held that where a creditor unites with others in the release of their debtor, and signs off for a demand which he has previously transferred, he impliedly undertakes to protect the debtor from such demand; and upon payment being enforced against the debtor he can recover from the creditor, although the release was made upon only a nominal consideration.

Where J. made a contract to sell

the promissory note of C. to L., when he was not its owner and it was not in his possession, it was held that the purchase was at the risk of L.; that the law implied no warranty by J.; that he had title to the note; that although J. subsequently acquired the title this did not inure to the benefit of L. so as to render effectual a payment by C. to L. in extinguishment of the note. *Scranton v. Clark*, 39 Barb. 273.

An assignment of a judgment without recourse implies no warranty that the record is free from error. And on reversal there is no remedy to recover the purchase-money. *Glass v. Reed*, 2 Dana 168.

A refusal to guaranty does not of itself exclude an implied warranty of genuineness. *Bell v. Dagg*, 60 N. Y. 528.

The seller of orders issued to him by drainage commissioners for his services impliedly warrants that the instruments are genuine and that he is the owner thereof and authorized to transfer title; but there is no implied warranty that they are issued by authority of law or that they are worth what they represent. *First Nat. Bank v. Drew*, 91 Ill. 186.

⁸² *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404; *Rothmiller v. Stein*, 143 N. Y. 581, 26 L.R.A. 148; *Gordon v. Irvine*, 105 Ga. 144.

⁸³ *Delaware Bank v. Jarvis*, 20 N. Y. 226.

and expenses so incurred.⁸⁴ In case of contest and adverse judgment the vendor will be concluded by it if he has had notice of the action and an opportunity to be heard.⁸⁵ Where the indorsement of a note is "without recourse" parol evidence is admissible to show that at the time of the transfer the buyer agreed to take the note at his own risk, thereby relieving the indorser from the implied warranty of genuineness.⁸⁶ The implied warranty in the sale of stocks does not include the legal existence of the corporation which issued them.⁸⁷ The assignee of a judgment does not warrant its impregnability, but only its genuineness, the regularity of its entry, that it was rendered by a competent tribunal and has not been satisfied.⁸⁸

The indorsement of a promissory note imports a guaranty that the maker was competent to make the note in the character and in the terms in which it was made.⁸⁹ The drawee in a forged check who has paid it, after indorsement by the payee named therein, may recover the money from such indorser if he has given currency to the check by his indorsement made without due inquiry.⁹⁰ The measure of damages for breach of this implied warranty is the difference between the value of the paper as it is and the value it would possess if the warranty had been true; or, if the instrument is void for a cause within the warranty, the assignee is entitled to recover what it would have been worth if conformable to the implied assurance or, at least, the consideration and interest.⁹¹ Where a judgment against four defendants was assigned and one of them had been released it was held that the assignee was entitled to recover the difference in value between a judgment against all and its value with one released.⁹² In England the vendor's liability is

⁸⁴ Giffert v. West, 33 Wis. 617.

⁸⁵ Bell v. Dagg, 60 N. Y. 528.

⁸⁶ Carroll v. Nodine, 41 Ore. 412.

⁸⁷ Marshall v. Keach, 227 Ill. 35.

⁸⁸ Hinkley v. Champaign Nat. Bank, 216 Ill. 559.

⁸⁹ Erwin v. Downs, 15 N. Y. 575.

⁹⁰ National Bank v. Bangs, 106 Mass. 441, 8 Am. Rep. 349.

⁹¹ Giffert v. West, 33 Wis. 617;

Eaton v. Knowles, 61 Mich. 625;

Adams v. Bowman, 51 Mich. 189;

Coolidge v. Brigham, 1 Metc. (Mass.) 547.

⁹² Bennett v. Buchan, 61 N. Y. 222.

In Thrall v. Newell, 19 Vt. 202, 47 Am. Dec. 682, the defendant had executed an assignment in these words: "I hereby assign to R. H. T.

not based on the notion of a warranty, but on the obligation in the contract of sale itself to deliver, as a condition precedent, that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it.⁹³ The vendee in such cases can only recover the price paid.⁹⁴ In South Carolina a contract of sale for a full price paid for an article always implies a warranty of its soundness.⁹⁵ But the parties may agree that the vendee shall take the property at his

a note in my favor against T. W. and J. H. P., dated 13th November, 1838, for \$150, payable in one year from date, with use, for value received." It was held that the words "for value received" were not merely descriptive of the note assigned, but that *prima facie*, at least, they imported a sufficient consideration for the assignment; it was also held that such an instrument, describing the property assigned as "a note," must be construed as an express warranty on the part of the defendant that it was a valid note; and that the signers were of sufficient capacity to contract when they executed it; and *quere*, whether such a warranty would not be implied from the sale without words indicating an express warranty. And it appearing that the note was invalid as to one of the makers by reason of his insanity, and that an action upon it had been successfully defended by him on that ground, and that the other had removed from the state, it was held that the plaintiff, in an action upon the warranty contained in the assignment, was entitled to recover the difference between the actual value of the note and the amount appearing due upon it. See *Marshall v. Peck*, 1 Dana 612.

In *Pacific I. Works v. Newhall*, 34 Conn. 67, the plaintiff agreed to manufacture and sell to the defend-

ant, for use in his business, a steam-engine with a cut-off known as "Greene's Patent Cut-off," for which they represented that one G. had a patent and that they had a license from him to make and sell the same; and that it would be of great value to the defendant in connection with the engine, all which representations were untrue. The whole was to be for one agreed price, for which the defendant gave his notes when the engine was delivered. After he had used it for a few months another person claimed the cut-off to be an infringement of his own prior patent, and obtained an injunction against its use by the defendant. Held, that there was a failure of consideration to the extent of the value of the cut-off to the defendant in connection with the engine and that that amount should be deducted from the price.

⁹³ *Benj. on Sales*, § 607; *Jones v. Ryde*, 5 Taunt. 488; *Young v. Cole*, 3 Bing. N. C. 724; *Gompertz v. Bartlett*, 2 El. & B. 849; *Westropp v. Solomon*, 8 C. B. 345.

⁹⁴ *Id.*

⁹⁵ *Simons v. Walter*, 1 McCord 70, 10 Am. Dec. 650; *Rivers v. Grugett*, 1 McCord 71; *Thompson v. Lindsay*, 3 Brev. 403; *Wood v. Ashe*, 3 Strobb. 64; *Vaughan v. Campbell*, 1 Brev. 478; *Colcock v. Goode*, 3 McCord 302.

own risk; ⁹⁶ nor will a warranty be implied if the vendor be not in possession of the property which he sells; ⁹⁷ nor against visible defects. ⁹⁸

This implied warranty of soundness will exist though there is an express warranty of title; ⁹⁹ and even though the contract be in writing and under seal,¹ if it is silent on the subject of soundness. A similar rule prevails in Louisiana.² The rule in those states is derived from the civil law. Implied warranties are excluded when there is an express warranty on the same subject.³ They exist where the only stipulation is that express

⁹⁶ *Thompson v. Lindsay*, *supra*.

⁹⁷ *Galbraith v. Whyte*, 1 Hayw. 535.

⁹⁸ *Id.*; *Wood v. Ashe*, 3 Strobbh. 64; *Forgotston v. Cragin*, 62 App. Div. (N. Y.) 243. See *Furman v. Miller*, 1 Brev. 536.

⁹⁹ *Pender v. Fobes*, 1 Dev. & Batt. 250; *Houston v. Gilbert*, 3 Brev. 216; *Wells v. Spears*, 1 McCord 421; *Merriam v. Field*, 24 Wis. 640.

¹ *Wood v. Ashe*, 3 Strobbh. 64; *Hughes v. Banks*, 1 McCord 537.

² *Bulkley v. Honold*, 19 How. 390, 15 L. ed. 663.

Louisiana Civil Code, art. 1764: "There are things which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced without changing the character of the contract or destroying its effect."

³ *Brooks Tire Mach. Co. v. Wells*, 182 Mo. App. 50; *J. I. Case P. Works v. Niles & S. Co.*, 90 Wis. 590, 603; *DeWitt v. Berry*, 134 U.

S. 312, 33 L. ed. 899; *Wilson v. New United States C. R. Co.*, 73 Fed. 994, 20 C. C. A. 244; *The Electron*, 56 Fed. 304; *White v. Gresham*, 52 Ill. App. 399; *Thisler v. Hopkins*, 85 id. 207; *Wood M. & R. Mach. Co. v. Bobbst*, 56 Mo. App. 427; *Canon City E. L. & P. Co. v. Medart P. P. Co.*, 11 Colo. App. 300; *Northey Mfg. Co. v. Sanders*, 31 Ont. 475; *Shepherd v. Gilroy*, 46 Iowa 196; *Mumford v. McPherson*, 1 Johns. 414, 3 Am. Dec. 339; *Dickson v. Zizinia*, 10 C. B. 602; *Wilson v. Marsh*, 1 Johns. 503; *Carson v. Baillie*, 19 Pa. 375, 57 Am. Dec. 659; *Smith v. Cozart*, 2 Head 526; *Parkinson v. Lee*, 2 East 314; *Willard v. Stevens*, 24 N. H. 271; *Brown v. Smith*, 5 How. (Miss.) 387; *Deming v. Foster*, 42 N. H. 165; *Sullivan Mach. Co. v. Breeden*, 40 Ind. App. 631; *Lombard W.-W. G. Co. v. Great Northern P. Co.*, 101 Me. 114, 6 L.R.A.(N.S.) 180; *Franklin Mfg. Co. v. Lamson & G. Mfg. Co.*, 189 Mass. 344; *Cleveland P. & S. W. Co. v. Consumers C. Co.*, 75 Ohio 153; *Wasatch O. Co. v. Morgan O. Co.*, 32 Utah 229, 12 L.R.A.(N.S.) 540. *Contra*, *Loxtercamp v. Lininger I. Co.*, 147 Iowa 29, 33 L.R.A.(N.S.) 501, citing local cases.

warranties will not be recognized unless written.⁴ An implied warranty may exist upon another matter as to which the writing is silent.⁵ It has been held that where the contract of sale is in writing and contains no warranty, none can be established by parol.⁶ But in such cases the silence of the written contract of sale ought not to negative the implied warranty of title.⁷

No particular form of words is required to constitute a warranty; any positive affirmation of facts, as distinguished from an expression of opinion, intended as a warranty or received and acted upon as such will be enough.⁸ A general warranty of

⁴ *Hooven v. Wirtz*, 15 N. D. 477.

⁵ *Ideal H. Co. v. Kramer*, 127 Iowa 137; *Lidgerwood Mfg. Co. v. S. R. H. Robinson & Son Contracting Co.*, 183 Ill. App. 431; *Burns v. Limerick*, 178 Mo. App. 145.

⁶ *McNaughton v. Wahl*, 99 Minn. 92, 116 Am. St. 389; *Stanford v. National D. & Mfg. Co.*, 28 Okla. 441; *McMillan v. De Tamble*, 93 Ill. App. 65; *Kansas Ref. Co. v. Pert*, 3 Kan. App. 364; *Rodgers v. Perault*, 41 Kan. 385; *Farmers' S. B. Ass'n v. Scott*, 53 Kan. 534; *Reed v. Wood*, 9 Vt. 285; *Smith v. Cozart*, 2 Head 526; *Bond v. Clark*, 35 Vt. 577. See *Pickard v. McCormick*, 11 Mich. 68.

⁷ *Miller v. Van Tassel*, 24 Cal. 458.

⁸ *Lutweiler P. E. Co. v. Ukiah W. & I. Co.*, 16 Cal. App. 198; *Hodgkins v. Dunham*, 10 Cal. App. 690; *Swift v. Redhead*, 147 Iowa 94; *Schlichting v. Rowell*, 140 Iowa 731; *Siegel v. Riebolt*, 110 Minn. 344; *Alvin F. & T. Ass'n v. Hartman*, 146 Mo. App. 155; *Wertheimer-S. S. Co. v. McDonald*, 138 Mo. App. 328; *Young v. Van Natta*, 113 Mo. App. 550; *Heath D. G. Co. v. Hurd*, 193 N. Y. 255, 25 L.R.A. (N.S.) 160; *Harris v. Cannady*, 149 N. C. 81; *Wrenn v. Morgan*, 148 N. C. 101; *Larson v. Calder*, 16 N. D.

248; *El Paso, etc. R. Co. v. Eichel* (Tex. Civ. App.), 130 S. W. 922, quoting the text; *Northwestern L. Co. v. Callendar*, 36 Wash. 492; *Thompson v. O. A. Crenshaw Grain Co.*, 113 Ark. 169; *Tomlinson & Co. v. Morgan*, 166 N. C. 557; *Stranahan Co. v. Coit*, 55 Ohio St. 398, 4 L.R.A. (N.S.) 506; *Reese v. Bates*, 96 Va. 321, 329; *Accumulator Co. v. Dubuque St. R. Co.*, 64 Fed. 70, 12 C. C. A. 37, 44; *White v. Gresham*, 52 Ill. App. 399, 403; *Warren v. Philadelphia C. Co.*, 83 Pa. 437; *Joseph v. Richardson*, 2 Pa. Super. 208; *Milburn W. Co. v. Nisewarner*, 90 Va. 714; *Huntington v. Lombard*, 22 Wash. 202; *Eagle I. Works v. Des Moines S. R. Co.*, 101 Iowa 289; *Maxted v. Fowler*, 94 Mich. 106; *Fairbank C. Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. 753; *Shippen v. Bowen*, 122 U. S. 581, 30 L. ed. 1174; *Titus v. Poole*, 145 N. Y. 426; *Robinson v. Harvey*, 82 Ill. 58; *Swett v. Colgate*, 20 Johns. 196, 11 Am. Dec. 266; *Chapman v. Murch*, 19 Johns. 290, 10 Am. Dec. 227; *Carley v. Wilkins*, 6 Barb. 557; *Warren v. Van Pelt*, 4 E. D. Smith, 202; *Rogers v. Ackerman*, 22 Barb. 134; *Lawton v. Keil*, 61 id. 558; *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *White v. Miller*, 71

soundness will only cover defects which are not visible and obvious as such unless expressly made to do so or they are fraudulently concealed.⁹ It does not cover defects which are perfectly visible and obvious to the senses, and actually known

N. Y. 118, 27 Am. Rep. 13; Stroud v. Pierce, 6 Allen 413; Stone v. Denny, 4 Metc. (Mass.) 151; Morrill v. Wallace, 9 N. H. 111; Henshaw v. Robins, 9 Metc. (Mass.) 83, 43 Am. Dec. 367; Hillman v. Wilcox, 30 Me. 170; Bryant v. Crosby, 40 id. 18; Randall v. Thornton, 43 id. 226, 69 Am. Dec. 56; Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438; Taylor v. Bullen, 5 Ex. 779; Shepherd v. Kain, 5 B. & Ald. 240; Freeman v. Baker, 5 B. & Ad. 797; Power v. Barham, 4 A. & E. 473; Hopkins v. Tanqueray, 15 O. B. 130; Powell v. Horton, 2 Bing. N. C. 668; Allan v. Lake, 18 Q. B. 560; Hawkins v. Berry, 10 Ill. 36; Towell v. Gatewood, 5 id. 22; Ender v. Scott, 11 Ill. 35; Bond v. Clark, 35 Vt. 577; Beals v. Olmstead, 24 Vt. 114, 58 Am. Dec. 150; House v. Fort, 4 Blackf. 293; Humphreys v. Comline, 8 id. 507; Hahn v. Doolittle, 18 Wis. 196; McGregor v. Penn, 9 Yerg. 74; Henson v. King, 3 Jones 419; Ricks v. Dillahunt, 8 Port. 133; Murphy v. Gay, 37 Mo. 535; Carter v. Black, 46 id. 384; O'Neal v. Bacon, 1 Houst. 215; Osgood v. Lewis, 2 H. & G. 495, 18 Am. Dec. 317; Otts v. Alderson, 10 Sm. & M. 476; Blythe v. Speake, 23 Tex. 429; Weimer v. Clement, 37 Pa. 147, 78 Am. Dec. 411; McFarland v. Newman, 9 Watts 55, 34 Am. Dec. 497; Ellis v. Barkley, 160 Iowa 658 (must have been intended); White A. Co. v. Dorsey, 119 Md. 251; Frey v. Failes, 37 Okla. 297; Armstrong v. Descalzi, 48 Pa. Super. 171.

It is held in *Hoffman v. Dixon*,

105 Wis. 315, 76 Am. St. 914, that "if a person offer an article for sale, accompanying such offer with an affirmation of fact, or acts equivalent to such affirmation, as to the identity of such article, for the purpose of making a sale thereof to another, and such other relying upon such affirmation, purchase such article, and such affirmation be false to the injury of the purchaser, he may hold the vendor liable for damages for breach of warranty or actionable fraud, without regard to whether such vendor made the affirmation knowing it to be false or not."

⁹ *Florida A. Club v. Hope L. Co.*, 18 Tex. Civ. App. 161; *Vanderwalker v. Osmer*, 65 Barb. 556; *Brown v. Bigelow*, 10 Allen 262; *Chadsey v. Green*, 24 Conn. 562; *Dillard v. Moore*, 7 Ark. 466; *Fisher v. Pollard*, 2 Head 314, 75 Am. Dec. 740; *Mulvany v. Rosenberger*, 18 Pa. 203; *Dana v. Boyd*, 2 J. J. Marsh 587; *Hudgins v. Perry*, 7 Ired. 105; *Pinney v. Andrews*, 41 Vt. 631; *Benj. on Sales*, § 616.

A manufacturer who makes and sells machinery for a special use warrants that it is free from latent defects which render it unfit for the use to which it is to be applied. He does not warrant (in the absence of express contract) that it is perfect, or the best for that purpose, but only that it is reasonably fit and proper for the use designed. "If one orders a casting which cannot be made without blow-holes, there is no warranty implied that he will receive one without blow-holes; but

to the party taking the warranty.¹⁰ Where, however, it was conceded that the defect complained of in a horse sold with warranty, so far as it was obvious and visible, was known to the purchaser or his agent, but it appeared that the seller represented that it did not injure the horse, nor affect him in the slightest degree, and the purchaser or his agent did not believe, and had no reason to believe, that the defect was anything but a mere blemish, which would never render the horse less useful or capable of service, and the testimony tended to prove that in point of fact the defect was a real unsoundness at the time of sale. it was held that this was one of those equivocal defects that a warranty may well be considered as taken to guard against.¹¹ A warranty may be expressly made to cover defects known to the vendee,¹² and for the purpose of covering and including a prior warranty which he claimed had been broken.¹³ The implied warranty of an article does not extend beyond the article itself to other articles or appliances connected therewith, even though included in the same order and bought at the same time.¹⁴ But all the component parts of an article are covered by a warranty of it, and that may be relied upon though the purchaser made a partial inspection of it.¹⁵ A breach of warranty is available only to the immediate purchaser from the warrantor.¹⁶

The rule excluding from a warranty defects known to the purchaser only applies to such as are perfectly obvious, and the effects and consequences of which may be accurately estimated,

there is a warranty that he may not expect any more or larger blow-holes than is usual in the process of manufacture designed to such articles fit and proper for use." *Tennessee River, etc. Co. v. Leeds*, 97 Tenn. 574.

¹⁰ *Byrd v. Campbell P. P. & Mfg. Co.*, 90 Ga. 542; *Hill v. North*, 34 Vt. 604.

¹¹ *Hill v. North*, 34 Vt. 604; *Dietrich v. Badders*, 4 Boyce (Del.) 499.

¹² *June v. Falkenburg*, 89 Mo.

App. 563, 571, and cases cited in next note.

¹³ *Hansen v. Gaar*, 63 Minn. 94; *Fitzgerald v. Evans*, 49 Minn. 541; *Norris v. Parker*, 15 Tex. Civ. App. 117; *Watson v. Roode*, 30 Neb. 264.

¹⁴ *Troy L. Co. v. Henry*, 23 Ore. 232; *Savery H. Co. v. Under-Feed S. Co.*, 178 Fed. 806, 102 C. C. A. 254.

¹⁵ *Frey v. Failes*, 37 Okla. 297.

¹⁶ *Nelson v. Armour P. Co.*, 76 Ark. 352; *Smith v. Williams*, 117 Ga. 782.

so that no purchaser would expect the seller intended to warrant against them; but all other defects, though apparent to some extent, but still equivocal and doubtful in character, as to whether they are permanent or temporary, or mere harmless blemishes, or but partially developed unsoundness must be understood to be included in and covered by a general warranty.¹⁷

For mere breach of warranty the sale cannot be rescinded by return of the property after it has been delivered and accepted so as to vest the title in the purchaser unless the contract gives that option or requires it.¹⁸ But in some states a warranty is considered in the nature of a condition subsequent at the election of the vendee, and upon a breach of it he may rescind the contract by returning the property.¹⁹ If the defect in the goods

¹⁷ *Loxtercamp v. Lininger I. Co.*, 147 Iowa 29, 33 L.R.A.(N.S.) 501; *Bierman v. City M. Co.*, 151 N. Y. 482, 56 Am. St. 636, 37 L.R.A. 799; *Hodgman v. State Line & S. R. Co.*, 45 Ill. App. 395; *Miller v. Moore*, 83 Ga. 684, 20 Am. St. 329, 6 L.R.A. 374; *Hill v. North*, 34 Vt. 604. See *Callaway v. Quattlebum*, 19 Ga. 277.

¹⁸ *Thomas C. Co. v. Raymond*, 135 Fed. 25, 67 C. C. A. 629; *Skinner v. Mulligan*, 56 Ill. App. 47; *Minneapolis H. Works v. Bonnallie*, 29 Minn. 373; *Merrick v. Wiltse*, 37 Minn. 41; *Street v. Blay*, 2 B. & Ad. 256; *Gompertz v. Denton*, 1 Cr. & M. 207; *Poulton v. Lattimore*, 9 B. & C. 259; *Parsons v. Sexton*, 4 C. B. 899; *Dawson v. Collis*, 10 C. B. 530; *Cutter v. Powell*, 2 Smith Lead. Cas. 26; *Wright v. Davenport*, 44 Tex. 164; *Thornton v. Wynn*, 12 Wheat. 183, 6 L. ed. 595; *Withers v. Greene*, 9 How. 213, 13 L. ed. 109; *Lyon v. Bertram*, 20 id. 149, 15 L. ed. 847; *Voorhees v. Earl*, 2 Hill 288; *Cary v. Gruman*, 4 id. 625; *Muller v. Eno*, 14 N. Y. 601,

per *Comstock, J.*; *Kase v. John*, 10 Watts 107, 36 Am. Dec. 148; *Lightburn v. Cooper*, 1 Dana 273; *Allen v. Anderson*, 3 Humph. 581, 39 Am. Dec. 197; *Williams v. Hart*, 2 Humph. 68; *West v. Cutting*, 19 Vt. 536; *Hcadly v. House*, 32 id. 179, 76 Am. Dec. 167; *Mayor v. Dwinell*, 29 Vt. 298; *Matteson v. Holt*, 45 id. 336; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Rust v. Eckler*, 41 N. Y. 488; *Milton v. Rowland*, 11 Ala. 732; *Freeman v. Clute*, 3 Barb. 424; *Myer v. Wheeler*, 65 Iowa 390; *Miller v. Moore*, 83 Ga. 684, 20 Am. St. 329, 37 L.R.A. 799; *Eagle Glass & Mfg. Co. v. Second Hand Pipe & Supply Co.*, 74 W. Va. 228; *J. I. Case Threshing Mach. Co. v. Badger*, 56 Ind. App. 399.

¹⁹ *Sloan v. Wolf*, 124 Fed. 196, 59 C. C. A. 612 (Neb.); *Parsons B. C. & S. F. Co. v. Mallinger*, 122 Iowa 703; *Hodge v. Tufts*, 115 Ala. 366; *Rubin v. Sturtevant*, 80 Fed. 930, 26 C. C. A. 259; *Wilson v. New United States C. R. Co.*, 73 Fed.

is not discovered until part of them have been sold the unsold part may be returned and the price paid for them be recovered.²⁰ If by the terms of the contract the purchaser is required absolutely to return the property if found defective or in any wise not conformable to the warranty, with a view to the substitution of other property or rescission, the vendee will have no right of action on the warranty without returning or offering to re-

994, 20 C. C. A. 244; *Eagle I. Works v. Des Moines S. R. Co.*, 101 Iowa 289; *Door v. Fisher*, 1 Cush. 271; *Perley v. Balch*, 23 Pick. 283, 34 Am. Dec. 56; *Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103; *Kimball v. Cunningham*, 4 Mass. 502, 3 Am. Dec. 230; *Bryant v. Isburgh*, 13 Gray 607; *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276; *Taymon v. Mitchell*, 1 Md. Ch. 496; *Franklin v. Long*, 7 Gill & J. 407; *Rutter v. Blake*, 2 Harr. & J. 353, 3 Am. Dec. 552; *Boothby v. Scales*, 27 Wis. 626; *Wardle v. Whitney*, 23 id. 55, 99 Am. Dec. 102; *Merrill v. Nightingale*, 39 Wis. 247.

"In cases of executory contracts for the manufacture and sale of goods of a particular description there is an implied warranty that they are free from any latent defect growing out of the process of manufacture or the use of inferior material; this is the sole warranty that attaches to such a contract and after full opportunity for examination as to quality, or as to apparent defect, or the discovery of it, if it is latent, the vendee must rescind the contract and offer to return the property to the vendor, in which case he may recover the contract price; this is his only remedy. If the vendee neither returns nor offers to return the property, nor gives the vendor notice or oppor-

tunity to take it back, in the absence of a collateral warranty or agreement as to quality, he is conclusively presumed to have acquiesced and may not thereafter complain that the article is not in accordance with the contract. *Durbrow & H. Mfg. Co. v. Cuming*, 35 App. Div. (N. Y.) 376; *Reed v. Randall*, 29 N. Y. 358; *Coplay I. Co. v. Pope*, 108 id. 232; *Lester-shire L. & B. Co. v. Ritter L. Co.*, 153 Fed. 573, 82 C. C. A. 527 (New York).

If there is an express or collateral warranty the vendee may retain the goods if they are defective and sue for the breach of warranty, in which case he may recover as damages the difference between the value of the goods if they had been, as represented and their value as they actually were." *Bank v. Cary S. Co.*, 42 App. Div. (N. Y.) 233.

²⁰ *Bunch v. Weil*, 72 Ark. 343, 65 L.R.A. 80.

In case of the purchase of a team where the horses were sold as a team, and no specific price paid for either horse, the buyer being unable to return the team by reason of the death of one of the horses, cannot recover the purchase price paid, but must recover if at all on the breach of the warranty. *Foster v. Smith*, 184 Ill. App. 255.

turn it.²¹ The vendor may limit his liability for the breach of a warranty.²²

It is nowhere obligatory to return the goods unless it is required by the contract.²³ The buyer may sue immediately on the breach; his action accrues at once on the completion of the sale if the goods are not according to the warranty.²⁴ This is so notwithstanding any difficulty or inability of the purchaser then to ascertain the quality or condition of the property.²⁵ If the buyer is required to return the property on ascertaining its defect and does not do so he cannot recover for expenses incurred after its condition is known to him.²⁶ The right to return or

²¹ *Sloan v. Wolf*, 124 Fed. 196, 59 C. C. A. 612; *McCormick H. Mach. Co. v. Arnold*, 116 Ky. 508; *Haynes v. Plano Mfg. Co.*, 36 Tex. Civ. App. 567; *Brown v. Austin-W. Co.*, 111 Va. 209; *Walsh Mfg. Co. v. Plymouth L. Co.*, 159 N. C. 507; *Nichols & Shepard Co. v. Stubbs Thresher Co.*, 160 Ky. 694; *Hickman v. Richardson*, 92 Kan. 716; *Davis v. Gosser*, 41 Kan. 414; *Bufalo B. W. Co. v. Phillips*, 67 Wis. 129; *Sessions v. Hartsook*, 23 Ark. 519; *Mayor v. Dwinell*, 29 Vt. 298.

Under a warranty that a horse is sound and kind, and if he should not suit the seller would take him back and send the purchaser another, the warranty as to unsoundness was independent, and the right to provide another horse did not extend to unsoundness; the horse being unsound and having died the purchaser could recover damages and was not obliged to call upon the seller to furnish another horse. *Perrine v. Serrell*, 30 N. J. L. 454.

²² *Case T. M. Co. v. Davis*, 131 La. 87.

²³ *Sutherland v. Green*, 49 Mont. 379.

²⁴ *Western U. Tel. Co. v. Jackson Lumber Co.*, 187 Ala. 629; *Erie City I. Works v. Tatum*, 1 Cal. App. 286;

Rosenbaum G. Co. v. Pond Creek M. & E. Co., 22 Okla. 555; *Kleeb v. McInturff*, 62 Wash. 508; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286; *Hefner v. Haynes*, 89 Iowa 616; *Hooper v. Story*, 155 N. Y. 171; *Zimmerman v. Druecker*, 15 Ind. App. 512; *Central T. Co. v. Arctic I. Mach. Mfg. Co.*, 77 Md. 202, 238; *Joseph v. Richardson*, 2 Pa. Super. 208; *English v. Spokane C. Co.*, 57 Fed. 451, 6 C. C. A. 416; *Wheelock v. Berkeley*, 138 Ill. 153; *Close v. Crossland*, 47 Minn. 500; *Vincent v. Leland*, 100 Mass. 432; *Hammar P. Co. v. Glover*, 47 Kan. 15.

The implied warranty accompanying a sale by sample survives an acceptance of the goods though the fact that it is breached is discoverable on their inspection. *Staiger v. Soht*, 116 App. Div. (N. Y.) 874.

²⁵ *Allen v. Todd*, 6 Lans. 222.

Where the use of improper stock in the manufacture of cloth only made it unserviceable in places the vendee was not concluded by his acceptance and retention of the cloth for manufacturing it into ulsters, the defects not being discoverable upon inspection. *Bierman v. City M. Co.*, 151 N. Y. 482, 492, 56 Am. St. 636, 37 L.R.A. 799.

²⁶ *Wasatch O. Co. v. Morgan C.*

recover damages is lost if the goods are retained for a longer time than was reasonable for a trial or if the buyer's conduct shows he accepted them.²⁷

"When there is an express warranty upon an executory contract of sale and the articles which are the subject of the contract are found, when delivery is tendered to the vendee, not to correspond to the warranty two remedies are open to him. He may return the articles and rescind the contract, or he may accept them and, affirming the contract, recover upon the warranty.²⁸ The right to rescind arises, not because the contract of warranty is broken, but because the articles do not correspond with the contract of sale and the vendee is not bound to accept that which he did not agree to buy,—a consideration which has

Co., 32 Utah 229, 12 L.R.A.(N.S.) 540; *Acme H. Mach. Co. v. Gasper-son*, 168 Mo. App. 558; *Newberry v. Bennett*, 38 Fed. 308; *Draper v. Sweet*, 66 Barb. 145; *Nye v. Iowa City A. Works*, 51 Iowa 129, 33 Am. Rep. 121; *Murphy v. McGraw*, 74 Mich. 318.

It is competent for the jury to consider, in determining whether or not there was a breach of warranty, the fact that the buyer, after a reasonable opportunity to examine goods sold by sample, retained possession of them without complaining of their quality or offering to return them. *Moore F. Co. v. Sloane*, 166 Ill. 457, aff'g 64 Ill. App. 581.

²⁷ *Woodford D. Co. v. Remington T. Co.*, 174 Ill. App. 244; *Rice v. Pulliam*, 141 Ky. 10; *Buick M. C. Co. v. Reid Mfg. Co.*, 150 Mich. 118; *Parker v. Fenwick*, 138 N. C. 209; *McMillan v. De Tambla*, 93 Ill. App. 65; *Hodge v. Tufts*, 115 Ala. 366; *Brown v. Davidson*, 42 Okla. 598; *Best Mfg. Co. v. Hutton*, 49 Mont. 78; *Burnley v. Shinn*, 80 Wash. 240.

If the parties have entered into stipulations respecting the measure of the damages the courts will en-

force them. *Twin City C. Co. v. Godfrey*, 176 Mich. 109, 50 L.R.A.(N.S.) 805.

²⁸ *Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393; *Bayley v. Cleveland R. M. Co.*, 22 Blatch. 342, 21 Fed. 159; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63; *J. I. Case Threshing Mach. Co. v. Badger*, 56 Ind. App. 399; *Piersall v. Huber Mfg. Co.*, 159 Ky. 338; *Mobile Auto Co. v. R. W. Sturges & Co.*, — Miss. —, 66 So. 205; *Excelsior Stove Mfg. Co. v. Million*, 174 Mo. App. 718; *Robinson v. Huffstetler*, 165 N. C. 459; *Bracken v. Fidelity Trust Co.*, 42 Okla. 118, L.R.A.1915B 1216; *Half Co. v. Jones*, — Tex. Civ. App. —, 169 S. W. 906.

Where the defendant relied primarily on the defense of rescission, and gave evidence of an attempted rescission in the court below and refused to elect to stand on his counterclaim for damages, the court was justified in disregarding the latter branch of the case and deciding the case on the principles applicable to rescission. *Miller v. Zander*, 85 Misc. (N. Y.) 499.

sometimes been overlooked in the adjudged cases. A rescission contemplates that both parties shall be placed in *statu quo*, and ordinarily the vendee of goods who proposes to rescind the contract for their purchase must rescind *in toto*. But when the contract of purchase embraces a number of distinct articles at different prices then, even if they are of the same general description, so that a warranty of quality would apply to each, the contract is not entire, but is, in effect, a separate contract for each article and a right of rescission exists as to each.²⁹ But if one consideration is to be paid for all the articles so that it is not possible to determine the amount of consideration paid for each the contract is entire and there cannot be a rescission without an offer to return the whole."³⁰

§ 669. **Damages on breach of warranty of title.** The measure of damages for breach of the warranty of title, it might be expected, would be at least what would be recoverable for failure to deliver, that is the value of the property lost by the defect of title,³¹ at the time of the breach, which is, in the absence of any stipulation, when there is an absolute refusal to deliver.³² A loss of property through a want of title is precisely the same to the vendee as a loss of it because the vendor fails to deliver, and the latter, by violating his contract, is the cause of the loss in either case. The value of the property at the time the vendee is dispossessed has been held to be the measure of dam-

²⁹ Young & C. Mfg. Co. v. Wakefield, 121 Mass. 91.

³⁰ Per Wallace, C. J., in Rubin v. Sturtevant, 80 Fed. 930, 26 C. C. A. 259, citing Miner v. Bradley, 22 Pick. 457; Lyon v. Bertram, 20 How. 149, 15 L. ed. 847.

³¹ Shultis v. Rice, 114 Mo. App. 274; Routh v. Caron, 64 Tex. 289.

A judgment against a vendor who has been notified of the pendency of the action against his vendee is conclusive as to the value. Shultis v. Rice, *supra*. It is otherwise if notice was not given. Salle v. Light, 4 Ala. 700. See §§ 86, 87.

The assignment of a judgment

which does not exist is attended with liability for the value of the non-exempt property owned by the judgment debtor intermediate the assignment and institution of suit, with interest from the time a sale of it might have been made. Jansen v. Ball, 6 Cow. 629.

The cancellation of a judgment after its sale carries liability for the amount due upon it, with interest from the time it was sold. Moody v. Rowland, 46 Tex. Civ. App. 412.

³² Lister v. Windmuller, 52 N. Y. Super. 407.

ages.³³ Generally, however, the measure has been stated to be the purchase-money and interest,³⁴ thus adopting the same rule that is usually applied in estimating the damages for breach of

³³ *Close v. Crossland*, 47 Minn. 500; *Hendrickson v. Back*, 74 Minn. 90; *Hoffman v. Chamberlain*, 40 N. J. Eq. 663, citing *Grose v. Hennessey*, 13 Allen 389, and *Rowland v. Shelton*, 25 Ala. 217; *Brown v. Pierce*, 97 Mass. 46, 93 Am. Dec. 57; *Duecker v. Goeres*, 104 Wis. 29, 36, citing the text; *Marlatt v. Clary*, 20 Ark. 251; *Dabovich v. Emeric*, 12 Cal. 171; *Boyd v. Whitfield*, 19 Ark. 447. This is assumed to be the measure in *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482.

³⁴ *Smith v. Williams*, 117 Ga. 782, 97 Am. St. 220; *Morgan v. Hendrie*, 34 Colo. 25, quoting the text; *Caproon v. Mitchell*, 77 Neb. 562; *Jeffers v. Easton*, 113 Cal. 345; *Hudson v. Norwood*, 13 Tex. Civ. App. 662; *Confederation L. Ass'n v. Labatt*, 27 Ont. App. 321, quoting the text; *Brown v. Woods*, 3 Cold. 182; *Ellis v. Gosney*, 7 J. J. Marsh 109; *Crittenden v. Posey*, 1 Head 311; *Anding v. Perkins*, 29 Tex. 348; *Noel v. Wheatley*, 30 Miss. 181; *Armstrong v. Percy*, 5 Wend. 535; *Burt v. Dewey*, 31 Barb. 540; *Goss v. Dysant*, 31 Tex. 186; *Granberry v. Hawpe*, 30 id. 409; *Ware v. Weathnall*, 2 McCord 413; *Rowland v. Shelton*, 25 Ala. 217; *Eaton v. Mellus*, 7 Gray 566; *Arthur v. Moss*, 1 Ore. 193; *Atkins v. Hosley*, 3 Thomp. & C. 322; *Wood v. Wood*, 1 Metc. (Ky.) 512; *Pierce v. Banton*, 98 Me. 553.

In *Hendrickson v. Back*, 74 Minn. 90, this rule of damages was declared erroneous because under it the recovery might be more or less than the damages, depending on the real value of the chattel when

the paramount title was asserted against the vendee; that is, whether the real value was more or less than the price paid. "A good illustration of this is found in the present case. Defendant purchased in 1892, agreeing to pay \$75 for the harvester and binder in question. He gave his note for this sum to his vendor, plaintiff's intestate, and the note in suit was given in renewal in 1894. The machine was mortgaged until 1895, and it was then worth but \$25. Defendant had the possession and the use for three years, during which time the property would materially decrease in value. His actual loss when the paramount title or right was asserted was the value of the property when taken away from him, and his loss would have been the same if he had bought the machine for \$10 in 1892. We call attention to the fact that in a number of the text-books on the subject of damages the rule finally adopted by the trial court is laid down and cases cited in support of it. An examination will show that, with two or three exceptions, they do not sustain the rule, and quite a number are authority for what we believe to be the only just doctrine."

There is no connection between the failure of title and the act of the owner of the property in maliciously, wilfully and fraudulently taking possession of it; hence, if such owner is impleaded by the vendor he cannot be held for exemplary damages. *Hudson v. Norwood*, 13 Tex. Civ. App. 662.

One who has bought subject to

covenants for title to real estate.³⁵ There can be no recovery on warranty for more than nominal damages unless the paramount title has been asserted or yielded to and the property given up to the owner.³⁶ In North Carolina there may be a recovery without proof of dispossession by legal process; that follows if the title is in another than the vendee and such other has ac-

the original owner's lien for unpaid purchase money, which he has agreed to pay, may not recover a sum so paid on the theory that it was a part of the purchase money. *Bevan v. Muir*, 53 Wash. 54, 32 L.R.A.(N.S.) 588.

³⁵ If the failure of title is but partial the damages will bear the same proportion to the whole purchase-money as the value of the part to which the title fails bears to the whole property, estimated at the price paid. *Moorehead v. Davis*, 92 Ind. 303; *Brown v. Woods*, 3 Cold. 182; *Hoffman v. Chamberlain*, 40 N. J. Eq. 663.

In *Crittenden v. Posey*, 1 Head 311, the vendor had a life estate—slaves for the life of another; the consideration paid was recovered, but with an abatement of interest during the period of enjoyment; it was computed only from the termination of the life estate. See *Wood v. Wood*, 1 Metc. (Ky.) 512.

³⁶ *Barnum v. Cochrane*, 143 Cal. 642; *Close v. Crossland*, 47 Minn. 500; *Hull v. Caldwell*, 3 S. D. 451; *Johnson v. Oehmig*, 95 Ala. 189, 36 Am. St. 204; *O'Brien v. Jones*, 91 N. Y. 93; *Wanser v. Messler*, 29 N. J. L. 256; *Bordewell v. Colie*, 45 N. Y. 594, 1 Lans. 141; *Joslin v. Caughlin*, 27 Miss. 852; *Sumner v. Gray*, 4 Ark. 467, 38 Am. Dec. 39; *Sweetman v. Prince*, 62 Barb. 256; *Randon v. Toby*, 11 How. 493, 13 L. ed. 784; *McGiffin v. Baird*, 62 N.

Y. 329; *Burt v. Dewey*, 40 id. 283, 100 Am. Dec. 482; *Brown v. Smith*, 5 How. (Miss.) 387; *Patrick v. Swinney*, 5 Bush 421, 96 Am. Dec. 360; *Ogburn v. Ogburn*, 3 Port. 126; *Conner v. Eddy*, 25 Mo. 72; *Case v. Hall*, 24 Wend. 102, 35 Am. Dec. 605; *Richardson v. McFadden*, 13 Tex. 278; *Dent v. McGrath*, 3 Bush 174; *Schuchardt v. Allens*, 1 Wall 359, 17 L. ed. 642. See *Grose v. Hennessey*, 13 Allen 389.

If the vendor is insolvent the vendee may, upon being threatened with suit by the owner of the property, pay the latter the price and thereby acquire a defense to an action by the vendor. *Matheny v. Mason*, 73 Mo. 677, 682, 39 Am. Rep. 541, citing *Sweetman v. Prince*, 26 N. Y. 232; *Bell's Contract of Sale*, 94, 95; *Burt v. Dewey*, *supra*; *McGiffin v. Baird*, *supra*; *Bordewell v. Colie*, 1 Lans. 141, 143, 144; *Dickinson v. Maul*, 4 B. & Ad. 638; *Allen v. Hopkins*, 13 M. & W. 93; *King v. Richards*, 6 Whart. 418, 427, 37 Am. Dec. 420; *Hayden v. Davis*, 9 Cal. 573; *Frazier v. Erie Bank*, 8 W. & S. 18, 20, and *Arnold v. Macungie Sav. Bank*, 71 Pa. 287.

One who yields property to the owner on demand without eviction assumes the burden of proving that the person to whom he yielded it had a paramount title. *Jeffers v. Easton*, 113 Cal. 345. And so as to payment voluntarily made to the owner. *Matheny v. Mason*, *supra*.

quired possession.³⁷ In Kentucky the same rule is recognized where the warranty is implied; ³⁸ but if it is expressed no cause of action accrues until dispossession by the owner.³⁹ The latter rule is the law of Georgia.⁴⁰ It has been said that there is not sufficient ground for this distinction.⁴¹ Legal prohibition of the use of a patented article need not be shown if a valid patent exists.⁴²

If the vendor fraudulently represents the property to be his when he knows it is not an action lies to recover damages although the owner has not recovered the property and the vendee has not suffered any actual damages.⁴³ A recovery of the value by the owner against the vendee is equivalent to an eviction for the purpose of recovery against the vendor on the warranty of title.⁴⁴

It is said in a Canadian case ⁴⁵ that "there is no case in the English courts or our own which expressly decides that unliquidated damages may be recovered on the breach of an implied warranty of title. In all the reported decisions on the subject the recovery has been confined to the price paid, but in all these cases the claim was simply one to recover back money paid as upon a failure of consideration.⁴⁶ In Benjamin on Sales ⁴⁷ it is said: *Eichholz v. Bannister* was on the money counts and therefore, strictly speaking, only decides that the price may be recovered back by the buyer on the failure of the title to the thing sold; but as the *ratio decidendi* was that there was a warranty implied as part of the contract, there seems no reason to doubt

³⁷ *Hodges v. Wilkinson*, 111 N. C. 56, 17 L.R.A. 545, 32 Am. St. 782.

³⁸ *Pusey v. Wathen*, 90 Ky. 473.

³⁹ *Tipton v. Triplett*, 1 Metc. (Mass.) 570 and cases cited.

⁴⁰ *Terrell v. Stevenson*, 97 Ga. 570.

⁴¹ *Hodges v. Wilkinson*, *supra*; *Gross v. Kierski*, 41 Cal. 111.

⁴² *National M. E. B. Co. v. Gotham*, 125 App. Div. (N. Y.) 101.

⁴³ *Case v. Hall*, 24 Wend. 102, 35 Am. Dec. 605; *Hull v. Caldwell*, 3 S. D. 451.

⁴⁴ *Bordewell v. Colie*, 1 Lans. 141,

45 N. Y. 494; *Allen v. Roundtree*, 1 Spears 80; *Hynson v. Dunn*, 5 Ark. 395, 41 Am. Dec. 100; *Sumner v. Gray*, 4 Ark. 467, 38 Am. Dec. 39.

⁴⁵ *Confederation L. Ass'n v. Labatt*, 27 Ont. App. 321 (1900).

⁴⁶ *Eichholz v. Bannister*, 17 C. B. (N.S.) 708; *Raphael v. Burt*, Cab. & Ell. 325; *Peuchen v. Imperial Bank*, 20 Ont. 325.

⁴⁷ 7th Am. ed. (1899) from the Eng. ed. of 1892, and earlier editions published in the author's life time.

that the vendor would also be liable for unliquidated damages.

* * * It appears to me that the law is accurately stated in the passage quoted from Mr. Benjamin's learned work and that the vendee, going upon the breach of the implied warranty, is entitled to recover the value of the thing he has lost in consequence of the failure of the vendor's title. Can less be supposed to have been in the contemplation of the parties when the sale was made? Why should a loss by failure of title be less fully compensated than a loss by breach of warranty of quality? The case appears to fall fairly within the general rule of the common law, as stated by Parke, B.,⁴⁸ that 'where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.' " In another Canadian case it was held that the vendee was entitled to recover the value of the article sold,—a hay press—and the sum he would have received, beyond expenses, upon contracts actually made to press hay with the press in question, and which he was in the course of executing at the time he was dispossessed, the use of the press in that way having been in the contemplation of the plaintiff's vendor at the time of the sale.⁴⁹

Where the vendee is dispossessed by suit and has in good faith incurred expenses in defending it he is entitled to recover these, also, as an additional item of damages, for the same reasons and on the same conditions as when an action is brought on the covenant of warranty in a deed of land, and in other instances of recovery over.⁵⁰ By giving the vendor seasonable

⁴⁸ Robinson v. Harman, 1 Ex. 855.

⁴⁹ Sheard v. Horan, 30 Ont. 618 (1899). The plaintiff used the press nearly four years before his possession was interfered with. The opinion refers to *The Argentino*, L. R. 14 App. Cas. 519; *Cory v. Thames I. W. Co.*, L. R. 3 Q. B. 181; *Mullett v. Mason*, L. R. 1 C. P. 559.

⁵⁰ *Scaling v. Knollin*, 94 Ill. App. 443; *Drennan v. Bunn*, 124 Ill. 175; *Balte v. Bedemiller*, 37 Ore. 27; *Thurston v. Spratt*, 52 Me. 202;

Pierce v. Banton, 98 Me. 553; *Armstrong v. Percy*, 5 Wend. 535; *Boyd v. Whitfield*, 19 Ark. 447; *McDonald v. Clearwater S. R. Co.*, 164 Fed. 1007; *Houser v. United States*, 39 Ct. of Cls. 508; *St. Anthony & D. E. Co. v. Dawson*, 20 N. D. 18. *Contra*, *Tennis v. Gifford*, 133 Iowa 372. It is said in this case that the rule that the covenantor in a deed with warranty may be liable to his covenantee for expenses in defending against an incumbrance has

notice to defend the suit (which has been held to be essential⁵¹) brought by the owner of the property he is so far made a party that, whether he responds to the notice and defends or not, the judgment is conclusive against him in favor of his vendee to the extent to which his rights are tried and adjudicated.⁵² After the

no application to an action to recover damages for breach of the implied warranty of title in the sale of personal property. What plaintiff is entitled to recover is the damage sustained, which cannot exceed the value of the property when purchased.

In *Boyd v. Whitfield*, *supra*, the vendor lived in Virginia, and after his death his administrator also. The securities for the purchase-money were in the hands of an attorney in Kansas for collection. He had been attorney for the vendor and, after his death, was such for the administrator for the purpose of such collection. This attorney was notified of the suit and the nature of it, for the assertion of the paramount title, and requested to attend to it in behalf of the vendor. The attorney, being unable to attend court, said he would request his partner to do so, and he did assist in the defense. Testimony was taken in Virginia, and it was inferred by the court that the vendor's administrator in that manner obtained notice of the suit and the object of it, as he was present at the taking of the depositions, and the record was held conclusive against him. The property was slaves, and in the action upon the warranty the court gave the plaintiff their value and the amount of hire he had been adjudged to pay the true owner, with interest, "etc." which, perhaps, refers to the costs and expenses of defending the title.

⁵¹ *Houser v. United States*, 39 Ct. of Cls. 508.

⁵² *Davis v. Wilborne*, 1 Hill (S. C.) 27, 26 Am. Dec. 154; *Pickett v. Ford*, 4 How. (Miss.) 246; *Barney v. Dewey*, 13 Johns. 225, 7 Am. Dec. 372; *Blasdale v. Babcock*, 1 Johns. 517; *Brewster v. Countryman*, 12 Wend. 450; *Minor v. Clark*, 15 id. 427; *Middleton v. Thompson*, 1 Spears 67; *Train v. Gold*, 5 Pick. 360; *Ives v. Niles*, 5 Watts 325; *Collingwood v. Irwin*, 3 id. 310; *Eldridge v. Wadleigh*, 12 Me. 371; *Marlatt v. Clary*, 20 Ark. 251; *Myers v. Smith*, 27 Md. 91; *St. Anthony & D. E. Co. v. Dawson*, *supra*; *Shultis v. Rice*, 114 Mo. App. 274; *National M. E. B. Co. v. Gotham*, 125 App. Div. (N. Y.) 101. See *Bevan v. Muir*, 53 Wash. 54, 32 L.R.A. (N.S.) 588; *Coolidge v. Brigham*, 5 Metc. (Mass.) 68; *Schnurmacher v. Kennedy*, 88 N. Y. S. 943, (counsel fees paid by the seller are not recoverable, it seems).

It was so held in *Armstrong v. Percy*, 5 Wend. 535. In August, 1825, the defendant had sold a horse to the plaintiff for \$140. In March, 1827, the plaintiff sold the horse, together with another, to M., and took his notes for \$225. In May following the horse bought of defendant was taken from M. by G. on replevin. A claim for property was interposed—the plaintiff and defendant in this action attended on the inquiry before the sheriff,—the jury found the property to be in G., and defendant expressed his satisfaction

failure of title has been judicially established the vendor is not

with the finding. The replevin was prosecuted to judgment. G. recovered \$72.32 for damages, and \$33.95 costs, which sums, together with \$19.50, the costs of the defense, were paid by M. A. settled with M. by giving up his notes for \$225 and paying him \$20 in cash, and claimed of the referees a report in his favor for the amount of the original consideration paid P. and for the damages and costs recovered against and paid by M., which he had subsequently paid to M. in the manner above stated. Referee's report \$275. Marcy, J.: "Where the action is on the warranty of title, the damages which naturally result to the purchaser are the value of the article which he loses by the failure of the title, or the price he has paid for it. In the cases of *Curtis v. Hannay*, 3 Esp. 82, and *Caswell v. Coan*, 1 Taunt. 566, no special damages were set forth in the declaration; the measure of damages, therefore, in those cases was the price paid for the article; but in the case of *Lewis v. Peake*, 7 Taunt. 152, the declaration assigned as special damages, occasioned by the breach of the warranty, that the plaintiff, confiding in the defendant's warranty, resold the horse with warranty, and was thereby subjected to pay £88 as costs besides the price of the horse. Having given notice to the defendant that he was prosecuted on his warranty, and offered him the option to defend (which was not accepted), the plaintiff was allowed to recover, in addition to the price of the horse, the costs which he was subjected to pay. The principle of that case is probably correct; but it may well be doubted whether the plaintiff here

has brought himself within it. We are not furnished with the declaration, and may, therefore, presume that it is so framed as to allow the plaintiff to recover such special damages as by law he could, in any form of declaring, be entitled to recover. If the plaintiff was liable for the costs incurred in testing the title to the horse, or could have been made liable, and has, in fact, paid them, he may recover them of the defendant. If he has paid them without being under a legal liability to do so, it appears to me he had no just right to have them allowed to him in this cause. The extent of the plaintiff's right to damages could not be conclusively settled by the sum which he agreed to allow, or had actually paid M., but by the amount that M. could have recovered against him. What sum could M. have recovered? Certainly not more than the price paid for the horse when purchased of the plaintiff, and the costs of the suit in which the title was tested. The fact that \$72.32 were allowed to the owners for damages proves that the horse had become deteriorated in the hands of M., and, if so, he could not have recovered of the plaintiff the damages and costs which the owners recovered against him, and the full value of the horse before the deterioration or at the time of his purchase. The damages must be allowed in part or wholly for the use of the horse, and as the plaintiff or M. must have had the benefit of that use, the defendant could not be legally charged therewith. The referees should have arrived at the amount which the plaintiff was entitled to recover by allowing him the price paid to the defendant for the

liable for the expense of further litigation.⁵³ The vendor is bound to protect the vendee from all actions arising from circumstances anterior to the sale, of which the cause or germ existed at the time thereof: the debts chargeable on the thing sold, revenue duties to which the goods are liable, or such defects in the vendor's title as form a *labes realis*. Thus, if rent be due at the time of the sale the vendor is liable on his implied warranty of title if the property sold be afterwards lawfully seized and taken by the landlord to pay such rent.⁵⁴ This warranty extends to and protects against a prior lien as well as an adverse title. So where one sold property and took a note for the price and the purchaser, finding a lien upon it at the time of the sale paid it, the law presumed the payment to have been made at the request of the vendor and that it was valid.⁵⁵ Where the adverse owner has recovered the value instead of the property itself and the vendor has had the requisite notice to defend the suit in which such recovery was had, he is liable to his vendee for the amount of that judgment, both as to damages and costs. The same rule applies to the original vendor who warrants property when his vendee has sold it with a like warranty

horse and interest thereon, together with the costs which he became liable to pay to the true owners in their suit to establish their title. * * * I presume that the referees considered the costs paid by M. to his own attorney as an item to be taken into the calculation, but I know of no authority for doing so. In the case of *Lewis v. Peake* the plaintiff was permitted to include as an item in the amount of damages the costs recovered against him on his warranty at the resale of the horse. In the case of *Blasdale v. Babcock*, 1 Johns. 517, which was an action on an implied warranty as to the title of a horse, the amount that had been recovered against the plaintiff by the owner of the horse was allowed to be the measure of
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his damages against the defendant. The expenses of *Blasdale* in defending the suit against him were not allowed to him as damages against *Babcock*."

The vendor's liability for the costs and expenses of actions involving the title does not extend to those arising against the vendee by his creditor after the title vested in the vendee. *McDonald v. Clearwater S. R. Co.*, 164 Fed. 1007.

⁵³ *Lunt v. Wrenn*, 113 Ill. 168; *Sealing v. Knollin*, 94 Ill. App. 443, 453. See *Tennis v. Gifford*, 133 Iowa 372.

⁵⁴ *Myers v. Smith*, 37 Md. 91.

⁵⁵ *Crowell v. Simpson*, 7 Jones 285; *Dresser v. Ainsworth*, 9 Barb. 619.

and judgment has been recovered against him by the subvendee.⁵⁶

Where there was a sale of a patented article and the full price was paid, less \$25, which the vendor told the vendee was owing to the owner of the patent, and which the vendee assumed to pay, on its appearing that such sum was reserved for the use of the article for one year and that another \$25 was the price for its perpetual use it was ruled that the sale carried an implied warranty of both the article and the right to use it, and that the vendee was entitled to the additional \$25, which was the only damage sustained.⁵⁷ This view has been approved in a case somewhat similar. "The mere ownership of the title to personal property designed solely for use is of no value if the owner cannot lawfully use it at all. * * * As respects the vendor's implied warranty the right to use should stand on the same ground as the title. Unless, therefore, sufficient facts appear to warrant the inference that the vendee took the risk of any conflicting claims to the patent right. I think the vendor is bound either to secure to the vendee the right to use that which was sold for use, or else to answer in damages for the loss of the value of that use from the time any further use was prevented." The vendee's right to damages was dependent upon an eviction from the use of the article or a final adjudication resulting in a perpetual injunction, which would be equivalent. The damages would be either the cost of procuring a license for the continued use of the article or, if that could not be done, the amount of pecuniary loss arising from the inability to continue its use.⁵⁸ An actual adjudication forbidding the use of a patented article is not necessary to a right of action against the vendor; it is enough that there is a paramount outstanding title or patent. If he has been given notice to defend a suit against his vendee and advised him to settle the claim the amount paid therefor, being reasonable, may be recovered.⁵⁹ A licensee who has cut and removed

⁵⁶ *Hammond v. Bussey*, 20 Q. B. Div. 79.

⁵⁷ *Carman v. Trude*, 25 How. Pr. 440.

⁵⁸ *The Electron*, 56 Fed. 304; see s. c. 74 id. 689, 21 C. C. A. 12.

⁵⁹ *National M. E. B. Co. v. Gotham*, 125 App. Div. (N. Y.) 101.

logs and timber, paying stumpage therefor, and from whom these have been replevied may recover their value when and where they were replevied and the costs of the replevin suit, less the stumpage price agreed to be paid, to which balance interest may be added from the time he was deprived of the property.⁶⁰ The amount of a lien against property may be satisfied and deducted from the purchase price. The vendor is not liable for the destruction of property after it has been taken from his vendee by virtue of a lien which was warranted against, it not appearing that its loss was the result of the seizure. But even if it was, the damages are not proximate. The seizure was indeed the proximate result of the vendor's negligence in not discharging the lien; but if the burning was the result of the seizure, it was the indirect result, some other cause intervening which was the proximate cause.⁶¹

§ 670. Damages for breach of warranty as to quantity or quality; general rules. The general rule of damages for breach of warranty as to quantity or quality is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty;⁶²

⁶⁰ *Pierce v. Banton*, 98 Me. 553.

⁶¹ *Harper v. Dotson*, 43 Iowa 232.

⁶² *Overall v. Chicago Motor Car Co.*, 183 Ill. App. 276; *Reynolds v. Ramsey*, 56 Pa. Super. Ct. 97; *Liggett v. Ritter*, 54 Pa. Super. Ct. 405; *Miller v. Zander*, 85 Misc. (N. Y.) 499; *Richard Cocke & Co. v. New Era Gravel & Development Co.*, — Tex. Civ. App. —, 168 S. W. 988; *Excelsior Stove Mfg. Co. v. Million*, 174 Mo. App. 718; *Eagle Glass & Mfg. Co. v. Second Hand Pipe & Supply Co.*, 74 W. Va. 228; *Norris v. O'Connor*, 166 Iowa 303; *Gascoigne v. Cary Brick Co.*, 217 Mass. 302; *Clarke v. Schmidt*, 210 N. Y. 211; *Collins v. Tigner*, 5 Pen. (Del.) 345; *Foster v. Baer*, 7 La. Ann. 613; *Sloan v. Allegheny Co.*, 91 Md. 501; *McClatchey v. Anderson*, 84 Neb. 783, citing the text; *Eastern I. Co.*

v. King, 86 Va. 97; *Bennett v. Buchan*, 61 N. Y. 222; *Mabury L. Co. v. Stearns Mfg. Co.*, 32 Ky. Law Rep. 739; *Booher v. Goldsborough*, 44 Ind. 490; *Becker v. Baker*, 146 Ky. 233; *Oak Lawn S. Co. v. Sparks M. Co.*, 159 Mo. App. 496; *Dempster v. Simpson*, 7 West Aust. L. R. 103; *Meyer v. Everett P. & P. Co.*, 184 Fed. 945; *McDonald v. Kansas City B. & N. Co.*, 149 Fed. 360, 8 L.R.A. (N.S.) 1110, 79 C. C. A. 298; *Sloan v. Wolf*, 124 Fed. 196, 59 O. C. A. 612; *Southern P. Co. v. Oteri*, 94 Ark. 318; *Stevens v. Whalen*, 95 Ark. 488; *Armour v. Gundersheimer*, 23 App. D. C. 210; *Barry-W. Mach. Co. v. Thompson*, 83 Ark. 283; *Germain F. Co. v. Armsby*, 153 Cal. 585; *Tibbals O. Co. v. Meigs*, 11 Cal. App. 298; *Erie City I. Works v. Tatum*, 1 Cal. App. 286;

or in cases where the property was not delivered to the purchaser at the time of sale, then the difference in its value at the time de-

- Seaboard L. Co. v. Cornelia P. M. Co., 122 Ga. 370; Henderson E. Co. v. North Georgia M. Co., 126 Ga. 279; Smith v. Hodges, 8 Ga. App. 785; Oxford K. Mills v. Wooldridge, 6 Ga. App. 301; Nave v. Gross, 146 Ill. App. 104; Miller v. Aldrich, 123 id. 464, citing the text; Wallace v. Tanner, 118 id. 639, citing the text; Loxtercamp v. Lininger I. Co., 147 Iowa 29, 33 L.R.A.(N.S.) 501; Wingate v. Johnson, 126 Iowa 154; Massillon E. & T. Co. v. Shirmer, 122 Iowa 699; Mosby v. Larue, 143 Ky. 433; Hanson v. Wittenberg, 205 Mass. 319; National C. Co. v. Cincinnati, G. C. C. & M. Co., 168 Mich. 198; Henry v. Hobbs, 165 Mich. 183; Hardy v. Stoppel, 162 Mich. 676; Hall C. Co. v. Crook, 87 Miss. 445; Mark v. Williams C. Co., 204 Mo. 242; Hanna-B. Co. v. Holley-M. Mfg. Co., 160 Mo. App. 437; Doyle v. Parish, 110 Mo. App. 470; Mathes v. McCarthy, 195 N. Y. 40; Isaacs v. Wannamaker, 189 N. Y. 122; Schoepf v. Bender, 147 App. Div. (N. Y.) 894; Ames v. Norwich L. Co., 122 App. Div. (N. Y.) 319; Isbell-P. Co. v. Heineman, 113 App. Div. (N. Y.) 79; Egbert v. Hanford P. Co., 92 App. Div. (N. Y.) 252; Cable Co. v. Macon, 153 N. C. 150 (correcting statements in earlier cases to the effect that the difference between the contract price and the value of the goods was the test); Hardie-T. Mfg. Co. v. Easton C. O. Co., 150 N. C. 150, 134 Am. St. 899; Wrenn v. Morgan, 148 N. C. 101; Parker v. Fenwick, 138 N. C. 209; Fowler W. Mfg. Co. v. Otto G. E. Works, 227 Pa. 314; Raymond Co. v. Pennsylvania B. F. & P. Co., 42 Pa. Super. 601; Shoe v. Maerky, 35 id. 270; Cavanaugh v. Stevens, 24 S. D. 349; Blair v. Johnson, 111 Tenn. 111; Abrahamson v. Cummings, 65 Wash. 35, citing the text; Kleeb v. McInturff, 62 Wash. 508; Walsh v. Meyer, 40 Wash. 650; Hammond v. Sandwich Mfg. Co., 146 Wis. 485; Archer v. Milwaukee A. E. & S. Co., 144 Wis. 476; Forster v. MacKinnon Mfg. Co., 130 Wis. 281; Denison v. Taylor, 6 Ont. App. 93; Wiggins v. Jackson, 31 Okla. 292; Yellow Jacket M. Co. v. Legarden, 104 Ark. 573; Powell v. New England C. Y. Co., 154 App. Div. (N. Y.) 875; Mountain City M. Co. v. Wood, 11 Ga. App. 486; Schleuter v. Sherman, 169 Ill. App. 386, citing the text; Smith v. Hunt, 50 Ind. App. 592; White A. Co. v. Dorsey, 119 Md. 251; Skoog v. Mayer, 122 Minn. 209; Kitchin v. Oregon N. Co., 65 Ore. 20; Armstrong v. Descalzi, 48 Pa. Super. 171; Loissead v. Gates, 31 S. D. 227; Mair v. Williams, 29 S. D. 322; Jacot v. Grossmann S. & S. Co., 115 Va. 90; Hull v. Geary, 71 W. Va. 490, citing the text; Canon City E. L. & P. Co. v. Medart P. P. Co., 11 Colo. App. 300; Wheelock v. Berkeley, 138 Ill. 153; Berry v. Shannon, 98 Ga. 458; Millirons v. Dillon, 100 Ga. 656; Florence v. Patillo, 105 Ga. 577; Moore F. Co. v. Sloane, 166 Ill. 457, citing the text, 64 Ill. App. 581; Miller v. Law, 44 id. 630; Green v. Witte, 5 Ind. App. 343; Douglass v. Moses, 89 Iowa 40, 48 Am. St. 353; Love v. Ross, 89 Iowa 400; Aultman v. Shelton, 90 Iowa 288; Alpha C. Co. v. Bradley, 105 Iowa 537; Tufts v. Mabie, 7 Kan. App. 129; Loomis M. Co. v. Vawter, 8 Kan. App. 437, citing the text; Sharpe v. Bettis, 17 Ky. L. Rep.

livery was actually made or the time that the breach of warranty could have been discovered by the purchaser by the exercise of

- 673; *Central T. Co. v. Arctic I. Mach. Co.*, 77 Md. 202, 238; *Ponce v. Smith*, 84 Me. 266; *Noble v. Fag-nant*, 162 Mass. 275; *Maxted v. Fowler*, 94 Mich. 106; *Hansen v. Gaar*, 63 Minn. 94; *Miamisburg T. & C. Co. v. Wohlhuter*, 71 Minn. 484; *McCormick H. Mach. Co. v. Heath*, 65 Mo. App. 461; *Hogan v. Stuart*, 11 Mont. 498; *Hooper v. Story*, 155 N. Y. 171; *Bates v. Fish W. Co.*, 50 App. Div. (N. Y.) 38; *Huyett & S. Mfg. Co. v. Gray*, 124 N. C. 322; *Aultman v. Ginn*, 1 N. D. 402; *Joseph v. Richardson*, 2 Pa. Super. 208; *Himes v. Kiehl*, 154 Pa. 190; *Western T. Co. v. Wright*, 11 S. D. 521, 44 L.R.A. 438; *Florida A. Club v. Hope L. Co.*, 18 Tex. Civ. App. 161; *Danner v. Fort Worth I. Co.*, 18 Tex. Civ. App. 621; *J. I. Case P. Works v. Niles & S. Co.*, 90 Wis. 590, 606, citing the text; *Park v. Richardson*, 91 Wis. 189, citing the text; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286; *English v. Spokane C. Co.*, 57 Fed. 451, 6 C. C. A. 416, citing the text; *Wilson v. New United States C. R. Co.*, 73 Fed. 994, 20 C. C. A. 244; *Crane Co. v. Columbus C. Co.*, 73 Fed. 984, 20 C. C. A. 233; *Spence v. Duffield*, 1 Vict. (law) 49; *Hege v. Newsom*, 96 Ind. 426; *Jackson v. Mott*, 76 Iowa 263; *J. I. Case T. M. Co. v. Haven*, 65 Iowa 359; *Wey-brick v. Harris*, 31 Kan. 92; *Min-neapolis H. Works v. Bonnallie*, 29 Minn. 373; *Wickes v. Swift E. L. Co.*, 70 Mich. 322; *Birdsall v. Car-ter*, 11 Neb. 143; *Willingham v. Hooven*, 74 Ga. 233, 58 Am. Rep. 435; *Means v. Means*, 88 Ind. 196; *Blacker v. Slown*, 114 id. 322; *Deutsch v. Pratt*, 149 Mass. 415; *Merrick v. Wiltse*, 37 Minn. 41; *Young v. Filley*, 19 Neb. 543; *Bach v. Levy*, 101 N. Y. 511; *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1139; *McMullen v. Williams*, 5 Ont. App. 518; *Nye v. Iowa City A. Works*, 51 Iowa 129; *Snow v. Scho-macker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509; *Sinker v. Diggins*, 76 Mich. 557; *Birdsall v. Palmer*, 74 Md. 201; *Houghton v. Carpenter*, 40 Vt. 588; *Perrine v. Serrell*, 30 N. J. L. 454; *Roberts v. Fleming*, 31 Ala. 683; *Buford v. Gould*, 35 id. 265; *Rutan v. Ludlam*, 29 N. J. L. 398; *Allen v. Anderson*, 3 Humph. 581, 39 Am. Dec. 197; *Scranton v. Mechanics' T. Co.*, 37 Conn. 130; *Richardson v. Mason*, 53 Barb. 601; *Tuckwell v. Lambert*, 5 Cush. 23; *Wells v. Selwood*, 61 Barb. 238; *Comstock v. Hutchinson*, 10 Barb. 211; *Voorhees v. Earl*, 2 Hill 288; *Pritchard v. Fox*, 4 Jones 140; *Clark v. Neufville*, 46 Ga. 261; *Morse v. Hutchins*, 102 Mass. 439; *Foster v. Rodgers*, 27 Ala. 602; *Cary v. Gruman*, 4 Hill 625; *Tuttle v. Brown*, 4 Gray 457, 64 Am. Dec. 80; *Reggio v. Braggiotti*, 7 Cush. 166; *Van Valkenburgh v. Evertson*, 13 Wend. 76; *Decker v. Myers*, 31 How. Pr. 372; *Marshall v. Wood*, 16 Ala. 806; *Marshall v. Gantt*, 15 id. 682; *Scranton v. Tilley*, 16 Tex. 183; *Anderson v. Duffield*, 8 id. 237; *Tilley v. Montelius P. Co.*, 15 Colo. App. 204; *Williamson v. Conday*, 3 Ired. 349; *Seibles v. Blackwell*, 1 McMull. 56; *Badgett v. Broughton*, 1 Ga. 591; *Sharon v. Mosher*, 17 Barb. 518; *Prentice v. Dike*, 6 Duer. 220; *Connor v. Dempsey*, 49 N. Y. 665; *Hook v. Stovall*, 30 Ga. 418; *Lane v. Lantz*, 27 Md. 211; *Hoe v. Sanborn*, 35 How. Pr. 197; *Anding v. Perkins*, 29 Tex. 348; *William-*

reasonable diligence and the time of the sale,⁶³ with interest upon such sum.⁶⁴ This rule is not affected by the fact that the vendee has sold the property at an increased price,⁶⁵ and no claim has been made against him by the second vendee who bought under a warranty like that of the defendant,⁶⁶ or paid for it in advance of its delivery,⁶⁷ or thereafter;⁶⁸ nor by the fact that the property sold was actually worth the price the vendee paid for it.⁶⁹ Where a partial payment has been made the vendee's recovery is, if the amount paid exceeds the value of the property, the excess of the payment; if the property was

son v. Dillon, 1 Harr. & G. 444; Thornton v. Thompson, 4 Gratt. 121; Burton v. Young, 5 Harr. (Del.) 233; Brown v. Sayles, 27 Vt. 227; Smith v. Cozart, 2 Head. 526; Converse v. Burrows, 2 Minn. 229; Roberts v. Carter, 28 Barb. 462; Whitmore v. South Boston I. Co., 2 Allen 52; Edwards v. Collson, 5 Lans. 324; Hodgman v. State Line & S. R. Co., 45 Ill. App. 395, citing the text; Plano Mfg. Co. v. Richards, 86 Minn. 94.

A vessel was warranted to be of a certain class; the vendor promised to insure her for a designated sum. The warranty was not true and the insurance could not be obtained. After a total loss it was held that the vendee's damage was not the amount for which the vessel was to be insured, but the sum it would have cost to have made her of the warranted class. *La Roche v. O'Hagan*, 1 Ont. 300.

⁶³ *Shearer v. Park N. Co.*, 103 Cal. 415, 42 Am. St. 125; *Krasilnikoff v. Dundon*, 8 Cal. App. 406.

⁶⁴ *Leavell v. Coleman*, 144 Ky. 825; *Christie v. Crawford*, 152 Mich. 400; *Long v. Chapman*, 97 App. Div. (N. Y.) 241; *Ash v. Beck* (Tex. Civ. App.), 68 S. W. 53. See § 671, note.

⁶⁵ *Union S. Co. v. Jones*, 128 Fed. 672, 63 C. C. A. 224; *Americus G.*

Co. v. Brackett, 119 Ga. 489; *Neil v. Cunningham S. Co.*, 160 Mo. App. 513; *McClatchey v. Anderson*, 84 Neb. 783, citing the text; *Ellison v. Johnson*, 74 S. C. 202, 5 L.R.A. (N.S.) 1151, citing the text; *Ft. Worth Grain & Elevator Co. v. Walker Grain Co.*, — Tex. Civ. App. —, 168 S. W. 470; *Andrews v. Schreiber*, 93 Fed. 367, affirmed 101 id. 763, 41 C. C. A. 663; *Wheelock v. Berkeley*, 138 Ill. 153, citing the text; *Berry v. Shannon*, 98 Ga. 458, 58 Am. St. 314; *Miamisburg T. & C. Co. v. Wohlhuter*, 71 Minn. 484; *J. I. Case P. Works v. Niles & S. Co.*, 90 Wis. 590, 606; *Brown v. Bigelow*, 10 Allen 232; *Texada v. Camp, Walk.* (Miss.) 150; *Hunt v. Van Deusen*, 42 Hun 392. See *Eagle I. Works v. Des Moines S. R. Co.*, 101 Iowa 289.

⁶⁶ *Centaur C. Co. v. Hill*, 7 Ont. L. R. 110; *Western T. Co. v. Wright*, 11 S. D. 521, 44 L.R.A. 438.

⁶⁷ *Western T. Co. v. Wright*, 11 S. D. 521, 44 L.R.A. 438; *Loder v. Kekule*, 3 C. B. (N.S.) 128.

⁶⁸ *Centaur C. Co. v. Hill*, *supra*; *Elliott v. Puget Sound & Cent. Am. S. Co.*, 22 Wash. 220; *Nauman v. Ullman*, 102 Wis. 92.

⁶⁹ *Coble v. Potter*, 155 App. Div. (N. Y.) 716.

worthless for the purpose intended the whole sum paid may be recovered, and if the property was reasonably worth more than the payment the vendor may recover the excess of its value.⁷⁰ The rule of damages stated has thus been vindicated as against a contention for the doctrine that the vendor is entitled to recover all that the property was worth to him in the market at the time and place of delivery: "The law does not hold the purchaser at a fixed price of a warranted article for the market value of such article. He has a right to have just such an article as the vendor agreed to sell, and at the agreed price. A low price may be the chief inducement to purchase, and the purchaser at such a price is as much entitled to the benefit of his contract of warranty as though the price agreed on was equal to or greater than the market price of goods of the kind and quality warranted. There might be a breach of a warranty and consequent damage and the market price of the article be more than the contract price. If there was a breach of warranty appellant had a right to compensation for the difference by which the coal fell short of what it was agreed to be, and that would not be done merely by making him pay the market value. By deducting the damages from the contract price the result might or might not be the market value. The measure of recovery if a breach is proven would be the contract price less the damages, and the damages would be so much as would make up the difference between the value of the coal as it was and as it was warranted to be, together with any reasonable, necessary expenses directly resulting from a breach of warranty."⁷¹

⁷⁰ Schumann v. Wager, 36 Ore. 65; Huyett-S. Mfg. Co. v. Gray, 129 N. C. 438, 57 L.R.A. 198; Reeves v. Younglove, 148 Iowa 699. See Comstock v. Taggart, 156 Mich. 47.

⁷¹ Hodgman v. State Line & S. R. Co., 45 Ill. App. 395, 404; Green v. Witte, 5 Ind. App. 343; Canton L. Co. v. Liller, 107 Md. 146; Noble v. Nelson, 154 Mo. App. 616.

Some of the cases cited to the general proposition laid down in the

opening of this section use language indicating that the difference between the price paid and the value of the property measures the damages. The general rule is as stated; and it has been assumed that in such cases there was no dispute as to the payment of full value for the subject of the sale. There would be no sufficient ground for making the price paid absolutely conclusive as to the value of the property; though

The difference between the value of the whole property purchased, where only a small portion of it is inferior to that required by the contract, and not merely the difference between the price paid for the defective portion as a part of the lot and its actual value, is the measure of the seller's liability.⁷² But in Minnesota if the defect in a warranted machine is traceable to some detachable part, which may be replaced, irrespective of the whole, or which does not necessarily render the balance of the machine useless, the facts may be proven to show the value of the machine for any purpose.⁷³ If the article purchased has been used the cost of the labor and the waste of the material resulting from its defects, with interest from the commencement of the suit, are elements of damage,⁷⁴ unless it was used with

there can be no doubt it is cogent evidence of its value. Hence, no distinction has been made between the cases of the kind mentioned and those which enunciate the rule as stated. Some cases holding the exceptional rule are cited *infra*, this section.

⁷² *Deutsch v. Pratt*, 149 Mass. 415; *McCarthy v. Ellers*, 107 App. Div. (N. Y.) 219. See *Keeler v. Paulus Mfg. Co.*, 43 Tex. Civ. App. 555.

If inferior goods are fraudulently mixed with goods of a superior quality so that they cannot be classified or separated the jury may find that all are of the inferior grade. *Baer v. Mobile O. & B. Mfg. Co.*, 159 Ala. 491.

⁷³ *Benson v. Port Huron E. & T. Co.*, 83 Minn. 321.

The reasonable cost of repairs does not necessarily fix the rights of the parties: it may be considered in connection with the other facts. *Hardie-T. Mfg. Co. v. Easton C. O. Co.*, 150 N. C. 150, 134 Am. St. 899.

⁷⁴ *Bagley v. Cleveland R. M. Co.*, 22 Blatch. 342, 21 Fed. 159; *Smith*

v. Foote, 81 Hun 128; *Jones v. Mayer*, 16 N. Y. Misc. 586; *Dommerich v. Garfunkel*, 28 N. Y. Misc. 433.

In *Wait v. Borne*, 123 N. Y. 592, it is held that if the manufactured article has been sold by the warrantee under circumstances which leave no liability upon him to his vendee the measure of recovery against the warrantor is the difference between the price actually received for it and its value as it would have been but for the defect in the quality of the ingredient which went into such article. This was ruled on the assumption that the price received was at least equal to the actual value of the article sold, in which case it would be conclusive evidence of value. See *Sherman v. Billings*, 90 Hun 544.

The terms of the warranty limit the liability of the vendor. Where the obligation was to deliver machinery on the cars, and that if it should fall short of the representations he would replace it the vendee could not recover freight charges, the expense of placing the machinery or loss or damage resulting

knowledge that it was unfit for the purpose to which it was put.⁷⁶ There is a difference of view as to whether the cost of repairing a warranted article measures the liability of the vendor, interest thereon being added. The affirmative is held in New York.⁷⁶ But this may be doubted. Such cost may be considered in connection with all the facts, but not as necessarily measuring the recovery.⁷⁷ Making repairs involves the use of time, money, delay, and more or less risk, and, perhaps, other factors which ought to be considered. There is not a total failure of consideration if the property retained by the purchaser has some value for any purpose, though it is valueless for the purpose for which it was bought.⁷⁸ The price paid for an article is in many jurisdictions deemed the best evidence of its value between the parties at the time of the purchase, and is preferred to any other evidence;⁷⁹ but in others it is not treated

from an attempt to use it. *Canon City E. L. & P. Co. v. Medart P. Co.*, 11 Colo. App. 300.

It is otherwise as to losses sustained during the time the buyer is testing the property pursuant to the contract. *Yellow Jacket M. Co. v. Legarden*, 104 Ark. 573.

It is otherwise if plaintiff used the article knowing it to be unfit. *Armour v. Gundersheimer*, 23 App. D. C. 210.

⁷⁶ *Standard Automobile Co. v. Thurston*, 54 Pa. Super. Ct. 160; *Ducas v. American S., D. & F. Co.*, 48 N. Y. Misc. 411; *Armour v. Gundersheimer*, 23 App. D. C. 210; *American G. Co. v. Rayburn*, 150 Mich. 616; *Henderson E. Co. v. North Georgia M. Co.*, 126 Ga. 279; *Isbell-P. Co. v. Heineman*, 113 App. Div. (N. Y.) 79; *Cooper v. National F. Co.*, 132 Ga. 529.

⁷⁶ *Miller v. Patch Mfg. Co.*, 101 App. Div. (N. Y.) 22.

⁷⁷ *Hardie-T. Mfg. Co. v. Easton C. O. Co.*, 150 N. C. 150, 134 Am. St. 899.

⁷⁸ *Isaacs v. Wannamaker*, 189 N. Y. 122; *Long v. Chapman*, 97 App. Div. (N. Y.) 241; *McCarthy v. Ellers*, *supra*; *Thummel v. Dukes*, 82 Mo. App. 53; *Aultman v. Ginn*, 1 N. D. 402; *Himes v. Kiehl*, 154 Pa. 190; *Brown v. Weldon*, 99 Mo. 564, 27 Mo. App. 251.

⁷⁹ *South Covington, etc. R. Co. v. Gest*, 34 Fed. 628; *Clark v. Neufville*, 46 Ga. 261; *Marshall v. Wood*, 16 Ala. 806; *Scranton v. Tilly*, 16 Tex. 183; *Badget v. Broughton*, 1 Ga. 591; *Hook v. Stovall*, 30 Ga. 418; *Thornton v. Thompson*, 4 Gratt. 121; *Stout v. Jackson*, 2 Rand. 132; *Threlkeld v. Fitzhugh*, 2 Leigh 451.

The vendor is estopped from showing that goods sold under an express contract at a stated price were not worth that price. *Levi v. Dimmick*, 99 Cal. 490.

It is sufficient in the absence of other evidence. *Meyer v. Everett P. & P. Co.*, 184 Fed. 945.

as exclusive of the test of value;—only as admissible evidence tending to show value.⁸⁰ In some states the damages are ascertained, where the sale is for cash, by the difference between the price paid for the property and its value.⁸¹ This rule is

⁸⁰ Marsh v. McPherson, 105 U. S. 709, 26 L. ed. 1139; Hardie-T. Mfg. Co. v. Easton C. O. Co., 150 N. C. 150, 134 Am. St. 899; J. I. Case P. Works v. Niles & S. Co., 90 Wis. 590; Hege v. Newsom, 96 Ind. 426; Houghton v. Carpenter, 40 Vt. 588; Cary v. Gruman, 4 Hill 625; Lane v. Lantz, 27 Md. 211; Gilpin v. Consequa, 3 Wash. C. C. 184; Anding v. Perkins, 39 Tex. 348; Ash v. Beck (Tex. Civ. App.), 68 S. W. 53.

In Reggio v. Braggiotti, 7 Cush. 166, Shaw, C. J., said: "*Prima facie*, the price first paid for the article is good evidence of its value in one sense. But the value is not the same to both parties; and no merchant would make a purchase unless the goods bought were worth more to him than the amount he pays for them. In this country the established rule in relation to damages in such actions is that the plaintiff may recover what he can show that he has actually lost. A subsequent sale by the vendee of the article warranted is evidence of its value to him."

In Morse v. Hutchins, 102 Mass. 440, the court say: "To allow the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrong-doer; and, in proportion as the original price was low, would afford a protection to the party who had broken his contract at the

expense of the party who was ready to abide by the terms of the contract."

In Rutan v. Ludlam, 29 N. J. L. 398, R. sold to L. a horse, for which L. conveyed to him a house and lot and gave him a note for \$25. In an action against R. for a false warranty of the horse, it was held that evidence of the value of the house and lot was inadmissible; that the only question was the difference in value between a sound horse and an unsound one.

In Comstock v. Hutchinson, 10 Barb. 211, a charge to the jury that the measure of damages was the difference between the price paid for the horse and the amount he realized on a resale was held erroneous; and the same in Cary v. Gruman, 4 Hill 625. See Foster v. Rodgers, 27 Ala. 602; Tuttle v. Brown, 4 Gray 457, 64 Am. Dec. 80.

In an action by the vendor for the price of goods the defendant sought to recoup for damages done to the property after the sale and before delivery; it was held to devolve on him to prove that the injury was done during such period; and that he must prove the actual damage without reference to the price paid at auction; that it was erroneous to allow him the difference in value between the price at which he bought them at auction and the value when delivered. Gerard v. Prouty, 34 Barb. 454.

⁸¹ Burgess v. Felix, 42 Okla. 193; Young v. VanNatta, 113 Mo. App. 550; Narr v. Norman, 113 Mo. App. 533, both citing the text; Lissberger

rested on the principle that the purchaser is entitled to the benefit of his bargain if he has bought at a low price, which he would lose if his recovery was limited to the amount paid; the same consideration applies to the defendant if he has made a good sale. If the property was bought for the vendee's retail trade and the seller knew that fact the wholesale price, is not the standard by which the vendee's loss is to be measured.⁸² But this measure of damages does not govern when there has been an exchange of property—then the general rule as stated at the beginning of this section applies.⁸³ The measure of damages on the breach of a warranty as to the quantity of wood lying upon the land of the vendor is not the market value of the deficiency in the wood, but a due proportion of the purchase-money with interest thereon.⁸⁴ The value at the place to which a buyer who purchases free on board the cars ships the goods is not necessarily the standard by which damages are to be measured if the seller had no knowledge of the place to which shipment was to be made.⁸⁵

The rule that the vendee's damages are to be measured by the difference between the value of the property as it was at the time of its delivery and the market value of it if the warranty had been complied with is varied when it is necessary to do justice. Where an orchid was warranted to be of a variety which would blossom white and proved, after two years' cultivation by the vendee, to be an ordinary purple one, the warranty was not breached until the orchid blossomed, it being impos-

v. Kellogg, 78 N. J. L. 85; Stratton v. Spaeth, 146 App. Div. (N. Y.) 461; Levi v. Dimmick, 99 Cal. 490; West Republic M. Co. v. Jones, 108 Pa. 55; Crabtree v. Kile, 21 Ill. 180; Callender I. & W. Co. v. Badger, 30 Ill. App. 314; Bump v. Cooper, 19 Ore. 81. Compare Courtney v. Boswell, 65 Mo. 96, and Brown v. Welden, 99 id. 564.

⁸² Fay F. Co. v. Talerico (Tex. Civ. App.), 69 S. W. 196.

If the vendor is a nonresident the vendee is not required to go out-

side the local market to make his purchase. Armour v. Gundersheimer, 23 App. D. C. 210.

Where the parties to an exchange of properties have fixed a cash valuation thereon the damages for the breach of warranty will be governed thereby. Vance v. McBurnett, 94 Ga. 251.

⁸³ Wallace v. Wren, 32 Ill. 146.

⁸⁴ Parker v. Barlow, 93 Ga. 700.

⁸⁵ Neil v. Cunningham S. Co., 160 Mo. App. 513.

sible to determine before that event whether the warranty was according to the fact or not. The vendee's damages were not measurable by the injury sustained when the orchid was delivered; he could wait and see what those damages were, and was entitled to prove special damages, which were the difference between what the value of the orchid was at the time of the sale and what its value would have been when it blossomed if it had conformed to the warranty.⁸⁶ The same principle has been applied in California, the code of which provides that the detriment caused by the breach of the warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time. Where fruit trees were sold with a warranty as to their varieties and the breach was not discovered until two years after they were planted it was ruled that the time to which the warranty related was that when the breach was discovered or with ordinary care might be discovered.⁸⁷ In ascertaining the value of property purchased with a warranty for a special purpose, there being none in the market which would produce the result the vendor stipulated for, the vendee is not entitled to speculative damages for an ideal machine which was not in existence; his damages are measurable by the difference in value between the machine delivered and the contract price.⁸⁸ Where the parties to the contract are residents of the place where the goods are delivered and have had no

⁸⁶ Ashworth v. Wells, 14 T. L. Rep. 227 (1898).

⁸⁷ Shearer v. Park N. Co., 103 Cal. 415. And see the cases cited *infra* to the various sections of this chapter.

It is declared in Battley v. Faulkner, 3 B. & Ald. 288, that the cause of action for breach of warranty on a sale of unascertained goods arises upon their delivery though the defect was not discovered until long after, and the claim was in part for

special damages subsequently incurred.

If the goods are fraudulently pocketed the difference in their value when the fact is discovered as compared with the contract price is the basis upon which to assess damages. Graham v. Bigelow, 46 Nova Scotia 116.

⁸⁸ Huyett-S. Mfg. Co. v. Gray, 129 N. C. 438, 57 L.R.A. 190; H. W. Johns-Manville Co. of Texas v. H. D. Applegate & Son, — Tex. Civ. App. —, 168 S. W. 4.

previous opportunity to inspect them their value at the time of delivery, as compared with what it should have been, or as ascertained by a resale of them within a reasonable time measures the recovery. If the resale is delayed by the vendor's conduct that will be considered in determining whether it was made within a reasonable time.⁸⁹ The measure of liability of a person who sells property with a guaranty that it shall be worth a designated sum within a given time is treated of in the chapter on suretyship, and need not be further considered in this connection.⁹⁰

§ 671. Same subject; interest, expenses and special injuries.

The rule of damages just stated, like all general rules, is intended for ordinary cases of the class to which it applies, and where it will afford to the injured party full compensation for his actual loss, regard being had to the doctrine of proximate cause. The general principle is applicable where there is a breach of a general warranty, as that a machine sold will do good work, is well made, of good materials and will be durable if properly used, that "such damages only are recoverable as the parties, standing chargeable with knowledge of their legal rights and duties, may be deemed to have had in contemplation when making their contract as the result of their warranty being untrue. That which is an effect of the breach, in a certain sense, but is removed one stage from it," as where an accident to the person of the buyer happens in consequence of the breaking of the machine, "is not the primary, but the secondary, consequence of it. This action is based upon the contract and in such a case, where there has been no fraud, the recovery is to be measured by a compensation to the vendee for the natural and proximate consequence of the breach by the vendor of his warranty in the failure of the article to meet the representation as to its quality, which would be the difference between the value of the article as warranted and its actual value."⁹¹ It often happens, however, that the delivery and acceptance of property

⁸⁹ *Loder v. Kehule*, 3 C. B. (N.S.) 128.

⁹⁰ § 729.

⁹¹ *Birdsinger v. McCormick H. Mach. Co.*, 183 N. Y. 487, 3 L.R.A. (N.S.) 1047.

which is not conformable to the contract imposes upon the vendee trouble and expense which add to the loss for which compensation may be recovered under that rule, which, if it were applied arbitrarily, excluding all other items, would in many instances fail to give adequate redress. As the paramount principle is to give compensation commensurate with the loss or injury the rule on the subject of warranties is always stated, when the case requires it, so as to include interest⁹² if the price has been paid, and any expense⁹³ or other special damages naturally

⁹² *Hartgrove v. Southern C. O. Co.*, 72 Ark. 31; *Young v. VanNatta*, 113 Mo. App. 550, citing the text; *Scranton v. Tilley*, 16 Tex. 183.

Interest runs from the date of the breach to the time of trial. It is due by way of damages implied by law, and need not be specially claimed in the pleading. *Brown v. Doyle*, 69 Minn. 543; *J. I. Case P. Works v. Niles & S. Co.*, 107 Wis. 9. Interest is not recoverable in New York. *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544; *Riss v. Messmore*, 58 N. Y. Super. 23.

Interest on money paid to lessen the loss is to be computed from the time of payment. *Roberts v. Fleming*, 31 Ala. 683.

⁹³ *Cincinnati B. S. Co. v. Steinmetz*, 35 Ind. App. 228; *Steele v. Andrews*, 144 Iowa 360; *Mallory C. Co. v. Elwood*, 120 Iowa 632; *Kidder P. Co. v. Reed*, 133 Ky. 350, 134 Am. St. 450; *Young v. Van Natta*, *supra* (shipping expenses).

A vendor is not liable for expenses incurred by his vendee in adjusting differences between himself and another to whom he had sold the warranted property, the original sale not having been made with reference to a resale. *Joseph v. Richardson*, 2 Pa. Super. 208.

Expenses incurred by the pur-

chaser of a trotting-horse, sold upon representation that it was eligible to registration in a particular association, in endeavoring to have the horse registered and for extra care and expense of it on the theory that the horse was as he represented, have been held not to be elements of damage. *Sharpe v. Bettis*, 17 Ky. L. Rep. 673.

In *Huyett & S. Mfg. Co. v. Gray*, 111 N. C. 87, 93, a recovery of the cost of a building erected for warranted machinery was denied, and it was said that special damages for breach of warranty are rarely allowable except in cases of fraud in inducing the contract. But see notes to this section *infra*.

If the vendee may return a horse bought by him in a case of a breach of the warranty he cannot recover the cost of keeping him after knowledge of the breach. *Elwood v. McDill*, 105 Iowa 437.

The expense of a trip abroad has been recovered where goods were purchased from one supposed to be the agent of a foreign principal, but who in fact was the principal. *Lawson v. Barber*, 189 Fed. 165.

Reliance on a custom may prevent the recovery of expenses otherwise recoverable. *Proctor v. Atlantic Fish Co.*, 208 Mass. 351.

and proximately resulting from the breach.⁹⁴ Thus, where an article was sold as opium the court held there was an implied warranty of genuineness; and there being a breach of it and the

- ⁹⁴ *Coast Central Milling Co. v. Russell Lumber Co.*, 88 Conn. 109; *Gascoigne v. Cary Brick Co.*, 217 Mass. 302; *The Venezuela*, 173 Fed. 834; *McDonald v. Kansas City B. & N. Co.*, 149 Fed. 360, 8 L.R.A. (N.S.) 1110, 79 C. C. A. 298; *The Nimrod*, 141 Fed. 215, affirmed, no opinion, id. 834; *Thomas C. Co. v. Raymond*, 135 Fed. 25, 67 C. C. A. 629; *Adams Mach. Co. v. Castleberry*, 92 Ark. 310; *North Alaska S. Co. v. Hobbs*, 159 Cal. 380, 35 L.R.A. (N.S.) 501; *Lutweiler P. E. Co. v. Ukiah W. & I. Co.*, 16 Cal. App. 198; *Hodgkins v. Dunham*, 10 Cal. App. 690; *Cincinnati B. S. Co. v. Steinmetz*, 35 Ind. App. 228; *Canton L. Co. v. Liller*, 107 Md. 146; *Hanson v. Wittenberg*, 205 Mass. 319; *Punteney-M. Mfg. Co. v. Northwall*, 70 Neb. 688; *Lissberger v. Kellogg*, 78 N. J. L. 85; *Carter v. Fischer* (N. Y. Misc.), 121 N. Y. Supp. 614; *James v. Libby*, 103 App. Div. (N. Y.) 256; *Critcher v. Porter*, 135 N. C. 542; *Cleveland P. & S. Works v. Consumers C. Co.*, 5 Ohio C. C. (N. S.) 258; *Mine S. Co. v. Columbia M. Co.*, 48 Ore. 391; *Dustin v. St. Petersburg I. Co.*, 13 Pa. Dist. 567; *Murray v. Putnam* (Tex. Civ. App.), 130 S. W. 631; *New Hamburg Mfg. Co. v. Webb*, 23 Ont. L. R. 44; *Hodgman v. State Line & S. R. Co.*, 45 Ill. App. 395, citing the text; *Glidden v. Pooler*, 50 id. 36; *Deane v. Michigan S. Co.*, 69 id. 106, stated in § 672; *Hodge v. Tufts*, 115 Ala. 366; *Love v. Ross*, 89 Iowa 400; *Briggs v. Rumely Co.*, 96 Iowa 202; *Alpha C. Co. v. Bradley*, 105 Iowa 537; *Omaha C. C. & L. Co. v. Fay*, 37 Neb. 68; *Kester v. Miller*, 119 N. C. 475; *Coyle v. Baum*, 3 Okla. 695; *Danner v. Fort Worth I. Co.*, 18 Tex. Civ. App. 621; *Tompkins Co. v. Galveston St. R. Co.*, 4 Tex. Civ. App. 1; *J. I. Case P. Works v. Niles & S. Co.*, 90 Wis. 590, 606, citing the text; *Aultman v. McDonough*, 110 Wis. 263; *Accumulator Co. v. Dubuque St. R. Co.*, 64 Fed. 70, 12 C. C. A. 37; *Burr v. Redhead*, 52 Neb. 617; *Fisher v. Bertram*, 100 Ill. App. 542; *Heenan v. Redman*, 101 id. 603; *Cleave v. King*, 3 New Zeal. L. R. 277 (court of appeal); *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310 (expense of removing springs from carriages in which they were placed and inserting others); *New York & C. M. Co. v. Fraser*, 130 U. S. 611, 622, 32 L. ed. 1031, 1035; *Union Bank v. Blanchard*, 65 N. H. 21; *Minneapolis H. Works v. Bonnallie*, 29 Minn. 373; *Joplin W. Co. v. Bathe*, 41 Mo. App. 285; *Aultman v. Case*, 68 Wis. 612; *Hambrick v. Wilkins*, 65 Miss. 631; *Halstead L. Co. v. Sutton*, 46 Kan. 192; *Sinker v. Diggins*, 76 Mich. 557; *Swain v. Schiefelin*, 134 N. Y. 471, 18 L.R.A. 385; *Roberts v. Fleming*, 31 Ala. 683; *Buford v. Gould*, 35 id. 265; *Perrine v. Serrell*, 30 N. J. L. 454; *McKay v. Lane*, 5 Fla. 268; *Foster v. Rodgers*, 27 Ala. 602; *Reggio v. Braggiotti*, 7 Cush. 166; *Marshall v. Wood*, 16 Ala. 806; *Badgett v. Broughton*, 1 Ga. 591; *Sharon v. Mosher*, 17 Barb. 518; *Prentice v. Dike*, 6 Duer 220; *Seibles v. Blackwell*, 1 McMull. 56; *Jewell F. Co. v. Kirk*, 102 Ill. App. 246; *Dilley v. Ratcliff*, 29 Tex. Civ. App. 545; *Peo-*

vendee having resold with a like warranty, and judgment recovered against him for breach of it, the sum paid on this judgment was *prima facie* the amount he was entitled to recover against his vendor; also, that if he gave the latter notice of the commencement of that suit and requested him to defend it the plaintiff might, likewise, recover his taxable costs incurred therein; but, following the Massachusetts rule, the attorney fees paid for the defense of such a suit were not allowed.⁹⁵ The original vendor is not supposed to have contemplated the consequences of the delay to his vendee in paying the damages

ple's Sav. Bank of Waterloo & C. F. R. T. Co., 118 Iowa 740; Cook v. Williams, 148 Ky. 679; Ash v. International H. Co., 101 Miss. 542; Schug v. Wagner, 77 N. Y. Misc. 186 (wages paid and material destroyed); Loisseau v. Gates, 31 S. D. 227; Thompson v. Corbin, 41 Nova Scotia 386. See Schleuter v. Sherman, 169 Ill. App. 386.

The right to recover such damages may be conditioned upon compliance with the terms of the sale. Stone v. Victor E. Co., 36 Colo. 370.

Where goods were bought for resale, the vendor knowing the fact, and the vendee, before discovering the defects, sold them to his customers, who rejected the goods because of such defects, the reasonable expenses in making such sales and those incurred in returning the goods to the vendee were elements of damage. Puntney-M. Mfg. Co. v. Northwall Co., 66 Neb. 5.

In Clark v. Neufville, 46 Ga. 264, an action for breach of warranty of quality in the sale of goods, the court says the measure of damages is the difference between the price paid and the value of the goods as they were at the time and place of the sale and delivery, together with such consequential damages, if any there be, as come within the rule

excluding indirect and speculative damages. Thompson v. Bertrand, 23 Ark. 730; Tatum v. Mohr, 21 id. 349; Murray v. Meredith, 25 id. 164.

In Short v. Matteson, 81 Iowa 638, there was a breach of warranty concerning the colt-getting qualities of a stallion sold for breeding purposes. The vendee was entitled to recover the difference between the real value of the horse and what his value would have been if the warranty were not false, and also the reasonable costs and expenses incurred for advertising, keeping and standing the horse for breeding purposes prior to the time his real qualities became known.

In National H. I. Co. v. Novak, 95 Iowa 596, the vendee of a warranted stallion arranged with C., the owner of another stallion, that the two should stand together, the joint earnings of both horses to pay for their keeping, and that the surplus should be divided. C.'s horse earned nearly all that was earned, and the cost of keeping the other was taken out of such earnings. Such vendee was entitled to recover expenses like those specified in the preceding paragraph.

⁹⁵ Reggio v. Braggiotti, 7 Cush. 166; Randall v. Raper, El. B. & E. 84; Hammond v. Bussey, 20 Q. B.

sustained by the latter's vendee on the breach of a warranty he gave, and is not liable for the costs of a suit and attorney's fees paid therein, he not having notice of the suit; neither was the original vendor liable for interest on the money paid by his vendee to his sub-vendee in compromise of the latter's suit.⁹⁶ On the other hand, if the sale of goods warranted to be non-alcoholic imposes upon the vendee liability for the government tax because he resells them the vendor is bound to reimburse him;⁹⁷ and the sale of an adulterated article in violation of law is attended with liability for a fine imposed upon and paid by the vendee, the costs and counsel fees incurred, notice to defend the action having been given the vendor.⁹⁸ Where it was provided that if a machine did not work properly the purchaser's negotiable note should be returned upon the delivery of the machine to the vendor and the vendee complied with the condition, but the vendor did not return the note, but indorsed it before it was due to a third person under circumstances which gave the maker some cause to believe that the transfer was not *bona fide*, the vendor was responsible for the attorneys' fees incurred in defense of a suit thereon.⁹⁹ As explained the vendor in the case stated acted in bad faith, if not fraudulently; liability for costs and expenses of a suit upon the vendee's note

Div. 79; *Nashua I. & S. Co. v. Brush*, 91 Fed. 213, 33 C. C. A. 456; *Reese v. Miles*, 99 Tenn. 398; *Cleave v. King*, 3 New Zeal. L. R. 277 (court of appeal); *Carleton v. Lombard*, 19 App. Div. (N. Y.) 297, affirmed without opinion, 162 N. Y. 628; *Lissberger v. Kellogg*, 78 N. J. L. 85; *Schurmacher v. Kennedy* (N. Y. Misc.), 88 N. Y. Supp. 943. See § 84.

The purchaser may not recover on this ground unless he has paid his vendee or his liability to him is absolute and certain. *Maryland C. & C. Co. v. Quemahoning C. Co.*, 176 Fed. 303, 99 C. C. A. 641.

⁹⁶ *Erie City I. Works v. Tatum*, 1 Cal. App. 286.

⁹⁷ *Haynor Mfg. Co. v. Davis*, 147 N. C. 267, 17 L.R.A. (N.S.) 193.

⁹⁸ *Friedgood v. Kline*, 67 N. Y. Misc. 428.

⁹⁹ *Osborne v. Ehrhard*, 37 Kan. 413.

The case so holding has been distinguished on the ground that the vendor acted in bad faith if not fraudulently, and the rule it seems to favor does not impose liability on the vendor for the costs and expenses of a suit brought on the vendee's note which was dismissed before trial with prejudice, neither malice nor want of probable cause appearing. *Deere P. Co. v. Spatz*, 78 Kan. 786, 20 L.R.A. (N.S.) 492.

does not follow in the absence of malice or want of probable cause where the suit was dismissed without a trial.¹ Where there was a breach of warranty as to a machine which could not be bought in the market and the vendor knew the vendee bought it for use in his business, and must have anticipated that he would make contracts involving its operation the damages were measured by what it cost the vendee to have such a contract fulfilled and what he would have received for it if he had himself fulfilled it.² It has been considered cause for denying the recovery of lost profits that it was not shown the vendor knew of the extent of the vendee's operations or the conditions under which the engine sold was to be operated.³ Where the delivery of an inferior grade of goods necessitated a sale of them by the vendee and a purchase of others to take their place the expense of such a sale and purchase was a necessary and natural damage.⁴ Inability to obtain goods of the warranted quality justifies the vendee in procuring the best or nearest substitute obtainable, the cost of which the vendor is liable for.⁵ The same principle applies to expenses reasonably incurred to make property more salable by increasing its value, thereby lessening the liability of the vendor.⁶ It is not an objection to the application of the rule that the loss sustained from using a defective machine may be recovered and also the cost of substituting another one, with the object of mitigating the liability of the vendor, that the purchase of the latter was to the pecuniary advantage of the vendee even if the machine supplied had been equal to the representations made concerning it. The life of the defective

¹ *Excelsior Stove Mfg. Co. v. Mil-
lion*, 174 Mo. App. 718; *Deere P.
Co. v. Spatz*, 78 Kan. 786, 20 L.R.A.
(N.S.) 492.

² *Carroll-P. B. & T. Co. v. Colum-
bus M. Co.*, 55 Fed. 451, 5 C. C. A.
190.

³ *Puget Sound I. & S. Works v.
Clemmons*, 32 Wash. 36.

⁴ *Hudmon v. Cuyas*, 57 Fed. 355,
6 C. C. A. 381. One of the judges
was of opinion that such damage
was special and was not recover-

able because not specially pleaded.

The exercise of acts of ownership
over goods after the purchaser
knows their quality may estop him
from rescinding the sale and recover-
ing the expense of selling them.
Armstrong v. Descalzi, 48 Pa. Super.
171.

⁵ *Rhind v. Freedley*, 74 N. J. L.
138, following *Hinde v. Liddell*, L.
R. 10 G. B. 265.

⁶ *Star M. & E. Co. v. Sale* (Tex.
Civ. App.), 145 S. W. 1037.

machine is not measurable by the time the superior one was obtained. Lord Alverstone, C. J., said: I do not think that that contention can be maintained. In my opinion these questions of prudence and how far probable action in the future may be taken into consideration require to be very carefully guarded. In the landlord and tenant cases which have been referred to, where damages were claimed for breach of the covenant to repair, the court has refused to allow the question of what the landlord would probably do with the premises if they had been left in a proper condition of repair to be taken into consideration for the purpose of mitigating those damages. Similarly it seems to me that, for the purpose of considering the true measure of damages in the present case, the fact that the respondents have in consequence of the breach of the vendor's contract been compelled to buy a machine which turns out to be superior to the machine contracted for is not a circumstance that can be taken into consideration in mitigation of the damages for that breach. The only purpose for which that fact can be properly taken into consideration is as bearing upon the question whether or not what the party complaining of the breach of contract did was reasonable for the purpose of mitigating the damages that would otherwise have been recoverable from the other contracting party. The finding of the arbitrator affords no ground for saying that because Parsons machines have come into use the respondents are not entitled to recover any damages beyond the time when they substituted the Parsons machines. It is clear that the railway company are entitled to recover the cost of the substituted machines on the ground that by their action they saved the claimants from a very much larger claim for damages than is in fact being made against them.⁷ A manufacturer of cloth is not bound to respond to his vendee for the full selling price of suits made therefrom after he became aware of the worthlessness of the material, such suits being sold under circumstances which imposed no liability upon the vendee; and as

⁷ *British Westinghouse E. & Mfg. Co. v. Underground E. R. Co.*, [1911] 1 K. B. 575.

to suits made after such knowledge came to the vendee he could not recover increased damages because of the making of them.⁸

In an action for the breach of warranty on the sale of a mare the representation made to the plaintiff that she was perfectly gentle and kind was shown to be false. The action was for this representation, and it appeared that within two days after the purchase the plaintiff attempted to drive the mare before a buggy, when she commenced running and kicking, with the result that the buggy was broken; the plaintiff to save himself sprang to the ground and thereby broke one of his legs. It was held admissible to prove the nature, extent and permanent character of the injury to his leg; the length of time he was confined to his house, and the damage done to his buggy; that it should be left to the jury to say whether such injuries resulted from the viciousness of the mare and were the probable and natural consequences of the fraud practiced by the defendant.⁹ In Alabama there may be a recovery for personal injuries caused by the running away of a vicious and unsafe horse which the vendor represented to be kind and gentle if bad faith or fraud on the part of the latter is shown; but not otherwise.¹⁰ But there cannot be a recovery for damage done after the purchaser has acquired knowledge of the breach of warranty.¹¹ Where slaves were purchased as sound and proved to be unsound or diseased, reasonable charges for care and attention and medical aid were

⁸ *Black v. Dudley*, 75 App. Div. (N. Y.) 72; *Swift v. Redhead*, 147 Iowa 94.

⁹ *Sharon v. Mosher*, 17 Barb. 518; *Allen v. Truesdell*, 135 Mass. 75; *Bruce v. Fiss*, 26 N. Y. Misc. 472, 47 App. Div. (N. Y.) 273; *Mullerleile v. Brandt*, 64 Wash. 280; *Hodges v. Smith*, 159 N. C. 525.

In *Rich v. Smith*, 34 Hun 136, the warranty that a horse was "good, gentle and kind" to the extent of being a good family horse was considered general as to his qualities

only—not as special for any particular purpose. Injuries sustained by the purchaser in consequence of the animal's running away and colliding with a vehicle were remote and accidental.

¹⁰ *Jones v. Ross*, 98 Ala. 448.

¹¹ *Major v. Hefley-Coleman Co.*, — Tex. Civ. App. —, 164 S. W. 445; *Mark v. Williams C. Co.*, 204 Mo. 242; *Dean v. Standifer*, 37 Tex. Civ. App. 181; *Bruce v. Fiss*, 47 App. Div. (N. Y.) 273.

allowed as damages;¹² the same rule applies to other property.¹³ In such cases the vendee must exert himself with diligence and good faith to effect a cure and thus prevent further damage.¹⁴ The purchaser of scales cannot recover for losses sustained because he gave short weights if he failed to comply with an ordinance prohibiting their use before official inspection, if that or ordinary care by him would have disclosed the defect in them.¹⁵ If the defect in an article could be remedied by a slight addition, involving no impairment of it, the vendee cannot recover special damages unless he gives the vendor an opportunity to make reparation by remedying the defect or by a money compensation.¹⁶ The same rule applies to general damages, so as to prevent the recovery of the purchase price. In such a case the reasonable expense of making the change or attempting to remedy the defect may be recovered and may measure the damages.¹⁷ Expenditures unreasonably made in order to make

¹² *Roberts v. Fleming*, 31 Ala. 683; *Marshall v. Wood*, 16 id. 806; *Kornegay v. White*, 10 id. 255; *Willis v. Dudley*, id. 933; *Stoudenmeier v. Williamson*, 29 id. 558; *Worthy v. Patterson*, 20 id. 172; *Gingles v. Caldwell*, 21 id. 444; *Buford v. Gould*, 35 id. 265; *Hogan v. Thornton*, 8 Port. 428; *Scranton v. Tilley*, 16 Tex. 183.

¹³ *Dustin v. St. Petersburg I. Co.*, 126 Fed. 816; *Wallace v. Tanner*, 118 Ill. App. 639; *Leavell v. Coleman*, 144 Ky. 825 (seller advised treatment); *Young v. Van Natta*, 113 Mo. App. 550; *Larson v. Calder*, 16 N. D. 248, citing the text; *Hobbs v. Smith*, 27 Okla. 830, 34 L.R.A. (N.S.) 697; *Penny v. Andrus*, 41 Vt. 631; *Philadelphia Whiting Co. v. Detroit W. L. Works*, 58 Mich. 29 (expense of testing goods, insurance, freight and cartage); *Raeseide v. Hamm*, 87 Iowa 720; *Noble v. Fagnant*, 162 Mass. 275; *Heenan v. Redman*, 101 Ill. App. 603; *Galbreath v. Carnes*, 91 Mo. App. 512;

Sapp v. Bradfield, 137 Ky. 308 (from the time an offer to rescind the contract was made); *Parker v. Marquis*, 64 Mo. 38. *Contra*, *Bateman v. Warfield*, 12 Ga. App. 259 (loss of profits being recovered).

¹⁴ *Id.* See § 88.

¹⁵ *Wright v. Computing Scale Co.*, 47 Wash. 107.

¹⁶ *Bates v. Fish W. Co.*, 50 App. Div. (N. Y.) 38, 169 N. Y. 587; *Frick Co. v. Falk*, 50 Kan. 644.

¹⁷ *J. I. Case P. Works v. Niles & S. Co.*, 107 Wis. 9, citing *Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449, 49 L.R.A. 859; *Birdsall v. Carter*, 11 Neb. 143. To the same effect are: *Vulcan I. Works Co. v. Roquemore*, 175 Fed. 11, 99 C. C. A. 77; *The Venezuela*, 173 Fed. 834; *The Nimrod*, 141 Fed. 215, affirmed, no opinion, id. 834; *Stevens v. Whalen*, 95 Ark. 488; *Rochevot v. Wolf*, 96 App. Div. (N. Y.) 506; *Puget Sound I. & S. Works v. Clemmons*, 32 Wash. 36; *Stevens v. Whalen*, 95 Ark. 488; *Whitehead & A. M.*

the articles purchased conform to the warranty are not recoverable.¹⁸ If the vendor has bound himself to remedy defects, it is not a defense that they might have been remedied by the vendee if he had known how.¹⁹ If the vendee in an executory contract rescinds it and returns the goods because of a breach of warranty, on the vendor's refusal to receive them he may sell them, and if he acts reasonably in so doing his liability will be limited to the sum received on the sale.²⁰ The damages recoverable vary with the scope of the warranty. On the breach of a guaranty to supply any part of a machine shown to be defective there may be recovered the cost of supplying the defective part and the loss which naturally and proximately resulted.²¹

Where a contract is made by one to furnish to another a specific article of a designated description to be used for a particular purpose or for use at another place, and the destination, purpose and use are known to him who agrees to furnish it and the article furnished is defective for the purpose and and not according to the contract the damages occasioned by reason of such defects, with reference to the purpose and place, are direct and recoverable. The measure is the difference between the value of the article received and of that contracted for at the place and for the purpose contemplated.²² In apply-

Co. v. Ryder, 139 Mass. 366; *Yellow Jacket M. Co. v. Legarden*, 104 Ark. 573 (the contract so stipulated); *Sumner v. Dobbin*, 16 Manitoba 151 (limited to defects constituting the breach of warranty and excluding the cost of repairs made necessary by use). *Contra*, *Hanna-B. Co. v. Holley-M. Mfg. Co.*, 160 Mo. App. 437.

The seller's agreement to replace any defective part does not preclude the buyer from recovering the reasonable cost and attendant expense of procuring parts elsewhere. *Thomas C. Co. v. Raymond*, 135 Fed. 25, 67 C. C. A. 629.

¹⁸ *Crane Co. v. Columbus C. Co.*, 73 Fed. 984, 20 C. C. A. 233; *Ten-*

nis v. Gifford, 133 Iowa 372. See *Cavanaugh v. Stevens*, 24 S. D. 349.

¹⁹ *Aultman v. Shelton*, 90 Iowa 288.

A condition in the contract to the effect that the vendor will not be responsible for alterations or repairs unless made with his consent, nor for damages caused thereby, is inoperative if the article supplied was not according to the contract. *Mine S. Co. v. Columbia M. Co.*, 48 Ore. 391.

²⁰ *Rubin v. Sturtevant*, 80 Fed. 930, 26 C. C. A. 259.

²¹ *Rosbach v. Fincher M. C. Co.*, 178 Ill. App. 559; *Phelan v. Andrews*, 52 Ill. 486.

²² *Petrified B. M. Co. v. Rogers*,

ing this rule, however, the courts have been slow to permit recovery for damages only remotely due to the breach of warranty

150 Fed. 445; *McDonald v. Kansas City B. & N. Co.*, 149 Fed. 360, 8 L.R.A.(N.S.) 1110, 79 C. C. A. 298; *Krasilnkoff v. Dundon*, 8 Cal. App. 406, quoting the text; *Tiemer v. Zeidman*, 159 Ill. App. 461, citing the text; *Thorne v. McVeagh*, 75 Ill. 81; *Beeman v. Banta*, 118 N. Y. 538, 16 Am. St. 779 (see § 50); *Hammar P. Co. v. Glover*, 47 Kan. 15; *Swain v. Schieffelin*, 134 N. Y. 471, 18 L.R.A. 385; *Passinger v. Thorburn*, 34 N. Y. 634; *Van Wyck v. Allen*, 69 id. 61, 25 Am. Rep. 136; *White v. Miller*, 78 N. Y. 393; *Converse v. Burrows*, 2 Minn. 229; *Reese v. Miles*, 99 Tenn. 398; *Burr v. Redhead*, 52 Neb. 617; *Carroll-P. B. & T. Co. v. Columbus M. Co.*, 55 Fed. 451, 5 C. C. A. 190; *Ellis v. Tips*, 16 Tex. Civ. App. 82; *Hamilton v. Magill*, 12 L. R. Ire. 186.

A vendor of paint, bought to paint a house, who agrees that if it does not comply with his representations he would repaint the house is liable, on breach of his contract to repaint it, for the reasonable cost of doing it. *Reeds v. Lee*, 64 Mo. App. 683.

On the breach of a contract to replace a furnace with one that would meet the stipulated requirements, without extra cost, and to pay all damages caused by the insufficiency of the furnace first put in, the vendee may recover the expense of putting in a new heater of the required capacity. *Williams v. Thrall*, 101 Wis. 337.

The vendor of a warranted furnace which fails to heat a dwelling according to the terms of the contract must respond for the vendee's discomfort and the expense incurred in the use of other means to obtain

heat. *Fowler v. Pauly*, 67 Mo. App. 632.

The vendor of a harvesting machine contracted to supply any parts which should prove to be defectively constructed. The machine broke down during the harvesting season, when help had been collected and no other machine could be obtained. In consequence the ripened grain was injured and there was, also, a loss of the wages of the help. It was determined that injury to the grain could not be recovered for, even if there had been an implied warranty; to permit a recovery on that account, it was said, would establish a broad rule. (*Fuller v. Curtis*, 100 Ind. 237.) The recovery was limited to the actual expense of getting notice to the warrantor and of repairing the machine. *Smoots v. Foster*, 16 Ohio C. C. 612.

In *Converse v. Burrows*, 2 Minn. 229, the trial court gave an instruction to the jury embodying a legal proposition substantially as stated in the text, which on appeal was approved. The case is not a novel one, but the principle discussed in the opinion is of great practical importance, and will justify a full quotation. *Atwater, J.*, said: "Had there been nothing said between the parties to this contract as to the place where the pork contracted for was to be used, there seems to be no dispute but that the correct rule of damages would have been the difference in the value of the article contracted for and that of the article received at the place of delivery; but the case at bar forms an exception to this general rule. The plaintiff designed this pork for a particular place and purpose, of which

and in some cases have limited the award of damages to a sum sufficient to compensate him for the cost of remedying the defect.

fact he notified the defendants at the time of the contract. The defendants therefore entered into the contract in view of these facts, and incurred the obligations imposed by the law in such cases. What were these obligations? In our view, to pay the difference between the value of the pork, as such value was actually found in its damaged state at Fort Ridgeley, and the market value of the quality of pork contracted for at the same place. The correct rule of damages in this case must be determined from the language adopted in the complaint, which purports to state the substance of the contract in reference to the place of destination and use of the pork. The only clause in the complaint referring to this point reads as follows: 'The said plaintiff further shows to the court that the said pork was to be furnished to the plaintiff for supplies for Fort Ridgeley, in the territory of Minnesota, which plaintiff had contracted to supply, which fact was well known to said defendants.' Now had the complaint simply stated that the pork was destined for use at Fort Ridgeley, or for the market at Fort Ridgeley, and that the defendant had notice thereof, we presume there would have been little question but that the instruction of the court to the jury would have been correct. The case would have fallen within the rule laid down in *Bridge v. Wain*, 1 Stark. 504, a case which seems to be quoted with approbation in *Cary v. Gruman*, 4 Hill 625, as well as in *Hargous v. Ablon*, 5 Hill 472. The general rule of damages for breach of warranty on a sale of personal property, as above

stated, is the difference between the article sold, in its defective condition, and the market value of the article at the place where it was to be used, in the condition represented by the vendor. The reason of this rule does not seem to be based upon the fact that such measure of damages would always restore the vendee to what he had lost by the breach of warranty, for in many cases this would not be true; but rather upon grounds of public policy, it being manifestly more for the public interest that some rule should be established in such cases rather than leave each individual case to be governed by its own particular circumstances. Hence, parties entering into contracts of this kind are aware of their rights and liabilities under a breach of contract by either party; and the exception to the rule in the case above referred to is founded on the same reason and is in harmony with it, the only difference being that the rule of damages is made to depend on the market value of the article at the place where it is to be used, rather than the value at the place where it is purchased; and no good reason can be offered why the rule should be otherwise. If the general rule be not based upon the principle of restoring the party to what he has lost by the breach of contract, it is difficult to perceive why the exception should be based upon such principle. For the parties sustain the same relation to each other and the subject-matter, save that in the latter case the article is purchased for a particular market, of which the vendor is apprised, and it is manifest justice that the vendee

And the damages in excess of those recoverable under the general rule heretofore stated are not recoverable for the breach of the

should be made whole in that market. And in the eye of the law he is made whole by receiving the difference between the actual value of the article in its damaged condition, and its real value in the condition required by the contract at the place where the article was to be used. But it is claimed that the allegations of the complaint extend the contract made between the parties, so that in case of a breach on the part of the defendants they became liable for the difference, not between the market value of such pork at Fort Ridgeley, as was called for by the contract, and the inferior article furnished by them, but for the difference in value between such article and the contract price between the plaintiff and the Fort.

"Let us look at the allegation, and see if this view can be sustained. It will be observed that it does not appear from the pleadings what the contract was between the plaintiff and the party with whom he contracted at Fort Ridgeley; nor that there was any stipulated price for the pork. Much less does it appear that the plaintiff, at the time he contracted with the defendants for the purchase of the pork, informed them that he had contracted with the Fort at any particular price, nor, if so, at what price. In the absence of any agreement, therefore, on the subject, the presumption would be that the plaintiff had agreed to furnish the pork at current rates at the place of delivery (the Fort). But whatever his agreement may have been, it does not appear that the defendants had any reference to it, or were influenced by it, in entering into their con-

tract. They did not agree to fill the contract of the plaintiff, nor does it appear that they knew what his contract was. They knew only that he had a contract to fill at that place; and the fact that they were aware that the pork was to be used by the plaintiff at Fort Ridgeley makes the case an exception to the general rule which would govern damages on breach of warranty. And to bring the defendants within the exception, it was important that they should know in reference to the plaintiff's contract, so far as the place was concerned, for the degree of care and diligence which they might exercise to fill their contract might be influenced by such knowledge. The fact that the pork was to be transported to a considerable distance during the summer season might lead them to exercise more care in its selection and preparation than they otherwise would have done. It therefore becomes important to the plaintiff, if he would bring the defendants within the exception to the general rule of damages, that he should bring home to them the knowledge that the pork was to be used at a certain place; and if he would go further than this, and make the defendants responsible for the loss he has sustained on the particular contract, he must at least show that the defendants knew that the contract was to fill his own or to make him whole for any failure to do so. The object of the court should be to apply the rule of law to the contract between the parties, if that contract can be ascertained. We are satisfied that the defendants entered into the contract with the plaintiff

implied warranty of the fitness of an article made to order if they were caused or contributed to by the insufficiency of the

with the knowledge of the place where the pork was to be used by the plaintiff. But we are not satisfied, nor is there anything in the case to show, that the defendants, in making their contract, took into account in any manner the price the plaintiff was to receive for his pork; or that they ever even knew what price he was to receive. In such case we certainly can see no good reason why either the defendants or plaintiff should now claim any benefit from a consideration which never entered into the original contract. Suppose the plaintiff contracted to sell his pork at the Fort for \$100 per barrel, should he be permitted to recover from the defendants the difference between that sum and the actual value of the pork per barrel at the Fort in its damaged condition? Manifestly, it would not be just that he should do so, unless the defendants had expressly agreed to pay such difference.

"A law which should recognize such a measure of damages in such cases would be highly inequitable and work great injustice. If such was the rule, as has been justly observed, it would open the door to unfair dealing, and a fraudulent inflation of price by the vendee, with a view to charge the vendor or guarantor, for if the vendor was to be made liable for the loss of a particular trade which the vendee might have made with reference to the subject-matter of the sale, the particulars of such trade, especially as to price, would be of the highest consequence to the vendor, and would form a principal element in, and become the very essence and basis of, the original transaction,

instead of being considered of such little moment as not even to be mentioned between the parties. Had the contract between the plaintiff and the defendants in the case at bar been in fact made with reference to the price at which the plaintiff resold the pork, as well as the place where it was to be used, that fact should have been averred by the defendants in their answer, if they would avail themselves of any advantages from it. If the rule in this case be that the plaintiff is entitled to recover from the defendants such sum as he has lost by their breach of warranty, at the place where the pork was destined to be used, then the proposition must be true that the loss of a particular bargain, on resale of the warranted article, must be the rule of damages on breach of warranty; but the authorities are directly to the contrary of this proposition. In *Clare v. Maynard*, 7 C. & P. 741, it appears that the plaintiff gave \$45 for a horse, and had sold him for \$55, with warranty, but was obliged to take him back. This, *per se*, was not allowed as a ground for recovering the \$10 difference, the court saying it was the mere loss of an accidental bargain. The same principle is recognized in *Voorhees v. Earl*, 2 Hill 288; *Clare v. Maynard*, 6 Ad. & E. 19; *Hargous v. Ablon*, 5 Hill 472; *Phillips' Ev.*, vol. 5, p. 105; *Greenlf. on Ev.*, vol. 2, p. 273; *Sedg. on Dam.* 295."

See *Bridge v. Wain*, 1 Stark. 504. In this case scarlet cuttings were purchased for sale in China. In an action for breach of the implied warranty that the goods were such Lord Ellenborough instructed the

article because of instructions given by the vendee,²³ or by his negligence.²⁴

Where the contract is made to the knowledge of the vendor²⁵ for the purpose of shipping the article purchased to other markets or to a foreign country and he delivers one inferior in quality to that contracted for, a fact not ascertainable until it has reached its destination, the purchaser may sell it there for the best price obtainable, and the difference between that and the market price of the article contracted for, with the necessary expenses incurred by him, will be the damages.²⁶ The loss of profits by a street railway company through its failure to carry passengers to and from a summer resort because of the failure of an engine to furnish the required motive power, have been held too speculative to be a basis for recovery, the evidence being based largely on the earnings of the company in transporting passengers to such resort in previous years.²⁷

§ 672. Same subject. The cases show a great variety of illustrations of the rule that the damages are the difference between the actual value of the property and what its value would have been if conformable to the warranty. The special value to the vendee for a particular use will be taken into account if

jury to consider the effect of their being of no use or value in China. "I am decidedly of the opinion," said his lordship, "that by value is to be understood the value which the plaintiff would have received had the defendant faithfully performed his contract."

As to the necessity that the vendor be informed of the price in the vendee's contract for resale, see § 52; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Elbinger Actien Gesellschaft v. Armstrong*, L. R. 9 C. P. 473; *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; § 662; *Guetzkow v. Andrews*, 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. 909 (unusual profits).

²³ *Nashua I. & S. Co. v. Brush*, 91 Fed. 213, 33 C. C. A. 456.

²⁴ *Razey v. Colt*, 106 App. Div. (N. Y.) 103.

²⁵ § 662; *Spence v. Duffield*, 1 Vict. (law) 49 (1870); *Sutherland v. Round*, 57 Fed. 467, 6 C. C. A. 428.

²⁶ *Hanson v. Wittenberg*, 205 Mass. 319; *Thorne v. McVeagh*, 75 Ill. 81 (freight paid); *Camden C. O. Co. v. Schlens*, 59 Md. 31, 45, 43 Am. Rep. 537; *Reese v. Miles*, 99 Tenn. 398.

Hammond v. Sandwich Mfg. Co., 146 Wis. 485.

²⁷ *People's Sav. Bank v. Waterloo & C. F. R. T. Co.*, 118 Iowa 740; *H. W. Johns-Manville Co. of Texas v. H. D. Applegate & Son*, — Tex. Civ. App. —, 168 S. W. 4. See § 664 *et seq.*

known to the vendor at the time of the sale, and he expressly or by implication undertook to furnish goods suitable for that use. The principle seems to be settled that when the manufacturer of an article sells it for a particular purpose, the purchaser making known to him at the time the purpose for which he buys it, the seller impliedly warrants it fit and proper for such purpose and free from secret or latent defects.²⁸ In *Brown v. Sayles*²⁹ it was held that when an article is to be manufactured to order and nothing is said as to the quality of the material to be used it is implied that it shall at least be of an ordinary quality. The acceptance of an article so manufactured is not binding and conclusive upon the purchaser if the material was defective and the defect was not known nor observable on careful inspection. After such an acceptance of a defective article the purchaser will only be liable for its value, not for the contract price. Dealers who do not make or grow what they sell may, by the circumstances of the sale, incur a like obligation. They must agree that what they sell is suitable for the intended use; and the purchaser must trust to the judgment and skill of the vendor.³⁰ In such cases, and also where there is an express warranty, the value of the property purchased to the vendee includes those gains which would, with the requisite certainty, have accrued to him if the vendor had faithfully performed his contract,³¹ and exemption from those expenses and

²⁸ *McDonald v. Kansas City B. & N. Co.*, 149 Fed. 360, 8 L.R.A. (N.S.) 1110, 79 C. C. A. 298; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Edwards v. Collson*, 5 Lans. 324; *Charlotte, etc. R. Co. v. Jesup*, 44 How. Pr. 447; *Merrill v. Nightingale*, 29 Wis. 247; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Walton v. Cody*, 1 Wis. 420; *McCa v. Elam D. Co.*, 114 Ala. 74, 62 Am. St. 88; *Zimmerman v. Druecker*, 15 Ind. App. 512; *Bateman v. Warfield*, 12 Ga. App. 259; *Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355; *Schleuter v. Sherman*, 169 Ill. App. 386.

The implied warranty of a manufacturer who makes an article for a particular purpose or use does not cover the reasonable safety of the article for the purpose or use for which it was made. *Cram v. Gas Engine & P. Co.*, 75 Hun 316.

²⁹ 27 Vt. 227.

³⁰ *Charlotte, etc. R. Co. v. Jesup*, 44 How. Pr. 447; *Mason v. Chappell*, 15 Gratt. 572; *Noble v. Nelson*, 154 Mo. App. 616, § 667.

³¹ *Murray v. Putman* (Tex. Civ. App.), 130 S. W. 631; *Chisholm & M. Mfg. Co. v. United States C. Co.*, 111 Tenn. 202.

losses which naturally and proximately result from his failure to do so. Thus a warranty of a steam-engine as having a certain capacity for work and as sound and in good order, if untrue, will entitle the vendee to recover the difference between the actual value and what its value would have been had the engine been conformable to the warranty.³² And the vendee may show this difference of value by proof of what it would cost to replace the machinery furnished with such as was demanded by the contract.³³ Where a boiler, warranted to be suitable for a particular purpose, proved to be unsound and in consequence the purchaser was damaged because of the destruction of property situated near where the boiler was used, such damage was a natural and legitimate result of the breach of the warranty.³⁴ In a recent Massachusetts case a boiler maker of good reputation undertook to make for the plaintiff a boiler to be used for a specified purpose, of which the defendant was informed. The boiler proved insufficient and caused injury to an employee of the plaintiff, for which the latter paid. The court said, Holmes, C. J., writing the opinion, that if indemnity ever is to be recovered, short of an express contract of insurance, for what is in form the result of a tort on the plaintiff's part, this case belongs to the class in which it should be allowed. The plaintiff's misconduct consisted in a failure to discover by inspection a defect in an article specially made for it, and probably not falling within the exceptional rule as to well known articles made by reputable makers and sold in the market

³² *Edwards v. Collson*, 5 Lans. 324; *Ladd v. Lord*, 36 Vt. 194; *Merrill v. Nightingale*, 39 Wis. 247; *Giffert v. West*, 33 id. 617; *Parks v. Morris A. & T. Co.*, 4 Lans. 103, 54 N. Y. 586; *Accumulator Co. v. Dubuque St. R. Co.*, 64 Fed. 70, 12 C. C. A. 37, citing the text.

A recovery of the probable earnings of a vessel has been denied where the defects in her boiler were not known to the vendor. *The Venezuela*, 173 Fed. 834, distinguish-

ing *The Nimrod*, 141 id. 215, where the vendor knew of the defects.

³³ *Barry-W. Mach. Co. v. Thompson*, 83 Ark. 283; *New Haven Eastern P. B. Co.*, 78 Conn. 689; *Holmes v. Boydston*, 1 Neb. 346; *Hitchcock v. Hunt*, 28 Conn. 343; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Benjamin v. Hilliard*, 23 How. 149, 16 L. ed. 518; *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1139.

³⁴ *Page v. Ford*, 12 Ind. 46; *Dustin v. St. Petersburg I. Co.*, 126 Fed. 816, 13 Pa. Dist. 567.

ready for use. Such a failure might make the plaintiff answerable to its men, but even if its conduct be called want of ordinary care, it was induced, as we must assume after the verdict, by the warranty or representations of the defendant. The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendant's judgment in a matter as to which the defendant was an expert and the plaintiff presumably was not. Whether the false warranty be called a tort or breach of contract, the consequence which ensued must be taken to have been contemplated and was not too remote. The fact that the reliance was not justified as toward the men does not do away with the fact that the defendant invited it with notice of what might be the consequence if it should be misplaced, and there is no policy of the law opposed to his being held to make his representations good.³⁵ The same court has determined that the vendor of a highly inflammable substance used for manufacturing purposes by a process subjecting it to heat may be liable for the loss of the vendee's factory because of fire proximately resulting from the breach of warranty, all the facts concerning the use to which the material was to be put being within the knowledge of the vendor.³⁶ Furnishing par-

³⁵ *Boston Woven H. & R. Co. v. Kendall*, 178 Mass. 232, 86 Am. St. 478, 51 L.R.A. 781. The opinion states that *Nashua I. & S. Co. v. Worcester & N. R.*, 62 N. H. 159, is not opposed, and that *Mowbray v. Merryweather*, [1895] 1 Q. B. 857, [1895] 2 Q. B. 640, is very much in point. It is intimated in that case that the workman himself could have recovered in the first place against the defendant. Whether that is a necessary condition of recovery over we need not consider. See *Holyoke v. Hadley W. P. Co.*, 174 Mass. 424, 428; *Consolidated H. M. L. Mach. Co. v. Bradley*, 171 Mass. 127, 134. There are many cases in our own and other reports which offer as strong or stronger ap-

plications of the principle of liability over. *Gray v. Boston G. L. Co.*, 114 Mass. 149, 19 Am. Rep. 324; *Churchill v. Holt*, 127 Mass. 165, 34 Am. Rep. 355, 131 Mass. 67, 41 Am. Rep. 191; *Old Colony R. v. Slavens*, 148 Mass. 363, 12 Am. St. 558; *Holyoke v. Hadley W. P.*, *supra*; *Washington G. L. Co. v. District of Columbia*, 161 U. S. 316, 327, 328, 40 L. ed. 712, 718, 719; *Oceanic S. N. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461; *Pierce v. Bidwell T. Co.*, 153 Mich. 323, is in accord. See *Hawley Down-Draft F. Co. v. Diamond State S. Co.*, 13 Pa. Dist. 61.

³⁶ *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 15 L.R.A.(N.S.) 855.

tially seasoned lumber for use in the construction of a dwelling house has been adjudged to be cause for imposing liability for the difference in its value when completed (the vendee not knowing the fact before) and its value as it would have been had the material supplied conformed to the contract.³⁷ The defendant, a manufacturer of buggies, sold a buggy to a city for the use of one of its employees, knowing it to be defective, and concealing the defect by the use of paint and grease. While using it the employee, whose use of it was contemplated by the defendant, was injured in consequence of the concealed defect. The case was disposed of on the theory that it was similar to an action for deceit and a demurrer to the complaint overruled.³⁸ The cost of removing a defective article from the substance to which it has been applied and putting on a new article may be shown.³⁹

In an English case the sale of a rope for use on the vendee's crane was held to import a warranty of fitness, and the vendor was liable for a cask of wine lost by the breaking of the rope;⁴⁰ and in another case for the value of an anchor lost by the breaking of the cable sold for the purpose of holding it;⁴¹ and the vendor of a warranted lintel which caused the fall of a building

³⁷ *Elwood P. M. Co. v. Harting*, 21 Ind. App. 408.

³⁸ *Woodward v. Miller*, 119 Ga. 618, 64 L.R.A. 932.

³⁹ *Moore v. King*, 57 Hun 224.

⁴⁰ *Brown v. Edgington*, 2 M. & G. 279.

⁴¹ *Borradaile v. Brunton*, 8 Taunt. 535. The authority of this case was questioned in *Hadley v. Baxendale*, 9 Ex. 341. This criticism is noticed in *Mayne on Dam.* (Wood's ed.) 267, as is the remark of Alderson, B., that on the same principle the jury might have given the value of the ship if it had been lost. This author says: "No doubt the enormity of the damages which would be recoverable in such a case is very startling. But if a chain cable is sold for the express purpose of hold-

ing a ship to its anchor, and if, through some defect of it, the ship drifts on shore it is difficult to see why the damages should stop at any smaller amount. When the pole of a carriage broke, in consequence of which the horses became frightened and were injured, the court held that the sale of the pole carried with it an implied warranty that it was reasonably fit for its purposes; and that, as to damages, the proper question to leave to the jury was whether the injury to the horses was or was not a natural consequence of the defect in the pole. *Randall v. Newson*, 2 Q. B. Div. 102. See criticism on this case and that cited in preceding note, in note to § 672.

in which it was used was liable for the damage.⁴² A manufacturer of barrels is liable for the loss of their contents by reason of defects in them.⁴³ A vendor of potatoes is chargeable with notice that his vendee, known to be a retail grocer, might mix them with other potatoes and that the latter might be affected by the former, and in so far as that comes to pass the vendor must answer for the consequences,⁴⁴ as must the vendor of a refrigerator for the value of meat lost because his warranty thereof was not met.⁴⁵ The vendee of a defective threshing machine may recover for the wastage of his own time and that of his employees in an effort to use the machine, the vendor having solicited that he do so, and the value of his time in reasonable efforts to remedy its defects, and the cost of the hire of another engine for a short time to accomplish the work which the machine would have done if it met the warranty.⁴⁶ The reasonable cost of giving a machine a fair test may be recovered.⁴⁷ The loss of profits and the expense of operating a machine in excess of what it would have been if the warranty had not been broken have been considered too remote to be grounds of damage.⁴⁸ But loss of profits have been recovered where there was failure to properly place machinery for the operations of a mill.⁴⁹ The purchaser of a furnace which fails to heat his office so that it can be used may recover the rental value of the latter;⁵⁰ and the owner of a dwelling which is not heated according to the warranty of the vendor of the furnace

⁴² *Riss v. Messmore*, 30 N. Y. St. Rep. 250, 58 N. Y. Super. 23.

⁴³ *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *Tatro v. Brower*, 118 Mich. 615; *National R. & B.'s S. Co. v. Parmalee*, 9 Ga. App. 725.

⁴⁴ *Northern S. Co. v. Wangard*, 123 Wis. 1, 107 Am. St. 984.

⁴⁵ *Dean v. Standifer*, 37 Tex. Civ. App. 181; *Beeman v. Banta*, 118 N. Y. 538, 16 Am. St. 779.

⁴⁶ *Optenberg v. Skelton*, 109 Wis. 241; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Wilmington C. Co. v. Remington M. Co.*, 5 Penne. 543.

Compare *McDonald v. Kansas City B. & N. Co.*, 149 Fed. 360, 8 L.R.A. (N.S.) 1110, 79 C. C. A. 298. *Contra*, as to wages and board of men; damages for the loss of use proper. *Thompson v. Corbin*, 41 Nova Scotia 386.

⁴⁷ *Marbury L. Co. v. Stearns Mfg. Co.*, 32 Ky. L. Rep. 739.

⁴⁸ *Elmore v. Booth*, 83 Ark. 47.

⁴⁹ *Murray v. Putman* (Tex. Civ. App.), 130 S. W. 631.

⁵⁰ *Russell v. Corning Mfg. Co.*, 49 App. Div. (N. Y.) 610.

may recover for his discomfort and the expense of efforts to heat his house.⁵¹ The owner of a greenhouse, the stock in which is injured or destroyed because of a defect in a heating apparatus, may recover the difference between the value of the stock therein which was so affected by such reason before it was injured and the value of it thereafter.⁵² The rental value of a mill which lies idle because of the insufficiency of warranted machinery is an element of damage,⁵³ as is the cost of making repairs and the wages of men who are kept idle in consequence.⁵⁴ The vendor of hay or grain which is to be fed to animals or which is ordinarily used for that purpose, is liable for injury done to the vendee's animals by a poisonous substance contained therein,⁵⁵ notwithstanding the grain was damaged, it being in the contemplation of the parties it should be fed to the vendee's animals.⁵⁶ A vendor of remedies who supplies something different from what was ordered must answer for the value of animals lost because of its use.⁵⁷ Where the oats sold to the keeper of a livery-stable contained castor beans and, as a result of eating them, some of his horses died and others were permanently injured the vendor was liable for the value of those that died, the diminished value of those injured, the loss of the use of the horses while sick and the expense of medical treatment and medicines.⁵⁸ The owner of cattle who has been

⁵¹ See § 671, note.

⁵² *Laufer v. Boynton F. Co.*, 84 Hun 311.

⁵³ *Aultman v. Stout*, 15 Neb. 586; *Erie City I. Works v. Barber*, *infra*; *New York & C. M. Co. v. Fraser*, 130 U. S. 611, 622, 32 L. ed. 1031, 1035; *Critcher v. Porter*, *infra*; *Mine S. Co. v. Columbia M. Co.*, 48 Ore. 391. Compare *The Venezuela*, 173 Fed. 834; *Booher v. Goldsborough*, 44 Ind. 490.

⁵⁴ *Critcher v. Porter*, 135 N. C. 542; *Dustin v. St. Petersburg I. Co.*, 13 Pa. Dist. 567; *Sinker v. Kidder*, 123 Ind. 528; *Erie City I. Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 508; *Zuller v. Rogers*, 7 Hun 540.

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the legal rate of interest upon the cost may be taken as the fair rental value of a mill. *New York & C. M. Co. v. Fraser*, *supra*.

Expenses incurred in experimenting with a machine after it has been demonstrated to be defective are not recoverable from the vendor. *Aultman v. Stout*, *supra*.

⁵⁵ *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Wilson v. Dunville*, 4 L. R. Ire. 249, 6 id. 210.

⁵⁶ *Provost v. Cook*, 184 Mass. 315.

⁵⁷ *Mann-T. D. Co. v. Cheairs*, 75 Ark. 596.

⁵⁸ *Coyle v. Baum*, 3 Okla. 695, 716; *Hartgrove v. Southern C. O. Co.*, 72 Ark. 31.

damaged by feeding them unsound feed, in consequence of which they became sick, fell off in weight and deteriorated in value may recover to the extent of their lessened market value at the time and place they were injured.⁵⁹ It has been held that the damages resulting from the loss of flesh and growth of cattle on pasture because of the failure to furnish water are too remote.⁶⁰

⁵⁹ *Houston C. O. Co. v. Trammell* (Tex. Civ. App.), 72 S. W. 244; *Swift v. Redhead*, 147 Iowa 94.

The difference in the two rules of damages where animals are made ill—that is, the difference between their value immediately before they became sick and their value immediately thereafter, and the difference in their value before they became sick and after their recovery from their illness, with such sum as will compensate for the loss of time, care, attention and disbursements made necessary by their illness including the loss of the value of their use, is one of terms rather than of substance, the latter mode of expressing the rule being thought by some to more readily bring it within the comprehension of the jury. The method in which these rules work out is thus indicated: In the first rule, where the difference in the value of the animal before and after it became sick is taken as the measure of damages, nothing is expressly allowed the plaintiff for care and attention to the sick animal; but it is allowed in effect, for under this rule the value of the animal when sick is fixed by considering, among other things, the value of the care and attention required to cure him. For instance, suppose that the ox of plaintiff worth one hundred dollars is made sick by the wrongful act of the defendant; suppose that after he recover he is of the same value, but

that the care, attention and other costs of his sickness amount to fifty dollars. Under the first rule the jury should say that this ox was worth one hundred dollars before he became sick, and he is worth the same now as if he had never been sick, but it took fifty dollars to cure him, therefore his value immediately after he became sick was only fifty dollars, and the difference between that and his value before sickness is fifty dollars, which is the extent of the damages to be allowed. Under the second rule they would take the difference in value of the animal before and after sickness, which in the case supposed would be nothing, and to that they would add a sum sufficient to cover the cost of the sickness, including loss of time and expenses, which would be fifty dollars, as the amount to be allowed for damages, being the same sum as that under the other rule. *Hartgrove v. Southern C. O. Co.*, *supra*.

But where the vendee uses feed with knowledge that it is damaged and unsuitable for feed, and where it is not clearly shown that the failure to furnish the contract quality was the proximate cause of the injury, the buyer is entitled to only nominal damages. *Major v. Hefley-Coleman Co.*, — Tex. Civ. App., 164 S. W. 445.

⁶⁰ *Cole v. Laird*, 121 Iowa 146.

A dealer in Paris green sold by mistake to a customer, knowing that he desired it to use on his crop for the purpose of destroying worms which injured it, another substance much in appearance like that applied for. The substance delivered was used on the crop without producing the desired result. The vendor was held liable for the value of the crop as it stood just before it was destroyed, the cost of the article sold, the expense of preparing and applying it, with interest on the money expended, except in so far as the purchaser could, with ordinary care and reasonable expense, have prevented any of these elements of damage.⁶¹ If rags sold as clean, free from infection and fit to be manufactured into paper are infected with the small-pox and cause that disease to break out in the vendee's mill the elements of damage are the loss of his trade because of the disability of his men and the money expended to support them while they are afflicted with the disease.⁶² The manufacturer of a beverage bottled for use must answer to a consumer injured by broken glass therein for his physical suffering and for his mental suffering, based in part on the apprehension of pending death, up to the time of the removal of the glass from his stomach.⁶³ The vendee may recover compensation for labor, expense or losses sustained in *bona fide* attempts to make a warranted article produce the results which it was bought and sold for,⁶⁴ so far as

⁶¹ Jones v. George, 61 Tex. 345, 48 Am. Rep. 280. See § 50; Kent v. Haliday, 23 R. I. 182.

⁶² Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810.

⁶³ Watson v. Augusta B. Co., 124 Ga. 121, 1 L.R.A.(N.S.) 1178, 110 Am. St. 157.

⁶⁴ Adams M. Co. v. Castleberry, 92 Ark. 310; Waynesville W. Mfg. Co. v. Berlin M. Works, 144 N. C. 689; Bagley v. Cleveland R. M. Co., 22 Blatch. 342; Wolfinger v. Mayo M. Co., 21 Pa. Dist. 189; Fox v. Stockton C. H. etc. Works, 83 Cal. 333; Whitehead & A. Mach. Co. v. Ryder, 139 Mass. 366.

But in Minnesota, in the absence

of fraud, expenses incurred by the purchaser for the medical examination and treatment of a warranted horse are not recoverable. Merrick v. Wiltse, 37 Minn. 41.

When one uses the property of another under a contract to buy it, if upon trial it meets specified requirements, the costs and expenses of the trial are not to be met by the owner. Sturtevant M. Co. v. Kingsland B. Co., 74 N. J. L. 492.

There cannot be a recovery for the difference in value between the connections, accessories and labor furnished, and that called for by the contract, and also for the expense incurred in putting these in condition to correspond with the contract,

they were incurred prior to the time he was bound by his contract to return it if it did not fill the warranty,⁶⁵ unless such efforts are clearly futile,⁶⁶ or the contract limits the liability of the vendor.⁶⁷ To make the vendor of a harvesting machine, sold with a warranty of its quality and capacity and with knowledge that it was purchased for the purpose of harvesting the vendee's grain, liable for damage sustained by the grain on account of the failure of the machine to work it must appear that it was impracticable to secure the grain by other means, or that the delay in experimenting with the harvester was justified, or that it was contemplated by the parties that such damage would be the result of the breach of the warranty.⁶⁸ It has been ruled in Alabama that in the absence of fraud or bad faith the vendor of a sale which is warranted to be "burglar proof" is not liable for damages sustained by the loss of valuables taken therefrom by burglars who broke it open.⁶⁹ But in Illinois the vendor of a safe warranted to be burglar-proof (*i. e.*, in the

because there would be a duplication of damages. *Archer v. Milwaukee A. E. & S. Co.*, 144 Wis. 476.

⁶⁵ *Newberry v. Bennett*, 38 Fed. 308.

⁶⁶ *Draper v. Sweet*, 66 Barb. 145; *Nye v. Iowa City A. Works*, 51 Iowa 129, 33 Am. Rep. 121; *Murphy v. McGraw*, 74 Mich. 318; *American L. M. Mfg. Co. v. Belcher* (Tex. Civ. App.), 152 S. W. 853.

⁶⁷ *Allen v. Tompkins*, 136 N. C. 208 (as where it is provided that defective machinery shall be replaced); *Sycamore M. H. Mfg. Co. v. Sturm*, 13 Neb. 210; *McCormick v. Vanatta*, 43 Iowa 389.

⁶⁸ *Wilson v. Reedy*, 32 Minn. 256; *Froherich v. Gammon*, 28 Minn. 476; *Houser & H. Mfg. Co. v. McKay*, 53 Wash. 337, 27 L.R.A. (N.S.) 925. Compare *Aultman v. Case*, 68 Wis. 612.

⁶⁹ *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4. It is said in this case that *Borradaile v. Brunton*, 8 Taunt. 535 and *Brown v. Edginton*, 2 M. & G. 279, carry the principle of liability on the part of a vendor to extreme results. In the latter case "nothing was said, either in the argument of counsel or in the opinions of the judges, on the question of the loss of the wine being too remote to justify a recovery therefor." Distinguishing those and other cases from the one in hand the court say, that the injuries in them resulted directly from the known use for which the articles were procured, without extraneous interference or adventitious circumstances, and purely from inherent defects or inaptness for the service required. They were the natural consequences of the falsity of the warranty. See *Jones v. Ross*, 98 Ala. 448.

commercial sense, as distinguishing it from the commercially known fire-proof safe), who fails to furnish complete directions for locking it, in consequence of which the safe was opened by burglars without the use of force, is liable for the loss of a reasonable sum of money put in the safe. "The very intervention of a burglar was the essential element that both parties contemplated as being the thing to be guarded against and concerning which the warranty was interposed."⁷⁰ Negligence in installing electrical protection against burglary is cause for the recovery of the value of goods taken by burglars.⁷¹ If an article sold for a known use proves unfit therefor and produces injury to the customers of the vendee the vendor is liable for the value of the article and for the injury resulting to the vendee from its defects by loss of trade.⁷² A vendor of mortar which was defective, a fact which could not be determined before using it, was liable for the cost of pulling down the building in which it was used and the cost of rebuilding it, the authorities having condemned the building because the mortar was bad; he was also liable for the vendee's loss of ground rent.⁷³ Where cement warranted fit for use in plastering a dwelling was unfit for that purpose the vendee recovered for disbursements made to have the floors marred by the falling of the plaster cleaned, the door and window casings removed preparatory to replastering, the cost of replastering and replacing casings and the loss of the use of the house caused by having these things done. He also recovered the cost of an attempt to remedy the defect in the plastering by patching it, the necessity of replastering not being apparent when such attempt was made.⁷⁴

The uncertainty of the extent to which damages have resulted from the breach of a contract is not ground for refusing the recovery of any. As was said in a New York case: "When it is certain that damages have been caused by a breach

⁷⁰ Deane v. Michigan S. Co., 69 Ill. App. 106.

⁷¹ Silverblatt v. Brooklyn Tel. & M. Co., 73 N. Y. Misc. 38.

⁷² American P. F. Co. v. Elliott, 151 N. C. 393, 31 L.R.A. (N.S.) 910,

Swain v. Schieffelin, 134 N. Y. 471, 18 L.R.A. 385.

⁷³ Smith v. Johnson, 15 T. L. Rep. 179 (1899).

⁷⁴ Nye v. Snyder, 56 Neb. 754.

of contract and the only uncertainty is as to their amount there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach."⁷⁵ But a vendee cannot recover unless his evidence establishes the basis for calculating his damages.⁷⁶ Where these are measurable by the difference between the value of the machine if it had been as warranted and its actual value, the latter must be proven. The fact that a machine warranted to varnish a designated number of labels in a day would varnish only a certain smaller number does not establish its actual value as compared with the contract price.⁷⁷ Where the value of property for the purpose for which it was bought exceeds its value for another purpose to which it might be put its value for the former will be the standard upon which the damages will be computed.⁷⁸

§ 673. Same subject. Where coal dust was sold and warranted to contain no soft or bituminous coal, and with knowledge that it was intended by the vendee to make brick and that if there was soft coal dust in it its use would ruin the brick, on breach of the warranty it was held that the vendee was not limited in his recovery to the difference between the value of impure and pure dust, but that he might recover all

⁷⁵ *Wakeman v. Wheeler & W. Mfg. Co.*, 101 N. Y. 205, 54 Am. Rep. 676; *Eagle I. Works v. Des Moines S. R. Co.*, 101 Iowa 289; *Independent B. Ass'n v. Burt*, 109 Minn. 323.

In *Resse v. Bates*, 94 Va. 321, it is laid down that the breach of a warranty that a fertilizer is as good as any other article of a like character and price offered in the same market, may be shown by proof that, when applied in like quantities to the same crop, during the same season, upon the same land, receiving the same cultivation, the results obtained where such fertilizer was used were inferior to those obtained from other fertilizers sold in the same market.

In *Depew v. Peck H. Co.*, 121 App. Div. (N. Y.) 28, the purchaser of

warranted alfalfa seed was confronted with a crop of trefoil which had patches of dodder scattered through it. Before the alfalfa could have matured he plowed the land to get rid of the other noxious growth and prevent its spread. In doing so it was recognized that it was his duty to reduce the damages, and if he acted prudently the defendant could not avoid liability because of the absence of proof of the probable value of the crop that might have been raised.

⁷⁶ *Hammond v. Sandwich Mfg. Co.*, 146 Wis. 485; *Western Implement Co. v. Blodgett*, 24 Cal. App. 19.

⁷⁷ *Hooper v. Story*, 155 N. Y. 171.

⁷⁸ *Ladd v. Lord*, 36 Vt. 194.

the loss he had actually sustained from the use of the dust in making brick; these damages were clearly such as were in contemplation by the parties.⁷⁹ On a sale of onion seed it was warranted to be "good, fresh, and such seed as would grow." There being a breach of warranty and the seed not growing the vendee recovered as damages the amount paid for the seed, the value of labor in preparing the ground for it (after deducting the benefit to the land) and in planting it, with interest on the several amounts.⁸⁰ In another case where the warranty was that the seed was "early strap-leafed, redtop turnip seed," on a breach because the seed sold was a different turnip seed it was held that the measure of damages was the difference between the market value of the crop raised and a crop from the seed ordered.⁸¹ Depue, J., said: "Profits expected to be made from a whaling voyage, the gains from which depend in a great measure upon chance, are too purely conjectural to be capable of entering into compensation for the non-performance of a contract by reason of which the adventure was defeated. For a similar reason the loss of the value of a crop for which the seed had not been sown, the yield of which if planted would depend upon the contingencies of weather and season, would be excluded as incapable of estimation with that degree of certainty which the law exacts in the proof of damages. But if the vessel is under charter or engaged in a trade, the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sowed on the ground prepared for cultivation and the plaintiff's complaint is that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimate of the injury re-

⁷⁹ *Milburn v. Belloni*, 39 N. Y. 53, 100 Am. Dec. 403.

⁸⁰ *Ferris v. Comstock*, 33 Conn. 513; *Shaw v. Smith*, 45 Kan. 334, 11 L.R.A. 681.

⁸¹ *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Crutcher v. Elliott*, 13 Ky. L. Rep. 592 (Ky. Super. Ct.); *Haycroft v. Walden*, 14

id. 892 (Ky. Super. Ct.); *Vaughan's S. Store v. Stringfellow*, 56 Fla. 708; *Cline v. Mock*, 150 Mo. App. 431; *Depew v. Peck H. Co.*, 121 App. Div. (N. Y.) 28; *Edgar v. Breck*, 172 Mass. 581; *Flick v. Wetherbee*, 20 Wis. 392; *American W. Co. v. Ray* (Tex. Civ. App.), 150 S. W. 763.

sulting from the loss of profits of this character. In this case the defendant had express notice of the intended use of the seed. Indeed, the fact of the sale of seeds by a dealer keeping them for sale for gardening purposes to a purchaser engaged in that business would of itself imply knowledge of the use which was intended sufficient to amount to notice. The ground was prepared and sowed, and a crop produced. The uncertainty of the quantity of the crop, dependent on the condition of the weather and season, was removed by the yield of the ground under the precise circumstances to which the seed ordered would have been exposed.”⁸²

There is no inconsistency between the result here reached and that arrived at in the preceding case, but the language quoted would exclude the damages allowed if the seed did not grow when planted. According to the foregoing quotation the uncertainties of weather and season render the crop, when the seed is not sowed, incapable of estimation; but it is conceded to be otherwise if a different seed is sowed and a crop raised on the ground prepared for the seed ordered. It is to be observed that the contract of sale was not made with reference to the use of the seed on any specified ground. And hence the uncertainties of weather and season might be removed by proof of actual turnip raising in the vicinity and the requisite proof would always exist if any turnips were produced in the neighborhood; such proof would entirely harmonize with the principle of the other illustrations of a vessel under charter or engaged in a trade. A similar case to the last arose in New York,⁸³ and the court held to the same rule of damages, and it has been approved in a still later case,⁸⁴ *Andrews, J.*, referring to the preceding case, said: “It was carefully considered and decided, and we are not prepared to say that the rule there adopted is a departure from correct principles. Gains prevented, as well as losses

⁸² *Vaughan's S. Store v. String-fellow*, *supra*.

⁸³ *Passinger v. Thorburn*, 34 N. Y. 634; *Dunn v. Bushnell*, 63 Neb. 568, 93 Am. St. 474; *Landreth v. Wyckoff*, 67 App. Div. (N. Y.) 145.

⁸⁴ *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13 (approved, *arguendo*, in *Heilman v. Pruyn*, 122 Mich. 303; *Kent v. Halliday*, 23 R. I. 182). See *Sanford v. Brown*, 134 App. Div. (N. Y.) 652.

sustained, may be recovered as damages for a breach of contract where they can be rendered reasonably certain by evidence and have naturally resulted from the breach.⁸⁵ But mere contingent and speculative gains or losses, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not, are rejected, and the jury will not be allowed to consider them. Can it be said that the damages allowed in *Passinger v. Thorburn* are incapable of being ascertained with reasonable certainty by a jury? The character of the season, whether favorable or unfavorable for production; the manner in which the plants set were cultivated; the condition of the ground; the results observed in the same vicinity where cabbages were planted under similar circumstances; the market value of Bristol cabbage when the crop matured; the value of the crop raised from the defective seed; these and other circumstances may be shown to aid the jury and from which they can ascertain approximately the extent of the damages resulting from the loss of a crop of a particular kind. The referee allowed interest on the damages from the time the crop would have been harvested and sold. We are of opinion this was erroneous. The demand was unliquidated, and the amount could not be determined by computation simply or reference to market values.”⁸⁶

§ 674. **Same subject.** A few months prior to the decision of *White v. Miller* the case of *Van Wyck v. Allen*⁸⁷ had been decided, but it is not referred to in the later case. The instruction given the jury in *Passinger v. Thorburn* was that if the warranty was untrue then “the damages would be the value of the crop of Bristol cabbages such as they should believe would ordinarily have been produced that year, deducting all expenses of raising the crop, and also deducting the

⁸⁵ *Masterton v. Mayor, etc.*, 7 Hill 61; *Griffin v. Colver*, 16 N. Y. 489; *Messmore v. New York S. & L. Co.*, 40 N. Y. 422; *Hodgkins v. Dunham*, 10 Cal. App. 690; *Bateman v. Warfield*, 12 Ga. App. 259 (recovery of fees lost by impotence of jack so

far as mares were brought for service).

⁸⁶ Citing *Mahon v. New York, etc. R. Co.*, 20 N. Y. 469; *Smith v. Velie*, 60 N. Y. 106.

⁸⁷ 69 N. Y. 61, 25 Am. Rep. 136.

product or value of the crop actually raised." In *Van Wyck v. Allen* the question was whether this instruction was sufficiently favorable to the plaintiff. Folger, J., said: "It is urged here as error that the trial court departed from the rule in that case laid down in not directing a deduction from the value of the crop of the cost of producing it; so that we are to assume for the purpose of this case that the decision in *Passinger v. Thorburn* is not erroneous. But it will be observed of that case that it did not undertake to fix the limits of the rule on all sides. There came to this court therein for review a rule of damages laid down at the circuit, to wit: that the plaintiff was entitled to recover the value of a crop which could have been raised from good seed, less the cost of producing the crop, and the value of what was in fact raised. To this holding at the circuit the defendant excepted, but the plaintiff did not; so that there was raised in this court only the question whether the rule was unjust to the defendant: not any question whether the plaintiff could have found fault with its limits. The appellate court could not review it, save to say that it was or was not too large. Whether it might not have been larger was not before the court, so that case is not an authority against the holding now before us. It is a decision which we may not in this case question, that where seeds are sold as, or warranted to be, those of a certain vegetable, and to produce that vegetable, then the vendee, the warranty failing, may recover the value of the reasonably anticipated crop, less the cost of tillage and the value of what was in fact raised. But if he may recover the value of the crop which should be, why, when naught is the product, should the vendee be held to credit the vendor with the lost labor and expenses? That he has expended in this case, and should be remunerated if he is to have full compensation. He would have been repaid it out of the profits of the crop had a crop been raised. He will repay it now out of the damages, which stand in the place of the profits of the crop, if his judgment for them remains unimpaired. If he, having paid it out in futile tillage, is not to have recompense for it, he has lost it once. And if now he is to deduct it from the value of the crop which that tillage should have produced, he loses it twice.

The crop, if raised, would have represented to him all that went into it, of time, labor, money, use of land and materials. The avails of the crop would have gone to reimburse each of those. He gets, in his damages, what the avails of the crop would have been, and those damages should go to reimburse each of those items. But if from the damages he deducts them, there are no damages to reimburse them, and he loses them entirely. If there had been any part of a crop raised the value of that, clearly, should have been deducted."⁸⁸

In an English case seed potatoes sold with a warranty proved to have been mixed with another variety less valuable. The quantity purchased was twelve tons, from which thirty-five tons were grown. Cave, J., directed the jury that if they thought the purchaser ought to have examined the potatoes before planting them and ascertained their quality, that damages should be given on the basis of the quantity bought; if he acted reasonably in not doing so then the quantity produced would be the basis upon which to calculate the damages.⁸⁹ The vendor of impure clover seed has been held liable for the difference between the value of pure seed and of that sold, and also for the difference between the value of the farm before and after the seed sold was sown thereon.⁹⁰ The damage to the farm may be shown by proof of the extent to which weeds grew upon it in consequence of the impurity of the seed, the expense, labor and difficulty of removing them and the hindrance to the growth of crops thereon.⁹¹ It is not perceived why the cost of seed for re-sowing should not be recovered where that sown does not grow.⁹² According to the view of the Tennessee court such damages as

⁸⁸ *American W. Co. v. Ray* (Tex. Civ. App.), 150 S. W. 763. See *Page v. Pavay*, 8 C. & P. 769; *Cary v. Gruman*, 4 Hill 625; *Depew v. Peck H. Co.*, 121 App. Div. (N. Y.) 28.

In *Fuhrman v. Interior W. Co.*, 64 Wash. 159, 37 L.R.A. (N.S.) 89, the market value of the crop that would have been raised, less the expense of producing and harvesting, not incurred, but not deducting the cost of

marketing, was held to be the measure of damages.

⁸⁹ *Wagstaff v. Short Horn D. Co.*, Cab. & E. 324 (1884).

⁹⁰ *Fox v. Everson*, 27 Hun 355; *Bell v. Mills*, 68 App. Div. (N. Y.) 531; *McMullan v. Free*, 13 Ont. 57.

⁹¹ *Fox v. Everson*, *supra*.

⁹² *Depew v. Peck H. Co.*, 121 App. Div. (N. Y.) 28.

were recovered in the foregoing cases are too speculative for allowance;⁹³ and in Georgia the extent of a recovery where seeds prove worthless is the purchase-money with interest and expenses incurred in preparing the land for, and in planting, the seed, and compensation for any other necessary labor.⁹⁴ In North Carolina and Florida the damages for the failure of warranted seed rice to grow include the price paid for it, the amount expended in preparing the soil for the crop and for putting the seed in the ground, and, because it was too late to plant another crop of rice when the failure of the seed to grow was discovered, a reasonable rent for the land, less any sum for which it could have been rented for raising any other crop.⁹⁵ A tenant who buys warranted seed which fails to meet the warranty may recover the entire damages notwithstanding his landlord was to receive one-third of the crops. The landlord was not in privity with the vendor, and the tenant's contract inured to his benefit on the same principle that a contract of insurance by a bailee in his own name covers the full value of the property in his care, first for the satisfaction of his own claim, and then for the satisfaction of the interest of the owner.⁹⁶

In a case,⁹⁷ involving the measure of damages for the breach of warranty respecting fruit trees which the vendee had set out on his land, the cases which adjudge that the measure of damages for the breach of warranty as to seeds is the difference in value between the crop raised from the defective seed and such a

⁹³ *Hurley v. Buchi*, 10 Lea 346.

⁹⁴ *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508. The code provides that "remote or consequential damages are not allowed whenever they cannot be traced solely to the breach of the contract, or unless they are capable of exact computation, such as the profits which are the immediate fruit of the contract and are independent of any collateral enterprise entered into in contemplation of the contract."

⁹⁵ *Reiger v. Worth*, 127 N. C. 230, 52 L.R.A. 362, 80 Am. St. 798;

Vaughan's S. Store v. Stringfellow, 56 Fla. 708. See *Phelps v. Elyria M. Co.*, 12 Ohio Dec. 692.

⁹⁶ *Phillips v. Vermillion*, 91 Ill. App. 133, citing *Home Ins. Co. v. Peoria, etc. R. Co.*, 78 id. 137.

⁹⁷ *Heilman v. Pruyn*, 122 Mich. 301, 81 Am. St. 570; *Angell v. Pruyn*, 126 Mich. 16; *Shearer v. Park N. Co.*, 103 Cal. 415, 42 Am. St. 125; *Long v. Pruyn*, 128 Mich. 57; *Alsworth v. Reppert*, — Tex. Civ. App. —, 167 S. W. 1098. See § 1019.

crop as would ordinarily have been produced in the year in which the seed was sown, were approved. The reason for a distinction as to the measure of compensation in the case of fruit trees is thus pointed out: "Where crops are raised from seeds, and mature in a few months, and the value of the land is not affected thereby, no other rule of damages can obtain. It is different, however, where fruit trees are planted, which will not mature for years, which become a part of the reality and materially add to its value. The destruction of a crop of cabbage, corn, wheat or other annuals does not injure the land, and consequently there can be but one rule of damages. The most of the cases cited by the defendant are cases of this character. The other cases involve the question of speculative damages, which is not involved in this case. It is a matter of common knowledge that lands are enhanced in value by orchards of fruit trees. They have a value capable of estimation, for the reason that they usually yield fruit. The case is not one of speculative damages, but of enhanced value by additions to the realty. The rule of damages ought to be, and is, the same where worthless fruit trees are furnished, contrary to the warranty, as where good fruit trees are destroyed by the negligent acts of others. The purchaser has suffered the same damages in each case. Both parties must be held to have contracted with reference to the land in future years as it would be enhanced by the existence of trees of the kind warranted. The difference between the value of the land with and without the trees is the just measure of damages." It was not a defense to the vendor that the trees were winter-killed after the suit was begun. In determining the value of the land with trees conforming to the warranty the cost of raising and caring for them is a proper matter of evidence.⁹⁸ In determining the extent to which land would have been enhanced in value if fruit trees of a given variety had been furnished and had grown, testimony may be received to show what such trees ordinarily produce and the enhanced

⁹⁸ Angell v. Pruyn, *supra*. Compare Kitchin v. Oregon N. Co., 65 Ore. 20.

value of the land by the tree or by the acre.⁹⁹ Where some of the trees supplied were killed and others injured by the weather after they began to bear and before suit was begun an instruction that these facts might be considered by the jury as bearing upon the value that the trees would have been to the premises if of the variety ordered, and as therefore affecting the damages sustained, was sufficiently favorable to the defendant.¹ The difference in the value of the land if there had been no breach and its value notwithstanding the breach is to be ascertained as of the time when, in the exercise of reasonable diligence, the vendee could have discovered the breach.²

§ 675. *Same subject.* Where seeds are sold with a warranty that they are of a kind identified by a particular name, with notice that the purchaser intends to sell them again to persons who will purchase for the purpose of sowing them, if the warranty is untrue there seems to be no difference in principle as to the subject of damages between such a sale and one with such warranty where the purchaser is known to buy for the purpose of sowing them himself. The warranty to one buying seed to sell again justifies him in warranting it accordingly to his customers; and as they have recourse to him for damages estimated by the standard mentioned in the first paragraphs of the preceding section that is also the measure of his loss as against his vendor,³ though the second vendor has not reimbursed his vendee.⁴

If animals sold are warranted sound, and are not so, but have an infectious or contagious disease which they communicate to others, where the parties contemplate their being placed with other stock, the loss not only in respect to the animals purchased, but to others to which the warranted animals communicate the disease, may be recovered, as well as the expense of taking care of and doctoring them.⁵ The injury to lambs

⁹⁹ Long v. Pruyn, *supra*.

¹ Id.

² Waldteufel v. Pacific V. Co., 6 Cal. App. 624.

³ Randall v. Raper, El., B. & E. 84.

⁴ Denton v. Gill, 102 Md. 386.

⁵ Cummins v. Ennis, 4 Penne. 424, citing the text; State Bank v. Dody, 71 Kan. 98; Needham v. Halverson, 22 N. D. 594; Pinney v. Andrews, 41 Vt. 631; Bradley v. Rea, 14 Allen 20; Marsh v. Webber, 16 Minn. 418;

dropped soon after the purchase of diseased ewes for breeding purposes is a ground of damage.⁶ It is not cause for imposing exemplary damages that the animals sold might scatter and spread disease among other animals.⁷ But loss occasioned by the interruption of the business of the purchaser on account of the sickness of horses he owned cannot be recovered in the absence of allegations of special damage.⁸ If sheep are purchased and sold for the purpose of breeding and as a result of a contagious disease affecting them there is a deterioration in the lambs dropped soon after their sale, that forms a proper element of damages in an action for the breach of the warranty.⁹ Knowledge of the existence of the disease in the animals sold is not necessary in order that the vendor shall be liable for the consequences of its communication to others where he expressly warrants against its existence.¹⁰ And according to some cases the right to recover does not depend upon knowledge in the

Brown v. Wood, 3 Cold. 182; *Faris v. Lewis*, 2 B. Mon. 375; *Rose v. Wallace*, 11 Ind. 112; *Sherrod v. Langdon*, 21 Iowa 518; *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 678; *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476; *Weaver v. Penny*, 17 Ill. App. 628; *Joy v. Bitzer*, 77 Iowa 73, 3 L.R.A. 184, quoting the text; *Mitchell v. Pinckney*, 127 Iowa 696; *Smith v. Green*, 1 C. P. Div. 92; *Long v. Clapp*, 15 Neb. 417; *Routh v. Caron*, 64 Tex. 289; *Stranahan Co. v. Coit*, 55 Ohio St. 398, 4 L.R.A. (N.S.) 506; *McCann v. Ullman*, 109 Wis. 574, 579; *Snowden v. Waterman*, 105 Ga. 384; *Stevens v. Bradley*, 89 Iowa 174; *Greenby v. Brooks*, 13 Ky. L. Rep. 298 (Ky. Super. Ct.); *Sandlin v. Wilder*, 142 Ga. 131; *Glann v. White*, 181 Mich. 320; *McKay v. Davey*, 28 Ont. L. R. 322. See *Hobbs v. Smith*, 27 Okla. 830, 34 L.R.A. (N.S.) 697.

Such liability may follow though there is no warranty if the dealer

knows of the existence of the disease and neither the original nor the subsequent buyer had knowledge thereof. *Skinn v. Reutter*, 135 Mich. 57, 106 Am. St. 384, 63 L.R.A. 743.

A sale of "good merchantable cattle" means such as are free from a latent disease, and the vendor of those which are not so is liable for the vendee's losses proximately resulting. *Parks v. O'Connor*, 70 Tex. 377. See *Hill v. Ball*, 2 H. & N. 299; *Mullett v. Mason*, L. R. 1 C. P. 559.

⁶ *Broquet v. Tripp*, 36 Kan. 700.

⁷ *Wheeler v. Randall*, 48 Ill. 182.

⁸ *McCann v. Ullman*, *supra*.

⁹ *Broquet v. Tripp*, 36 Kan. 700.

¹⁰ *McKee v. Jones*, 67 Miss. 405; *Joy v. Bitzer*, 77 Iowa 73, 3 L.R.A. 184; *Stranahan Co. v. Coit*, 55 Ohio St. 398, 4 L.R.A. (N.S.) 506; *Mitchell v. Pinckney*, *supra*. See *Hobbs v. Smith*, 27 Okla. 830, 34 L.R.A. (N.S.) 697; *Foster v. Smith*, 184 Ill. App. 255.

vendor at the time of sale that the buyer designs to place the animals sold with others;¹¹ the vendor is liable if he knew that this might be done.¹² A vendor who knows that a diseased cow is to be placed with other cows is liable for the expense the buyer incurs to prevent the infection of the latter and for the loss of their milk.¹³ The cost of burying dead animals and of disinfecting the premises on which they were kept is an element of damages; but it is otherwise as to the loss of the use of animals which might have been used by the men who cared for those which were sick of the communicated disease, and as to the loss of crops which might have been sown or planted if such animals had been used.¹⁴ A buyer may recover damages for personal injuries which result from selling property with a false warranty. A chemist, druggist or caterer may be held liable for such injuries received from deleterious compounds furnished which are unfit for the purpose for which he professed to sell them.¹⁵ A dealer will be liable for like injuries resulting from the explosion of illuminating oils sold with warranty, express or implied, which is untrue,¹⁶ as will the manufacturer of a generator of acetylene gas who falsely warrants that the same will not explode.¹⁷ And so will any vendor be held answerable for such injuries from vicious animals, sold with warranty of gentle and docile nature.¹⁸ In such cases there is a negligence which, though free from fraud, involves a serious breach of social duty as well as contract; and

¹¹ *Snowden v. Waterman*, 105 Ga. 384; *Sherrod v. Langdon*, 21 Iowa 518; *Packard v. Slack*, 32 Vt. 12.

¹² *Smith v. Green*, 1 C. P. Div. 92. See § 672.

¹³ *Dempster v. Simpson*, 7 West Aust. L. R. 103.

¹⁴ *Needham v. Halverson*, *supra*.

¹⁵ *Keep v. National T. Co.*, 154 Fed. 121; *Darks v. Scudder-G. Co.*, 146 Mo. App. 246; *Doyle v. Fuerst*, 129 La. 838, 40 L.R.A.(N.S.) 480; *George v. Skivington*, L. R. 5 Ex. 1; *Thomas v. Winchester*, 6 N. Y. 397; *Jones v. George*, 56 Tex. 149, 42 Am.

Rep. 689, 61 Tex. 345, 48 Am. Rep. 280, fully stated in § 50; *Swain v. Schieffelin*, 134 N. Y. 471, 18 L.R.A. 385 (loss of business resulting from poisonous substance in ice cream recovered for). See *Longmeid v. Halliday*, 6 Eng. L. & Eq. 562.

¹⁶ *Waters-P. O. Co. v. Desclms*, 212 U. S. 159, 53 L. ed. 453; *Miller v. Downer, etc. Co.*, 104 Mass. 64; *Davidson v. Nichols*, 11 Allen 519.

¹⁷ *Tyler v. Moody*, 23 Ky. L. Rep. 584, quoting several of the preceding propositions in the text.

¹⁸ *Sharon v. Mosher*, 17 Barb. 518.

when the injury comes to the vendee from an exposure induced by the warranty, doubtless the right to damages in an action upon the warranty would be co-extensive with that allowed for compensation in actions for negligence. Where an act of negligence is imminently dangerous to the lives of others the guilty party is liable to one injured thereby whether a contract between them be violated by that negligence or not.¹⁹ If the law and a contract impose the same duty the same redress for violation is due by either, and would be accorded unless there should be practical restriction in the form of action necessarily resorted to to obtain that redress. In *McDonald v. Snelling*²⁰ Foster, J., said: "Where a right or duty is created wholly by contract it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law it seems just and reasonable that he shall be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion this is the well established and ancient doctrine of the common law, and such liability extends to consequential injuries by whomsoever sustained so long as they are of a character likely to follow and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote if, according to the usual experience of mankind, the result was to be expected."²¹

¹⁹ *Longmeid v. Halliday*, *supra*; *Marsh v. Usk H. Co.*, 73 Wash. 543, quoting the text.

²⁰ 14 Allen 290. See § 672.

²¹ *Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355; *Marsh v. Usk H. Co.*, 73 Wash. 543. In *McGavoch v. Wood*, 1 Sneed 181, a slave was sold to be taken south or elsewhere for sale or service, and after the journey an action was brought by the vendee against the vendor upon his warranty of soundness; held, there was no rule which would authorize the plaintiff to re-

cover the expenses of the slave on that trip.

In *Gas Light Co. v. Colliday*, 25 Md. 1, it was held that for shutting off gas and refusing to supply it according to contract after the pipes and fixtures for that purpose had been put in place in a building used for business purposes, the depreciation of the property for sale or lease, and the expense of restoring the premises to proper condition, divested of the gas pipes, might be taken into account as part of the damages.

Interest on the purchase price of the warranted property and

In the similar case of *Shepard v. Milwaukee G. L. Co.*, 15 Wis. 318, 82 Am. Dec. 629, which was like the common-law action on the case, the jury was instructed that "plaintiff, if entitled to a verdict, should have such damages as will compensate him for the pecuniary loss, and also for the inconvenience and annoyance experienced by him in his mercantile business arising out of the defendant's refusal to furnish gas to him." *Payne, J.*, delivering the opinion, said: "It is claimed that this instruction gave the plaintiff punitive or vindictive damages. But we think this is clearly not so. The 'inconvenience and annoyance' occasioned directly by the wrongful act or refusal of the defendant are always legitimate items in estimating the damages in actions of this kind. Vindictive damages are those which are given over and above all this, as a punishment for the other party. In actions for a nuisance the damages usually consist almost entirely in inconvenience and annoyance. So also in many other actions of tort. In *Ives v. Humphrey*, 1 E. D. Smith 201, the court says: 'Even if the plaintiff be confined strictly to compensation for the injury sustained by him the jury are to determine the extent of the injury, and the equivalent damages, in view of all the circumstances of injury, insult, invasion of the privacy and interference with the comfort of the plaintiff and his family.' And again: 'For an involuntary trespass, or a trespass committed under an honest mistake, the damages should be confined to compensation for the injury sustained by the plaintiff; and in estimating the amount of such damages all the particulars wherein the plaintiff is ag-

grieved may be considered whether of pecuniary loss, or pain, or insult, or inconvenience.' So in an action for refusing to let a lessee into possession, the plaintiff gave evidence of injury to his wife's business as a milliner, without having averred it specially; but the court held it admissible under the general allegation of damages, as going to show that 'the plaintiff had sustained inconvenience.' *Ward v. Smith*, 11 Price 19. * * * But the appellant further objects to the admission of evidence to show that it would injure the plaintiff's business to be deprived of gas when other stores were lighted with it. It is said that the object of this was to show that the want of gas would tend to prevent customers from coming to the store, and consequently that the plaintiff lost the profits that he otherwise might have made. And the appellant then relies on a class of authorities in which, both in actions of tort and for breaches of contract, it has been held that anticipated profits could not be recovered as damages. Upon this subject the authorities are full of confusion and uncertainty, and it is very generally conceded that no definite or satisfactory rule can be extracted from them. *Sedgwick on Dam.*, p. 112; *Cincinnati v. Evans*, 5 Ohio St. 603. But I think it can by no means be said to be established that the profits of a business or of a contract may never be considered in estimating the damages, where one party has been deprived of those profits by the wrong or default of another. On the contrary, I think the opposite conclusion is sustained, and that the tendency of the recent cases is to allow such profits to be recovered as damages where

the cost of insurance on the property are not recoverable.²² The damages resulting to an electric street railway company from the necessary withdrawal of some of its cars while a defective

their amount can be shown with reasonable certainty. The question often arises in cases of breach of contract, and there are many authorities which hold that the profits that might have accrued to the injured party on the contract itself, which was broken, may be recovered as damages. *Philadelphia, etc. R. Co. v. Howard*, 13 How. 307, 344, 14 L. ed. 157, 173; *Masterton v. Mayor*, 7 Hill 61; *Fox v. Harding*, 7 Cush. 522. These cases confine the profits to be recovered to such as might have been made on the contract the breach of which is complained of. Yet it is very evident that even such profits cannot be arrived at with any absolute certainty, as they frequently depend upon fluctuations in the market, and changes in the price of labor and materials, which may take place while the contract is being performed. Yet, inasmuch as they may be estimated with reasonable certainty, and their loss is the direct result of the wrong complained of, they are allowed to be recovered. And in the case of *Waters v. Towers*, 20 Eng. L. & Eq. 410, the rule was extended so as to include profits on a collateral contract which the plaintiff had entered into with other parties. The court said: 'If reasonable evidence is given that the amount of profit would have been made as claimed the damages may be asked accordingly. * * * *Hadley v. Baxendale*, 26 Eng. L. & Eq. 398; *Fletcher v. Tayleur*, 33 id. 187.' I think the principle fairly to be derived from these cases is, that the profits lost as a direct result of a breach of contract may be recovered as damages, where they are not so conjectural and remote

as to be incapable of ascertainment with reasonable certainty. And their reasoning seems entirely applicable to this case. The defendant here knew that if he refused gas to the plaintiff he could get it nowhere else. It stood, therefore, in the same position that the carrier would have been in, in *Hadley v. Baxendale*, if he had known the plaintiff could have no shaft to his mill until the model was delivered. The defendant, therefore, must be presumed to have contemplated whatever damage would naturally arise from its refusal to furnish the plaintiff with gas. Its obligation to furnish it was, according to the decisions of this court, as clear and imperative as though it had expressly contracted to do it. And it seems to me that the profits of an established business are quite as capable of being ascertained with reasonable certainty as the profits to arise from a single contract or adventure. There is, in the case of such a business, the experience of the past to serve as a test. And the rule suggested by *Jarvis, C. J.*, in *Fletcher v. Tayleur*, that the damages should be estimated 'according to the average percentage of mercantile profits,' could readily be applied, and would seem just and reasonable. The cases already referred to seem to me, therefore, applicable here, and to sustain the conclusion that the profits of a business which are necessarily lost by the wrong or default of another may, under some circumstances and with proper restrictions, be considered in estimating the damages for the injury."

²² *Alpha Mills v. Watertown S.-E. Co.*, 116 N. C. 797. But see § 670 as to interest.

engine was being repaired have been ruled to be too remote.²³ A vendee of adulterated butter who has sold it to his customers cannot recover damages for loss of trade profits,²⁴ nor the amount of the fine paid by him for selling the butter in violation of a statute imposing a penalty if the violation was not committed with intent and knowledge. It seems it would be otherwise as to the fine if the intent was not an ingredient of the offense.²⁵ The vendor of warranted milk is not liable to his vendee who has retailed the same for a fine imposed upon the latter for selling skimmed milk without complying with a statute requiring that the can containing the milk should be marked. The court said: The damages which plaintiff seeks to recover did not arise, according to the usual course of things, from a breach of the contract of warranty; and, if defendant innocently sold skimmed milk for unskimmed milk, it is perfectly plain that it could not have contemplated, when warranting the quality of the article, that the probable result of a breach of contract would be the plaintiff's arrest and conviction for the statutory offense with which he was charged. Neither of the parties, the defendant corporation which sold, or plaintiff, who purchased, reasonably contemplated this special injury, and the conventional rule is applicable.²⁶ Expenditures made in advertising a business in which a warranted machine was bought for use and losses incurred in the general or miscellaneous business of the vendee are too remote, vague and uncertain to be recovered.²⁷ A vendor of a warranted wagon is not responsible for the death of a horse which was drawing it. "It was neither such damage as arose naturally from the breach of the warranty, nor such as could reasonably be supposed to have been contemplated by the parties as the

²³ *Tompkins Co. v. Galveston, St. R. Co.*, 4 Tex. Civ. App. 1. See § 671.

²⁴ *Moran v. Standard Oil Co.*, 211 N. Y. 187.

²⁵ *Fitzgerald v. Leonard*, L. R. 32 Ire. 675 (1893).

A vendor of goods which does not meet the statutory standard is liable to a vendee, who has given him an

opportunity to defend an action for the violation of the statute, for the sum paid to compromise such action. *Rossano v. Kaminsky* (N. Y. Misc.) 134 N. Y. Supp. 895.

²⁶ *Sloggy v. Crescent C. Co.*, 72 Minn. 316.

²⁷ *Carroll-P. B. & T. Co. v. Columbus M. Co.*, 55 Fed. 451, 5 C. C. A. 190.

probable result of the breach.²⁸ The loss of profits in lodging operations and the expense of hiring another horse to take the place of one diseased have been held too remote.²⁹ The damages resulting to a vendee from the impairment of the value of patents held by him and the loss of other contracts because of the defective character of cement sold to him and used in a building are too remote and speculative;³⁰ the same view has been held as to the loss of profits caused by the failure of an engine to work properly.³¹ The vendor of a stallion is not liable for the prospective profits the vendee expected to make by the services of the horse upon mares unless there were outstanding contracts for such services at the time of the sale, and the vendee knew thereof, and the purchase and sale were made with reference thereto.³² If the vendee has recovered the difference between the value of a stallion as he was and as he was warranted to be and the expense incurred by reason of the breach of warranty he is fully compensated, and cannot recover the difference in the sum realized for the horse's services and what would have been realized if the warranty had not been breached.³³ The breach of a warranty as to the condition of horses sold with knowledge that they were to be used to cultivate a crop is not attended with liability for the loss of the crop which might have been raised, nor for the rent paid for the land on which the crop was to be grown, in the absence of proof that other horses could not be obtained because the vendee was unable to purchase or for other reasons, and that the vendor knew the facts.³⁴ The defeat of the vendor's demand for the price of the goods prevents the recovery of losses sustained in

A vendee who has not received orders or contracts for the goods he would have manufactured but for the defects in a machine may not recover for the loss of profits though he had done an extensive business in the same class of goods which he had previously manufactured by hand. *Schug v. Wagner* (N. Y. Misc.), 135 N. Y. Supp. 1078.

²⁸ *Schurmeier v. English*, 46 Minn. 306.

²⁹ *Sapp v. Bradfield*, 137 Ky. 308.

³⁰ *Balsh v. Rathburn Co.*, 75 Fed. 971, 21 C. C. A. 584.

³¹ *Fowler W. Mfg. Co. v. Otto G. E. Works*, 227 Pa. 314.

³² *Glidden v. Pooler*, 50 Ill. 36.

³³ *Love v. Ross*, 89 Iowa 400; *Springer v. Puckett*, 25 Colo. App. 547.

³⁴ *Wiggins v. Jackson*, 31 Okla. 292.

supplying the vendee's customers with other goods in lieu of those furnished by the vendor.³⁵ In the absence of notice that a sawmill might be idle because of the want of logs caused by the failure of a locomotive to meet the warranty under which it was sold, the vendor is not liable for the resulting loss.³⁶ Any advantage derived by the vendee from the use of the warranted property mitigates the liability of the vendor.³⁷ The failure to remove a warranted article and pay a sum of money if it should not be equal to the warranty, authorizes the recovery of such sum and the expense incurred in making the removal.³⁸ Under a contract to replace goods free of charge or refund the money paid for them, there cannot be a recovery for expenses nor any other consequential damages.³⁹ A purchaser must exercise reasonable diligence to discover whether any defect exists in the goods before he can recover from the vendor consequential damages for the breach of warranty though the latter knew of the specific use to which they were to be put.⁴⁰

§ 675a. Breach of contract not to sell to others. A vendor who breaches his contract not to sell a like article to others than a particular vendee is liable for the difference in the value of the article for the purpose for which it was bought with the existence of such restriction and its value as affected by the violation of it, with interest from the time of the breach.⁴¹

§ 676. Defense to action for purchase-money. The vendee cannot resist the collection of the purchase-money, where there is no fraud or warranty, merely because the property is less valuable than he supposed,⁴² nor because of latent defects.⁴³ But where goods are sold with warranty which proves untrue the vendee, when sued for the contract price either on a general

³⁵ *Hill v. Hanan* (Tex. Civ. App.), 131 S. W. 245.

³⁶ *Marbury L. Co. v. Stearns Mfg. Co.*, 32 Ky. Law Rep. 739.

³⁷ *Scranton v. Tilley*, 16 Tex. 183.

³⁸ *Street v. Chapman*, 29 Ind. 142.

³⁹ *Canon City E. L. & P. Co. v. Medart P. P. Co.*, 11 Colo. App. 300.

⁴⁰ *Schleuter v. Sherman*, 169 Ill. App. 386.

⁴¹ *New York B. N. Co. v. Kidder P. Mfg. Co.*, 192 Mass. 391.

⁴² *Climax T. Co. v. American T. Co.*, 234 Ill. 179; *Burwash v. Ballou*, 230 Ill. 34, 15 L.R.A.(N.S.) 409; *Spear v. Hanson*, 157 Mich. 485; *Simpson v. Crane*, 149 Mich. 352; *Woodruff v. Graddy*, 91 Ga. 333, 44 Am. St. 33; *Atlanta City St. R. Co. v. American C. Co.*, 103 Ga. 254; *Edison G. E. Co. v. Blount*, 96 Ga. 272; *Leonard v. Peebles*, 30 Ga. 61.

⁴³ *Drew v. Roe*, 41 Conn. 41.

count for goods sold and delivered or bargained and sold upon the special contract of sale, or upon a note or other security for the price, may allege the breach of warranty as a defense and obtain an abatement of damages to the amount he would be entitled to recover for such breach in a cross action.⁴⁴ This defense is allowed under various names—reduction or mitigation of damages, partial failure of consideration, discount, or recoupment. It is not universally allowed, but nearly so, not only for breach of warranty, but also for any fraud of the vendor in the sale, or damage resulting from delayed delivery.⁴⁵ The cases cited below fully define and illustrate this defense; for a full exposition of the subject the reader is referred to the section on "Recoupment and Counter-claim."⁴⁶ The remedy by counter-claim is not available where the contract requires the return of

⁴⁴ *Drescher-Rotberg Co. v. Strauss*, 145 N. Y. Supp. 280; *Dietrich v. Badders*, 4 Boyce (Del.) 499; *Excelsior Stove Mfg. Co. v. Million*, 174 Mo. App. 718; *Richardson Const. Co. v. Whiting Lumber Co.*, 116 Va. 490; *Wilson v. Wiggin*, 73 W. Va. 560; *Wilson v. Danderand*, 124 Minn. 120.

⁴⁵ In an action for the purchase price of a drying machine, although the contract provided that if the machine should not do the work specified, the plaintiff should make good the defects, which should be the extent of its liability, nevertheless the defendant was allowed to recoup the damage to cloth, which the evidence showed the plaintiff requested the defendant to supply for testing purposes. *Philadelphia Drying Mach. Co., Inc. v. Kummerer*, 56 Pa. Super. Ct. 24.

⁴⁶ *Bateman v. Warfield*, 12 Ga. App. 259; *Meyer v. Everett P. & P. Co.*, 184 Fed. 945; *The Venezuela*, 173 Fed. 834; *Thomas C. Co. v. Raymond*, 135 Fed. 25, 67 C. C. A. 629; *Brownfield v. Jones*, 98 Ark. 495; *Stevens v. Whalen*, 95 Ark. 488; *Wilson v. Alcatraz A. Co.*, 142 Cal. 182; *Moultrie Rep. Co. v. Hill*, 120

Ga. 730; *Dorrance v. Dearborn P. Co.*, 233 Ill. 354; *Glucose S. R. Co. v. Climax C. & B. P. Co.*, 40 Ind. App. 182; *Massillon E. & T. Co. v. Shirmer*, 122 Iowa 699; *International F. Co. v. Caney I. & C. S. Co.*, 84 Kan. 705; *Webb v. Milford S. Co.*, 128 Ky. 308; *Wallace v. Knoxville W. Mills*, 117 Ky. 450; *Pratt v. Johnson*, 100 Me. 443; *Earnshaw v. Whittemore*, 194 Mass. 187; *Smith v. Werkheiser*, 152 Mich. 177, 125 Am. St. 406, 15 L.R.A.(N.S.) 1092; *American G. Co. v. Rayburn*, 150 Mich. 616; *Otto v. Braman*, 142 Mich. 185; *Thorn v. Morgan*, 135 Mich. 51; *Buss v. Allison W. G. Co.*, 146 Mo. App. 71; *Howard v. Haas*, 131 Mo. App. 499; *Punteney-M. Mfg. Co. v. Northwall*, 70 Neb. 688; *Biele v. Levy* (N. Y. Misc.), 107 N. Y. Supp. 607; *Wrenn v. Morgan*, 148 N. C. 101; *Hooven & A. Co. v. Wirtz*, 15 N. D. 477; *Obenchain v. Roff*, 29 Okla. 211; *Dean v. Standifer*, 37 Tex. Civ. App. 181; *Raleigh L. Co. v. Wilson*, 69 W. Va. 598; *New Hamburg Mfg. Co. v. Webb*, 23 Ont. L. R. 44; *Centaur C. Co. v. Hill*, 7 id. 110; *McAllister v. Reab*, 4 Wend. 484; *Reab v. McAllister*, 8 id. 109; *Van Epps v. Harrison*, 5

the warranted article and gives the vendor the option to supply another or refund the purchase-money.⁴⁷

Hill 63; Ward v. Reynolds, 32 Ala. 384; Hoe v. Sanborn, 3 Abb. Pr. (N.S.) 189; Caldwell v. Sawyer, 30 Ala. 283; Jemison v. Woodruff, 34 id. 143; Davis v. Dickey, 23 id. 848; Rotan v. Nichols, 22 Ark. 244; Desha v. Robinson, 17 id. 228; Plant v. Condit, 22 id. 454; Peck v. Farrington, 9 Wend. 44; Parker v. Pringle, 2 Strobb. 249; Savannah Chemical Co. v. D. Bragg & Son, 14 Ga. App. 371; Young v. Plumeau, Harp. 349; Harmon v. Sanderson, 6 Sm. & M. 41, 45 Am. Dec. 272; Wheelock v. Pacific P. G. Co., 51 Cal. 223; Polhemus v. Heiman, 45 Cal. 573; Huckaber v. Albritton, 10 Ala. 651; Simmons v. Cutreer, 12 Sm. & M. 584; Otis v. Alderson, 10 id. 476; Allaire v. Whitney, 1 Hill 484, 1 N. Y. 305; Luffburrow v. Henderson, 30 Ga. 482; Perley v. Balch, 23 Pick. 282; Aultman v. Mason, 83 Ga. 212; Dayton v. Hooglund, 39 Ohio St. 671; Shaw v. Smith, 45 Kan. 334, 11 L.R.A. 681; Dr. Harter M. Co. v. Hopkins, 83 Wis. 309; Newton R. Works v. Home R. Co., 100 Ill. App. 421; June v. Falkinburg, 89 Mo. App. 563; Florence v. Patillo, 105 Ga. 577; Foxton v. Hamilton S. & I. Co., 1 Ont. L. R. 393; Stillwell v. Biloxi C. Co., 78 Miss. 779; Wheelock v. Berkeley, 138 Ill. 153; Huntington v. Lombard, 22 Wash. 202; Harrow Spring Co. v. Whipple H. Co., 90 Mich. 147, 30 Am. St. 421; Hodge v. Tufts, 115 Ala. 366; Parry Mfg. Co. v. Tobin, 106 Wis. 286; Springfield M. Co. v. Barnard, 81 Fed. 261, 26 C. C. A. 389. See McDugald v. McFadgin, 6 Jones 89; Henning v. Vanhook, 8 Humph. 678; McEntyre v. McEntyre, 12 Ired. 299. See §§ 168-170.

Where the title to the warranted horse was not to pass to the vendee until payment of a note given for a portion of the purchase price, and the horse was delivered to, and used by, him for a time, but died before the maturity of the note from a cause not connected with the unsoundness, the consideration for the note was in part the bailment, and in part the promise of the vendor to sell, and the vendee could counterclaim for the damages arising out of the breach of the warranty for the period of the bailment and for the proposed sale the same amount as if the sale had been absolute. Copeland v. Hamilton, 9 Manitoba, 143. Compare Frye v. Milligan, 10 Ont. 509; Tomlinson v. Morris, 12 id. 311, ruled under contracts differing somewhat from that in the Manitoba case, and holding that the purchaser could not maintain an action for general damages for the breach of a warranty until the property warranted had become his; it was suggested that it might be otherwise as to special damages.

A vendee who has given non-negotiable notes for property sold with a warranty may pay them to a third person and thereafter maintain an action against the payee to recover for the breach of the warranty. Delaney v. Great Bend I. Co., 79 Kan. 126.

Both a failure of consideration and a breach of warranty may be pleaded if they are not inconsistent. Acme H. Mach. Co. v. Gasperson, 168 Mo. App. 558.

⁴⁷ Case T. M. Co. v. Puls, 158 Ill. App. 1, and cases cited; Best Mfg. Co. v. Hutton, 49 Mont. 78.

